Opinions of the Attorney General and Report to the Governor of Virginia 2002

Commonwealth of Virginia
Office of the Attorney General
At Richmond
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>LETTER OF TRANSMITTAL</td>
<td>v</td>
</tr>
<tr>
<td>PERSONNEL OF THE OFFICE</td>
<td>xxi</td>
</tr>
<tr>
<td>ATTORNEYS GENERAL OF VIRGINIA</td>
<td>xxxi</td>
</tr>
<tr>
<td>CASES</td>
<td>xxxiii</td>
</tr>
<tr>
<td>DECIDED IN THE SUPREME COURT OF VIRGINIA</td>
<td>xxxv</td>
</tr>
<tr>
<td>PENDING IN THE SUPREME COURT OF VIRGINIA</td>
<td>xxxix</td>
</tr>
<tr>
<td>PENDING AND DECIDED IN THE SUPREME COURT OF THE UNITED STATES</td>
<td>xli</td>
</tr>
<tr>
<td>OPINIONS</td>
<td>1</td>
</tr>
<tr>
<td>NAME INDEX</td>
<td>349</td>
</tr>
<tr>
<td>SUBJECT INDEX</td>
<td>355</td>
</tr>
<tr>
<td>STATUTORY AND CONSTITUTIONAL PROVISIONS AND RULES OF COURT</td>
<td>455</td>
</tr>
<tr>
<td>ACTS OF ASSEMBLY</td>
<td>457</td>
</tr>
<tr>
<td>CODE OF VIRGINIA</td>
<td>460</td>
</tr>
<tr>
<td>CONSTITUTION OF VIRGINIA</td>
<td>484</td>
</tr>
<tr>
<td>VIRGINIA RULES ANNOTATED</td>
<td>486</td>
</tr>
</tbody>
</table>
The Honorable Mark R. Warner  
Governor of Virginia  

Dear Governor Warner:

I have the honor to present to you the Report of the Attorney General for calendar year 2002. During the period covered by this report, the Office of the Attorney General issued 108 opinions, a 24% increase in opinions issued from the previous year. This Office, through its dedicated public servants, represented the Commonwealth in thousands of legal disputes in state and federal courts, including criminal appeals, habeas corpus actions, and civil suits involving many facets of state government.

The issues addressed in the opinions contained in this volume represent a wide variety of legal issues facing the Commonwealth and its local governments, including the admissibility of evidence in criminal cases, the application of the Dillon Rule to local government powers, and the interpretation of the Commonwealth's environmental laws. Many constitutional officers sought legal advice on a myriad of issues faced by them on a daily basis. Collectively, these opinions represent an interpretation of state and federal law that recognizes respect for property rights, strict adherence to the law as adopted by the General Assembly, and a commitment to ensuring that all citizens are treated fairly and in accordance with the rule of law.

The work of the lawyers and staff of the Office of Attorney General has been exemplary. These fine public servants are a great asset to the Commonwealth, its governmental agencies, and to all taxpayers.

Here are some of the accomplishments of the Office during the past year.

**LEGISLATIVE ACCOMPLISHMENTS**

During the 2002 Session of the General Assembly, the Office worked with many members of the legislature to pass legislation to make Virginia a safer place to live, work, learn, and raise a family. In particular, I am pleased to report that the General Assembly overwhelmingly adopted the legislative package that I proposed upon taking Office in January 2002. This legislative package included measures to combat domestic violence, address the growing threat of terrorism, increase openness in government and ethics in campaigns, obtain DNA samples from arrestees of violent crime, address school safety, and create a prescription drug monitoring program to combat the abuse of certain prescription drugs in Western and Southwestern Virginia.

Patroned by Senator Tommy Norment and Delegate Terrie Suit, the domestic violence legislation removes the requirement that married persons must be living apart or that the defendant caused bodily injury by use of force for a spouse to be convicted of rape. The legislation also establishes a statewide facilitator to oversee and evaluate services and programs available to victims of domestic abuse. The legislation directs the Department of Criminal Justice Services to enhance training
standards for police officers who respond to domestic violence calls. Moreover, the law now clarifies and expands the definition of "family abuse" to include any bodily injury. Finally, this legislation requires the entry of protective orders into the Virginia Criminal Information Network upon receipt by a law-enforcement agency. Each of these facets of our domestic violence legislation will make a real difference in combating this ever-growing problem.

Before taking the oath of office, I proposed a comprehensive terrorism package to address the emerging threat of terrorism to Virginia and our nation. The antiterrorism package developed by this Office was patroned by Senator Kenneth Stolle and Delegate David Albo. The legislation defines "terrorism" as a specific crime and expands the death penalty statute to include "evil masterminds" who plan a terrorist attack, but may not necessarily participate directly in an attack. The legislation also exposes the assets of terrorists to Virginia's seizure and forfeiture laws and increases penalties for possession or use of a weapon of terrorism, including chemical or biological weapons. Additionally, the legislation provides for increased penalties for threats of terrorism or hoaxes and extends enhanced penalties for injuring search and rescue personnel and emergency medical services personnel. Finally, the legislation expands the ability of the Attorney General to request the interception of suspected terrorist communications. The legislation is the basis upon which the so-called "snipers" that attacked the citizens of Virginia, Maryland, and the District of Columbia were indicted in Virginia for their domestic terrorism activities. I worked closely with United States Attorney General John Ashcroft to ensure that these suspects were prosecuted under Virginia law for their domestic terrorist acts.

Recognizing that our system of democracy relies upon our citizens' having faith and trust in its public officials, I proposed three initiatives to open government and reinvigorate faith in our electoral system. This Office worked tirelessly with Delegates Chris Jones and Jim Scott to pass legislation commonly referred to as "Stand By Your Ad." This legislation requires that print, television, and radio advertising contain specific information about who paid for the advertisement. Television advertisements are required to feature a full-screen image of the sponsor of the advertisement while the disclosure of sponsorship is read. Radio advertisements are required to feature the voice of the sponsor making the same disclosure. The legislation also requires print advertisements opposing a certain candidate to name the candidate meant to benefit from the advertisement, if the expenditure is coordinated between the sponsor and the candidate intended to benefit from the advertisement.

In an effort to open government and allow citizens to review the actions of various boards and commissions of the executive branch in a timely fashion, the Office worked with Senator Nick Rerras and Delegate Scott Lingamfelter to enact legislation requiring all boards, commissions, councils and other public bodies, subject to The Virginia Freedom of Information Act, to post the initial draft of their minutes on the Internet within ten days of the meeting at which they were taken and the final minutes within three days of approval.

This Office worked with Senator Nick Rerras and Delegate Winsome Sears to prohibit abuse of the legislative continuance privilege enjoyed by members of the
General Assembly. The legislation is the first step toward reforming the practice of legislative continuances in court proceedings involving members of the General Assembly. The law requires that lawmakers request continuances in writing when the General Assembly is not in session. It also requires them, when practicable, to notify all parties involved in the proceedings for which a continuance has been requested.

In an effort to make our communities safer, Senator Bill Mims and Delegate Ryan McDougle patroned our legislation requiring a sample of blood, saliva or tissue to be taken from every person arrested for a violent felony in Virginia. By analyzing the DNA and cross-checking it with Virginia's DNA data bank, prosecutors will be able to solve "cold" cases, prevent future crimes, and exonerate the innocent. Samples taken from suspects not convicted of the charges automatically will be expunged.

When a school crisis occurs, the first thing a parent wants to know is whether their child is safe. I was pleased to work with Senator Emmett Hanger and Delegate Phil Hamilton to enact legislation that directs certain state entities to create effective school crisis and emergency management plans. The legislation directs the Virginia Center for School Safety, the Coordinator of Emergency Management, and the Board of Education to craft procedures and means by which parents and schools can communicate to exchange information about the safety of children during an emergency.

This Office worked closely with Senator William Wampler to revive and then attain passage of legislation that establishes a prescription drug monitoring system. The legislation establishes a two-year pilot program in Western Virginia to help stop illegal drug abuse and trafficking of prescription drugs. The program will allow law enforcement to track prescriptions in cases where there is already an investigation underway. The legislation also enables Virginia to qualify for federal funds to create the monitoring system.

In addition to these accomplishments in the 2002 Session of the General Assembly, I announced several initiatives that I would seek in the upcoming 2003 Session. In the summer of 2002, I announced that I would seek legislation requiring Virginia to adopt the Amber Alert system in order to increase the chances of finding abducted children. In September 2002, this Office issued a report concerning Virginia's civil commitment procedures for sexually violent predators. The report detailed sixteen recommendations to enhance the effectiveness of the civil commitment law for sexually violent predators. In the fall of 2002, Delegate Morgan Griffith and I met with Paul Martin Andrews, a victim of a violent sexual assault, to discuss Virginia's civil commitment program for sexually violent predators. I stood with Mr. Andrews and the Majority Leader and pledged my commitment to ensure that the sexually violent predator program would be funded in the 2003 General Assembly Session. At the same time, the Office worked closely with Delegate Griffith in the closing months of 2002 in preparing legislation to amend Virginia's sexually violent predator laws.

I announced the formation of a Domestic Violence Task Force to advise me on issues related to domestic violence. The task force consisted of victims, those who provide services to domestic violence victims, business and community leaders, and law-enforcement officials. The task force conducted meetings throughout the Commonwealth and heard testimony from victims, counselors, shelter operators, and law-
enforcement officials. The task force presented several recommendations to further enhance the strides made against domestic violence in the 2002 General Assembly Session.

CIVIL DIVISION

Antitrust & Consumer Protection

The Antitrust & Consumer Protection Section of the Office of the Attorney General investigated, litigated, and resolved many antitrust cases and consumer issues. The Office responded to over 100 consumer complaint inquiries during the year concerning insurance and utility issues.

On April 19, 2002, the Supreme Court of Virginia issued a decision in the case of Commonwealth ex rel. Kilgore v. Tauber, awarding the Commonwealth in excess of $56 million and interests in real estate in Alexandria, Virginia, including the former Jefferson Memorial Hospital building. The suit alleged that various individuals and their corporate and partnership entities breached fiduciary duties and wrongfully appropriated the assets of Jefferson Memorial Hospital, Inc., a nonprofit, charitable corporation that operated a hospital in Alexandria. The Court entered judgment for the Commonwealth, as trustee on behalf of the public, in the amount of $26,372,438, with interest from July 13, 2000. The Supreme Court also imposed a constructive trust in the amount of $24,703,145 on the proceeds of a settlement the defendants had been receiving. A plan of distribution for the assets awarded will be presented for approval to the Alexandria Circuit Court. The assets are to be distributed in accordance with the charitable purposes to which they should have been devoted.

In the case of Federal Trade Commission v. The Tungsten Group, Inc. d/b/a American Savings Discount Club, the United States District Court for the Eastern District of Virginia entered a Stipulated Final Order and Permanent Injunction on July 30, 2002. The suit alleged defendants violated the Virginia Consumer Protection Act, the Virginia Home Solicitation Sales Act, the Federal Telemarketing Sales Rule, and the state consumer protection statutes of North Carolina and Wisconsin. In addition to injunctive relief, approximately $2.5 million was awarded for consumer restitution. The order also provides for $100,000 to be paid to the plaintiffs for their attorneys’ fees and costs, including $40,000 for the Commonwealth. All sums awarded will be paid from the defendants’ assets, which are being liquidated.

On September 6, 2002, Virginia, along with forty-three other states and two territories, announced an $8.2 million settlement with Salton, Inc., the manufacturer of the George Foreman® Grills. The states’ complaint alleged that Salton coerced its retailers into fixing the prices for George Foreman® contact grills and into excluding Salton’s competitors from their shelves. The settlement requires the defendant to pay $8 million in damages and $200,000 in attorneys’ fees. The damages awarded are to be distributed equitably to state and local agencies, charities, and not-for-profit entities to benefit health or nutrition-related causes. Virginia’s share of the settlement, which will be distributed after Salton’s final payment in March 2004, will be approximately $200,000 for damages and $5,000 for reimbursement of attorneys’ fees and expenses.

On September 30, 2002, Virginia, along with thirty-nine other states and three territories, settled an antitrust case with five of the nation’s largest music distributors.
The lawsuit centered on allegations that the defendants entered into illegal conspiracies to raise the prices of prerecorded music compact discs to consumers by restricting retailers’ CD advertising. Under the settlement, consumers will receive restitution of up to $67.3 million through a national claims process, and the states will receive a total of $75.7 million in CDs to be distributed to charities, governmental agencies, and other not-for-profit entities to be used for music education or therapy purposes. Virginia will receive approximately 133,000 CDs for distribution, having a value exceeding $1.8 million.


On December 20, 2002, Virginia, along with forty-nine other states and two territories, reached a $51.5 million settlement with the Ford Motor Company. The states alleged that Ford failed to disclose known safety risks concerning failures with certain Firestone ATX and Wilderness AT tires on some Ford SUVs. The states also alleged that Ford’s advertising misled consumers as to the safe use of Ford SUVs. The settlement amount will fund a $30 million public service campaign. Virginia’s share of the settlement is $300,000.

During 2002, Virginia, along with approximately thirty-eight to forty-two other states (depending on the particular agreement), entered into separate agreements with three tobacco retailers—BP Products North America, Inc., d/b/a BP Amoco (December 2002), ExxonMobil Corporation (August 2002), and Walgreen Co. (January 2002). Under each agreement, the settling company agreed to voluntarily implement new policies to reduce the sale of tobacco to minors. As part of the agreements, the companies agreed to minimize the employment of persons under the legal age for purchasing tobacco in positions that involve selling tobacco, to implement and maintain programs of internal compliance checks designed to determine whether their locations are in compliance with youth access laws, to produce their employee practices relating to the sale of tobacco products in writing, and to provide copies of their policies to all employees who sell tobacco at company-operated outlets.

**Insurance & Utilities**

The Insurance & Utilities Regulatory Section participated in numerous regulatory proceedings, principally before the State Corporation Commission, in the Attorney General’s role as consumer counsel for the Commonwealth. The Office also provided advice to the General Assembly regarding insurance and utility matters. The Office participated in those proceedings that had a significant, direct impact on large numbers of consumers and in those cases that had the potential to set important precedents.

This Office was the only party to intervene in the Trigon-Anthem merger proceeding at the State Corporation Commission. The Office did not oppose the merger on behalf of the Commonwealth, but it supported the imposition of conditions on the merger to ensure that medical policy decisions and policyholder servicing continue
to be handled within Virginia. The Commission ultimately adopted the conditions. The Office participated in the National Council on Compensation Insurance annual workers’ compensation rate case in which the Office obtained lower rates for the underground coal mining class of insureds, and due to the efforts of the Office, the rates for the surface mining classes will not increase to the extent proposed.

In the utility area, the Office remained active in the majority of the “customer choice” proceedings at the State Corporation Commission, the major rate cases addressing natural gas and electric utilities, and important telecommunications proceedings. The Office was instrumental in obtaining a legal settlement from Washington Gas Light Company that will result in refunds to thousands of customers of up to $500 per customer to correct erroneous billings as long as five years ago. Also, in the natural gas area, the Office secured certain customer protections in “weather normalization” adjustment proposals by Virginia Natural Gas and Roanoke Gas Company. In the case of Virginia Natural Gas, customers began receiving, in 2002, credits on their bills as a result of the colder than normal winter weather, and there is a two-year moratorium on future increases in base rates. The Office helped negotiate a settlement for Roanoke Gas customers that reduced a proposed rate increase by almost $300,000. The Office was active in several Commission-established committee work groups examining market opening measures and performance standards relative to competition in the local exchange telecommunications market.

Real Estate, Land Use & Construction Section

The Real Estate, Land Use & Construction Section received a total of forty-seven Department of Transportation construction claims in 2002, with a total stated value of $21,912,601.43. This was more than twice the number of claims filed against the Department in 2001. At the same time, the Office resolved thirty-one claims during 2002, again, more than twice the number resolved during 2001. The total original dollar value of the resolved claims was $9,646,924.52, and they were resolved for a total of $3,828,509.32, thereby saving the Commonwealth an estimated $5,818,415.

The Section opened 238 new matters during 2002, including the forty-seven Transportation claims, ninety leases for review, forty-four litigation files, and several other transactional matters including sales, acquisitions and easements, as well as several large projects outside involving contract matters.

Tax Unit

The Tax Unit represented the Treasury Board during its review and approval of approximately $21.36 million of general obligation bonds; $63.5 million of Virginia Public Building Authority bonds; $134.9 million of Virginia College Building Authority bonds; $156.9 million of Virginia Public School Authority bonds; $84.7 million of Commonwealth Transportation Board bonds; $135 million of Virginia Port Authority bonds; and $492.2 million of refunding bonds.

The Tax Unit also provided legal assistance to the Virginia Veterans’ Care Center Board of Trustees, the Secretary of Administration, and the Division of Risk Management in addressing a liability insurance crisis at the facility. The private contractor operating the facility was unable to obtain private insurance on the open market on
behalf of the facility. The Unit worked with the Division of Risk Management in crafting a plan of self-insurance for the Center to be administered by the Division. The Unit also worked with a multiagency team to develop a transition plan whereby the Commonwealth would assume full operational authority of the facility at the end of the current private contract. Following the transition, the state employees at the facility will be brought under the umbrella of the Commonwealth's risk management plan.

**Trial Litigation Section**

The Trial Litigation Section handled approximately 1,000 matters in 2002. Several of the cases involved challenges to the General Assembly's 2001 redistricting plan. In *West v. Wilkins*, this Office successfully appealed the trial court decision to the Supreme Court of Virginia. Plaintiffs challenged the 2001 redistricting plan of the General Assembly as gerrymandered on the basis of race, political affiliation, and gender; that the districts were not comprised of "contiguous and compact territory" as mandated by Article II, § 6 of the Constitution of Virginia; and that the districts were unequally represented because the Commonwealth did not use adjusted census figures. The Supreme Court upheld the redistricting plan as constitutional. In *Marye v. Quinn*, this Office successfully defended a challenge to the statute governing special elections immediately after a redistricting but before the next scheduled general election. In addition, this Office defended a challenge to the congressional redistricting plan in state court that subsequently was nonsuited.

The Office represented the interests of the Commonwealth against lawsuits involving a variety of legal issues including breach of contract, personal injury, denial of due process, and defamation.

**Division of Debt Collection**

The Division of Debt Collection operates on a fiscal-year basis and is charged with collecting debts owed to the Commonwealth and its agencies. Through December 31, 2002, the Division collected total revenues of $7,557,866. This amount is 56% ahead of the same period in fiscal year 2002.

**HEALTH, EDUCATION, & SOCIAL SERVICES DIVISION**

The Division of Health, Education, & Social Services provides advice to the public colleges and universities of Virginia and to those agencies charged with protecting the health of all Virginians and providing essential human services for those who are least able to help themselves. The Division also protects the rights of taxpaying Virginians by ensuring the proper use of state and federal funds in health and social services programs. The Office provides advice on a daily basis to members of the General Assembly on issues of health, education, social services, child support, and mental health. Finally, the Division represents the children of Virginia by vigorously enforcing child support payments.

The Division advised the Department of Medical Assistance Services in negotiating a contract settlement with First Health related to construction of the Medicaid Management Information System. The information system is the Department's primary computer system for processing claims for Medicaid recipients. The settlement ensures
the prompt handling of Medicaid claims and avoids a substantial lawsuit that would have delayed construction of the system.

The Office successfully negotiated a settlement agreement of a $73 million contract with DynTek and smoothly transitioned a new broker to provide nonemergency transportation services to Medicaid recipients. This settlement also was successful in obtaining the right to enforce DynTek’s payment obligations to its transportation providers by specific performance if any valid transportation claims remain unpaid by June 9, 2003.

The Office was instrumental in preventing a bankrupt Richmond nursing home from closing its doors and forcing the movement of 155 residents away from their home, families, and friends. The Office accomplished this goal by opposing the conversion of the case to a Chapter 7 bankruptcy and finding a buyer for the nursing home. This Office negotiated a successful transition to the new operator, including obtaining a $90,000 payment from the new operator to resolve the debtor’s liability to the Department of Medical Assistance Services.

In November 2001, this Office filed a bill of complaint in Fairfax County Circuit Court to enjoin the operation of an unlicensed child care facility. The defense argued that neither the Commissioner, nor the Acting Commissioner, of the Department of Social Services had the legal authority to bring suit on behalf of the Department, because neither had posted the required bond. The trial court entered an injunction enjoining the defendants from operating a family day home until such time as they (1) obtained a license; (2) reduced the number of children in their care, so that a license is not required; or (3) proved to the Department that they were exempt from licensure. On December 13, 2002, the Supreme Court of Virginia, in the matter of Goodwin v. Stroupe, dismissed the appeal of the injunction. This Office thus preserved the right of the Commonwealth to intervene on behalf of children put at risk by unlicensed child care facilities.

The Centers for Medicaid and Medicare Services (“CMS”) brought a claim against the Department of Medical Assistance Services for $74,826,663 in federal financial participation paid by CMS for federal fiscal years 1995 through 1999. The claim related to enhanced disproportionate share payments made by the Department to the University of Virginia and the Medical College of Virginia during this period. CMS claimed that in making these payments, Virginia violated the two-year timely claims deadline in § 1132 of the Social Security Act. The Departmental Appeals Board reversed the actions of CMS in reaching these conclusions and held that Virginia’s payment of enhanced disproportionate share payments did not violate the two-year deadline, and that Virginia’s interpretation of its own state plan was entitled to deference. This Office assisted outside counsel by reviewing their briefs and outlining litigation strategy. The reversal of this almost $75 million claim is a substantial victory for the Commonwealth.

The Office represented Western State Hospital during the United States Department of Justice’s final on-site investigation visit on April 16-19, 2002, under the Civil Rights of Institutionalized Persons Act. The Justice Department experts reviewing the quality of medical and psychiatric care, nursing and psychological services indicated that services now provided at Western State are the best in the country.
The Health Insurance Portability and Accountability Act Privacy Rule required the Department of Mental Health, Mental Retardation and Substance Abuse Services, the Department of Health, and other state agency health care providers to finalize their privacy policies and procedures. The Office performed a detailed preemption analysis of state and federal law to determine the legal responsibilities of the agencies with respect to protected health information.

During 2002, this Office assisted the Department of Mental Health, Mental Retardation and Substance Abuse Services and its facilities with the implementation of the Human Rights Regulations, which became effective November 21, 2001. Attorneys in this Office participated in training sessions on the regulations, offered technical assistance, and help in developing policies and procedures to comply with the regulations. The Office helped the Assistive Technology Loan Fund Authority with the development of a direct loan program to assist people with disabilities to make purchases of equipment and other products that improve their independence. The Office also assisted the Olmstead Task Force, convened by the Secretary of Health and Human Resources, with legal issues surrounding implementation of the Justice Department regulations, which provide people with disabilities a right to placement in the setting most appropriate to their condition.

The Office provided the Department of Health with guidance on the adequacy and interpretation of its laws in the event of a bioterrorism disaster. In addition, the Office reviewed contracts for the Department in its effort to attain bioterrorism preparedness. The Office also assisted the Health Department in developing a criminal background check policy to use in the hiring of personnel for the new federally funded bioterrorism positions. Finally, the Office reviewed the Department’s disease reporting regulations with emergency amendments to the reportable disease list. Acting on these efforts, the Office successfully petitioned the City of Richmond General District Court for the isolation of two individuals with active tuberculosis disease.

The Child Support Section of the Office appeared in 92,433 hearings across the Commonwealth, resulting in a recovery of $6,130,022 in delinquent child support and the imposition of over 1,500 years in collective jail time.

PUBLIC SAFETY DIVISION

Criminal Litigation Section

The Criminal Litigation Section handled all postconviction litigation filed by state prisoners attacking their convictions. In 2002, the Section defended 1,483 petitions for writs of habeas corpus filed in state and federal courts and represented the Commonwealth in 626 appeals in state and federal courts.

The Criminal Litigation Section’s Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. Four executions were carried out in 2002. Of the many capital cases handled by the Unit, three were of particular significance. In Mickens v. Taylor, the Supreme Court of the United States upheld the denial of federal habeas corpus relief, ruling that the inmate had shown no conflict of interest by his trial attorney’s prior brief representation of the capital murder victim. In Atkins v. Virginia, the Supreme Court held that the Constitution of the United States prohibits the execution of mentally retarded persons.
The case was remanded to the Supreme Court of Virginia to determine the application of this new rule to Atkins' case. In *Kasi v. Angelone*, the Supreme Court of the United States refused to grant the death row inmate’s petition for review of his habeas corpus case. Kasi claimed that Virginia had violated his rights when it tried him for the capital murders of three CIA employees after the FBI arrested him in Pakistan several years after the murders and returned him to this country for trial.

**Correctional Litigation Section**

The Correctional Litigation Section provided day-to-day advice to the Department of Corrections, the Department of Juvenile Justice, the Parole Board, the Department of Correctional Education and their citizen policymaking boards. Additionally, the Office represented the Secretary of Public Safety, the Governor on extradition matters, Commonwealth’s attorneys on detainer matters, and Correctional Enterprises. During 2002, the Office was responsible for handling 390 § 1983 civil rights cases, 21 employee grievances, 364 habeas corpus cases, 306 mandamus petitions, 78 tort claims, and 41 warrants in debt.

**Special Prosecutions Section**

As part of the reorganization of the Office, the Natural Resources and Investigation and Enforcement Sections were reconstituted as the Special Prosecutions Section, which is authorized to prosecute criminal and administrative cases. The Section is comprised of four discrete units—the Environmental, Health Professions, and Medicaid Fraud Control Units, and the newly created Organized Crime Unit.

The Environmental Unit represents all agencies in the Natural Resources Secretariat and certain other related agencies. The Unit’s services to these agencies include general legal advice; litigation; review of regulations, contracts, and other documents; drafting and review of legislation; and personnel matters. The Unit also has an environmental prosecutor who assists local Commonwealth’s attorneys in criminal prosecutions under environmental laws.

The Office defended the new state wetlands laws against a challenge in federal court. The case is now pending in the United States Court of Appeals for the Fourth Circuit. The Office has defended several challenges to the state wetlands law brought in state courts. In addition, the Office worked successfully with the waste industry to draft legislation for the 2003 Session of the General Assembly to effect an end to the litigation challenging the waste statutes adopted in 1999. The Office was responsible for obtaining and collecting a judgment for $1.9 million against an insurance company on a reclamation bond. Additionally, the Office has resolved the State Water Control Board’s long-standing dispute with the city of Galax; filed suit in the United States Court of Appeals for the District of Columbia to support the “New Source Review” regulations adopted by Environmental Protection Agency under the Clean Air Act; and assisted client agencies in defending and resolving various other disputes.

The Health Professions Unit primarily prosecutes cases before the various health regulatory boards under the Department of Health Professions. These boards include Medicine, Nursing, Pharmacy, and Dentistry. The creation of the Health Professions Unit has provided for more focused and effective prosecution of cases involving violations of health care-related licensing laws and regulations.
The Medicaid Fraud Control Unit investigated many major fraud cases throughout Virginia. The investigations resulted in the successful conviction of eighteen health care providers for fraud and recovered in excess of $12 million in criminal and civil restitution. The successful investigations are attributable to the outstanding working relationship established between the Office and many other federal, state, and local agencies. The majority of these investigations were prosecuted jointly by the United States Attorney’s Offices in the Eastern and Western Districts of Virginia and this Office.

The newly formed Organized Crime Unit covers a wide range of criminal and enforcement matters. The Unit is responsible for conducting prosecutions on behalf of the Attorney General. The Unit includes the Financial Crime Intelligence Center. In addition to overseeing the operations of the Center, the Unit is responsible for providing legal advice on all criminal matters to the Department of State Police, the Department of Criminal Justice Services, and the Division of Forensic Science. Additionally, the Unit handles prosecutions before the ABC Board on behalf of the ABC Bureau of Law Enforcement Operations.

The Organized Crime Unit also has provided legal advice to, and representation before various state courts and boards for, all divisions of the State Police, the Division of Forensic Science, and the Private Security Services Section of the Department of Criminal Justice Services. This representation included thwarting attempted discovery of criminal investigation files, the creation and adoption of regulations involving criminal procedure and public safety issues, and the revocation or denial of licenses of private security personnel. Finally, several significant administrative prosecutions were initiated before the ABC Board at the specific request of the ABC Bureau of Law Enforcement Operations. These prosecutions resulted in the suspension or surrender of ABC licenses by establishments operating illegally in the Commonwealth.

TECHNOLOGY & TRANSPORTATION DIVISION

Upon taking office in January 2002, I fulfilled one of my campaign promises by appointing the first Deputy Attorney General for Technology. This position signifies my commitment to ensuring that Virginia remains at the forefront of technology issues. During the course of reorganizing the Office, I consolidated the Technology Division and Transportation Section to form the Technology & Transportation Division.

One of the first tasks undertaken by the Division was to address the problem of identity theft in Virginia. Identity theft is the fastest-growing crime in the United States, costing individuals and businesses millions of dollars a year. With the advent of the Internet, identity thieves can steal an unsuspecting victim’s personal identifying information and establish numerous credit accounts on-line within minutes. The Computer Crimes Unit was instrumental in planning and coordinating the Attorney General’s Identity Theft Task Force. The task force met over a six-month period in various locations across the Commonwealth and, on October 29, 2002, presented a fifty-page report. The task force was composed of Virginia consumers, identity theft victims, law enforcement, and business leaders whose recommendations were part of this Office’s identity theft legislation for the 2003 Session of the General Assembly. The Office also produced a handbook entitled How to Avoid Identity Theft – A Guide for Victims.
This handbook will be distributed to thousands of Virginians in an effort to combat the growing threat of identity theft in our society.

In the fall of 2002, this Office successfully intervened, on behalf of the Commonwealth, in a federal district court case brought by Verizon Internet Services. The defendant in this case used Verizon’s system to send millions of unsolicited commercial e-mails, otherwise known as SPAM, in violation of Verizon’s terms of service and the Virginia Computer Crimes Act. The defendant claimed that both the Computer Crimes Act and Virginia’s long-arm statute were unconstitutional. The court granted the Commonwealth’s motion to intervene, and this Office successfully defended the constitutionality of the Act and the long-arm statute.

**Computer Crimes Unit**

The Computer Crimes Unit specializes in investigating and prosecuting computer-facilitated child exploitation cases. As part of our mission to eradicate the Commonwealth of predators who use computers and the Internet to victimize our children, the Unit focuses on educating parents on the dangers of the Internet and ways to protect their children. To that end, the Office, in partnership with Comcast Cable, instituted a “safe surfing” initiative that included statewide public service announcements advising parents to supervise their children’s Internet access.

As part of its mission to prosecute crimes that are committed using computers and the Internet, the Unit conducted several successful investigations and prosecutions in federal and state courts throughout the state, including the counties of Bedford, Botetourt, Lunenburg, Mecklenburg, Middlesex, Prince George, and Washington, and the cities of Martinsville, Newport News, Staunton, and Virginia Beach.

**Transportation Section**

The Transportation Section continued to represent client agencies in administrative tribunals and state and federal courts. The Office worked closely with the Department of Motor Vehicles in challenging the determination of the National Highway Transportation Safety Administration (“NHTSA”) that Virginia law was not in compliance with federal law on repeat drunk drivers. This determination would have resulted in the loss of approximately $14 million to Virginia for highway construction. Due to the Office’s involvement, NHTSA accepted our argument that Virginia law was in compliance.

In representing the Virginia Department of Transportation, the Office faced a broad array of legal issues, including inverse condemnation, eminent domain appeal, contract, funding, permit, roadway abandonment, and environmental issues.

Under the Public-Private Transportation Act (“PPTA”), the Office assisted the Department of Transportation on the successful negotiation and renegotiation of a comprehensive agreement for the Coalfields Expressway; the successful negotiation of a comprehensive agreement for Route 28 corridor improvements in Northern Virginia; and the successful negotiation of a comprehensive agreement for improvements in the Jamestown area in anticipation of Jamestown 2007. The Office also worked with the Department of Transportation and the Department of Rail and Public Transportation on PPTA proposals still in the pipeline, including Dulles Transit and Interstate 81. In
addition, the Office was involved in legal issues associated with the Woodrow Wilson Bridge, the Northern Virginia/Hampton Roads transportation referenda, Commonwealth Transportation Board bond sales (approximately $900 million), and other major contract issues.

VICTIM NOTIFICATION & TRIAD

The Victim Notification Program provided assistance to 593 victims. The program’s services include case status updates, distribution of information, crisis intervention, accompanying victims and family members to oral arguments in state and federal appellate courts, responding to letters, and acting as liaison between victims and the press and with the Governor’s Office in death penalty cases.

The Office continued its emphasis through the TRIAD program on educating senior citizens about crime prevention. With the support of the local sheriffs, police chiefs, and AARP, TRIAD also works to keep older Virginians informed of their rights. A major purpose of TRIAD is to develop, expand, and implement effective crime prevention and education programs for older Virginians. TRIAD works at the local level to improve the quality of life for seniors by providing an active exchange of information between local law enforcement and seniors. More than 115 cities, counties and towns in Virginia have signed TRIAD agreements.

NOTABLE CASES

In 2001, the Supreme Court of Virginia, in *Black v. Commonwealth*, ruled (1) that § 18.2-423 of the *Code of Virginia*, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes on freedom of speech and is unconstitutional on its face because it prohibits otherwise permitted speech solely on the basis of its content, and (2) that the statute is overbroad. Because the Commonwealth has a duty to protect its citizens from this type of fear and recognizing the symbol of hatred that cross-burning represents, this Office appealed the decision to the Supreme Court of the United States, which granted *certiorari* in 2002. This Office argued the case before the Court on December 11, 2002.

In the case of *Virginia v. Maryland*, a Special Master appointed by the United States Supreme Court recommended that the Court side with Virginia in its dispute with Maryland over water use rights to the Potomac River. Virginia objected to Maryland’s attempt to force Virginia localities to obtain Maryland permits before drawing water from the Potomac. In 1996, Maryland rejected a request from the Fairfax County Water Authority for a permit to build a new water intake pipe extending offshore into the river. Last year, a Maryland judge ordered that the permit be granted to Virginia. Virginia’s position in this case is that it does not need Maryland’s permission for such construction.

In his report, the Special Master recommended the Court to declare that Virginia has the right to construct improvements in and withdraw water from the Potomac, without regulatory interference from Maryland. The Special Master rejected Maryland’s arguments that Virginia’s compact rights were limited to the tidal portion of the river below Washington, D.C., that Maryland had an implied authority to regulate Virginia’s access, and that Virginia had acquiesced in Maryland’s regulatory authority. The
Special Master’s recommendation is not binding on the Court. This matter is pending before the Court and is important to providing Virginians access to water in an environmentally sound way that will help ensure that Northern Virginia remains strong and vibrant.

In *Commonwealth v. Hicks*, the Supreme Court of Virginia reversed a trespass conviction of a defendant charged with violating a public redevelopment and housing authority’s trespass policy. The Court determined that the policy was overly broad and infringed upon the defendant’s First and Fourteenth Amendment protections. Recognizing that residents of a redevelopment and housing authority complex in the inner City of Richmond have the same right to protection as gated communities in the suburbs, this Office immediately sought review of this case by the United States Supreme Court.

In *Mellon v. Bunting*, two students at the Virginia Military Institute challenged the school’s long-established supper prayer tradition, claiming that the practice violates the Establishment Clause of the First Amendment. The United States District Court for the Western District of Virginia agreed with the plaintiffs and held the practice unconstitutional. This Office immediately appealed that decision to the United States Court of Appeals for the Fourth Circuit.

In *Bolick v. Roberts*, several plaintiffs sued the Virginia Alcoholic Beverage Control Board, challenging Virginia’s regulatory scheme involving the shipment and distribution of alcoholic beverages. The United States District Court for the Eastern District of Virginia determined that some of Virginia’s statutes regarding the shipment and distribution of alcoholic beverages violated the Constitution of the United States. Defending the Commonwealth’s alcoholic beverage control laws, the Office appealed the Court’s decision to the United States Court of Appeals for the Fourth Circuit.

**BUDGET REDUCTIONS & REORGANIZATION OF THE OFFICE**

Due to the massive budget shortfall in 2002, the Office was required to reduce its budget by a total of 21% and consequently underwent two reorganizations, which resulted in a 27.9% reduction in staff from the previous year and a 17.3% reduction as compared to the previous five years. Early in 2002, I recognized the looming budget problems and determined that the Office would have to consolidate functions where necessary and eliminate functions where appropriate. Accordingly, I eliminated two Deputy Attorney General positions by (1) consolidating the Government Operations Division with the Civil Division and (2) placing the Natural Resources Section in a new unit under the Public Safety Division. The Local & Intergovernmental Affairs Division was eliminated and its functions were assumed by all the remaining divisions in the Office.

The budget of the Office was reduced by 21%. The reduction resulted in the termination of fifty-two employees, which represents 10% of the entire state workforce reduction. Though these reductions were regrettable and affected the Office’s ability to provide its core functions, the reduction in the number of employees was far less than what would have been required if the Office had not been reorganized earlier in the year.
REVENUES GENERATED FOR THE COMMONWEALTH

In calendar year 2002, the Office of the Attorney General defended claims against the Commonwealth of over $345 million in potential liability. The Office obtained $18 million in civil penalties, debts collected, and assets seized. The Office collected over $6 million in delinquent child support payments and won utility rate reductions in excess of $47 million for the citizens of the Commonwealth.

These achievements do not fully represent the achievements made by this Office and its dedicated staff. Legal services performed for agencies are billed at $72 per hour, when billed at all. This is far below the market average of $230 per hour.

CONCLUSION

It has been my honor to serve the people of the Commonwealth as Attorney General during the past year. While no one document could cover all the duties, responsibilities and accomplishments of the Office, this report serves as a guide to meet our mandate as the Department of Law for the Commonwealth of Virginia. The names of all the dedicated professionals employed by the Office of the Attorney General during 2002 are listed on the following pages. I am grateful for their energetic efforts on behalf of the citizens and government of the Commonwealth.

While the previous year was successful on so many fronts, there is more yet to do in order for the Commonwealth to continue to be a place we are all proud to call home. I look forward to meeting that challenge with energy and compassion guided by a firm respect for the rule of law.

With kindest regards, I am

Very truly yours,

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

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<tr>
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<tr>
<td>Jerry W. Kilgore</td>
<td>Attorney General</td>
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<tr>
<td>Elizabeth A. McClanahan</td>
<td>Chief Deputy Attorney General</td>
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<td>Bernard L. McNamee II</td>
<td>Chief Counsel to the Attorney General</td>
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<td>Thomas M. Moncure Jr.</td>
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<td>Richard B. Campbell</td>
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<td>Deputy State Solicitor</td>
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<td>Christopher R. Nolen</td>
<td>Chief/Opinions &amp; Sp. Counsel to Attorney General</td>
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<td>C. Meade Browder Jr.</td>
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<td>Craig M. Burshem</td>
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<td>Richard B. Zorn</td>
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1This list includes all persons employed on a full-time basis in the Office of the Attorney General at any time during 2002, 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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<tr>
<td>Katherine P. Baldwin</td>
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<td>Abigail T. Yawn</td>
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# Attorneys General of Virginia from 1776 to 2002

<table>
<thead>
<tr>
<th>Name</th>
<th>Term</th>
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<tbody>
<tr>
<td>Edmund Randolph</td>
<td>1776–1786</td>
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<tr>
<td>James Innes</td>
<td>1786–1796</td>
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<tr>
<td>Robert Brooke</td>
<td>1796–1799</td>
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<tr>
<td>Philip Norborne Nicholas</td>
<td>1799–1819</td>
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<tr>
<td>John Robertson</td>
<td>1819–1834</td>
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<tr>
<td>Sidney S. Baxter</td>
<td>1834–1852</td>
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<tr>
<td>Willis P. Bocock</td>
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<td>John Randolph Tucker</td>
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<tr>
<td>Thomas Russell Bowden</td>
<td>1865–1869</td>
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<tr>
<td>Charles Whittlesey (military appointee)</td>
<td>1869–1870</td>
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<tr>
<td>James C. Taylor</td>
<td>1870–1874</td>
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<tr>
<td>Raleigh T. Daniel</td>
<td>1874–1877</td>
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<tr>
<td>James G. Field</td>
<td>1877–1882</td>
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<tr>
<td>Frank S. Blair</td>
<td>1882–1886</td>
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<tr>
<td>Rufus A. Ayers</td>
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<td>R. Taylor Scott</td>
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<td>R. Carter Scott</td>
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<tr>
<td>A.J. Montague</td>
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<tr>
<td>William A. Anderson</td>
<td>1902–1910</td>
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<tr>
<td>Samuel W. Williams</td>
<td>1910–1914</td>
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<tr>
<td>John Garland Pollard</td>
<td>1914–1918</td>
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<tr>
<td>J.D. Hank Jr.</td>
<td>1918–1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918–1934</td>
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<tr>
<td>Abram P. Staples</td>
<td>1934–1947</td>
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<tr>
<td>Harvey B. Apperson</td>
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<tr>
<td>J. Lindsay Almond Jr.</td>
<td>1948–1957</td>
</tr>
<tr>
<td>Kenneth C. Patty</td>
<td>1957–1958</td>
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</table>

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

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

3. The Honorable Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of the Honorable Abram P. Staples, and served until his death on January 31, 1948.

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

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.
<table>
<thead>
<tr>
<th>Name</th>
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<td>Frederick T. Gray</td>
<td>1961–1962</td>
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<td>Andrew P. Miller</td>
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<td>Gerald L. Baliles</td>
<td>1982–1985</td>
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<td>Mary Sue Terry</td>
<td>1986–1993</td>
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<tr>
<td>Richard Cullen</td>
<td>1997–1998</td>
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<tr>
<td>Mark L. Earley</td>
<td>1998–2001</td>
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<tr>
<td>Randolph A. Beales</td>
<td>2001–2002</td>
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<tr>
<td>Jerry W. Kilgore</td>
<td>2002–</td>
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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.

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.

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.


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.

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 Courts
of
Virginia
and
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.
Alston v. Commonwealth. Affirmed decision of Court of Appeals of Virginia, holding that the trial court did not err in allowing into evidence a statement Alston gave to police after counsel had been appointed to represent him on an unrelated charge.

Amos v. Commonwealth. Reversed denial of expungement petition, ruling that a nolle prossed charge with a peace bond attached to it fits within the expungement statute, and instructing the trial court to receive additional evidence, because the record was insufficient to determine whether Amos qualified for expungement.

Armstrong v. Commonwealth. Affirmed en banc decision of Court of Appeals of Virginia, finding that the prosecution did not have to prove that a firearm was operable to convict a defendant for possession of a firearm after having previously been convicted of a felony.

Bailey v. Dir., Dep’t of Correct. Denied petition for rehearing of habeas corpus petition challenging capital murder conviction and death sentence.


Bender v. Va. Marine Res. Comm’n. Denied pro se motion for extraordinary relief under § 8.01-626 to enjoin a circuit court order upholding a regulation limiting placement of conch pots near Chesapeake Bay Bridge Tunnel and awarding sanctions against petitioner, following denial of the same relief by the Court of Appeals of Virginia.

Bolden v. Commonwealth. Reversed decision of Court of Appeals of Virginia holding that police engaged Bolden in consensual encounter and that his consent to a search of his vehicle was voluntary. Conviction for possession of more than five pounds of marijuana with intent to distribute was vacated and the case remanded.

Commonwealth v. Bower. Reversed decision of Court of Appeals of Virginia reversing Bower’s conviction for animate object sexual penetration of his 13-year-old daughter, holding that testimonial evidence, along with the familial relationship between the parties and their relative ages and sizes, constituted sufficient proof that Bower intimidated the victim and overcame her will.

Commonwealth v. Hicks. Affirmed, in part, and vacated, in part, en banc decision of Court of Appeals of Virginia that the Richmond Redevelopment and Housing Authority’s enforcement of its trespass barment policy, on privatized Housing Authority property, violated Hicks’ First and Fourteenth Amendment rights. Affirmed decision on the basis that the Authority’s trespass policy is overly broad and that Hicks could assert the issue in a criminal proceeding; vacated the ruling that private streets constitute a public forum.

Commonwealth v. Hill. Reversed decision of Court of Appeals of Virginia, finding that the right to resist an unlawful arrest does not extend to a Terry stop and frisks.

Commonwealth v. Hill. Reversed decision of Court of Appeals of Virginia reversing Hill’s conviction on the ground that the trial court refused to permit questions asking prospective jurors about the range of punishment that could be imposed upon conviction, and holding that neither Hill nor the Commonwealth in a noncapital criminal prosecution has a right to ask about such matters during voir dire.
Commonwealth v. JOCO Found. Affirmed ruling that Bedford Circuit Court lacked subject matter jurisdiction over Commonwealth’s claims seeking appointment of receiver and preliminary injunction against corporate directors of charitable nonstock corporation, because the Commonwealth’s exclusive remedy to address alleged breaches of fiduciary duties is set forth in Title 13.1, which gives exclusive jurisdiction to the State Corporation Commission.

Commonwealth v. Pannell. Reversed en banc decision of Court of Appeals of Virginia holding that former § 16.1-291 prohibited the admission of hearsay in a juvenile probation revocation proceeding and required that the violations of probation be proven beyond a reasonable doubt.

Commonwealth v. Redmond. Reversed decision of Court of Appeals of Virginia holding that Redmond clearly and unambiguously invoked his right to counsel during a custodial interrogation, requiring suppression of a confession of murder.

Commonwealth v. Shaffer. Held that person whose operator’s license was revoked under 1997 habitual offender laws and who waited two years, after repeal of those laws, to file a petition for review of DMV’s determination, was not entitled to postdeprivation review to satisfy his due process rights. Held that Court of Appeals of Virginia erred in finding that the right of a person to drive a motor vehicle is a property right, stating that such right is a conditional privilege that may be suspended or revoked in the interest of public safety. Held further that the statutory right to judicial review, previously allowed under the habitual offender laws, was not a substantive right but merely a procedural remedy that could be curtailed or repealed by the legislature, and that the courts no longer had jurisdiction to consider petitions for review filed after the effective date of the statutes’ repeal.

Commonwealth v. Smith. Reversed decision of Court of Appeals of Virginia, holding that the trial court did not abuse its discretion in allowing Smith to be tried jointly by a jury for four murder charges because the requirements of § 18.2-31(8) were satisfied.

Commonwealth v. Tweed. Reversed decision of Court of Appeals of Virginia that the trial court erred in refusing to grant Tweed a new trial for murder and attempted robbery based on after-discovered evidence, but affirmed decision remanding for new sentencing based on Fishback parole instruction error.


Dabney v. Angelone. Reversed trial court’s judgment and dismissed Dabney’s petition for writ of habeas corpus alleging that the Commonwealth knowingly used perjured testimony to obtain his conviction for robbery and use of a firearm in the commission of a felony.

Dalo v. Commonwealth. Affirmed decision of Court of Appeals of Virginia, finding that conviction by the trial court for involuntary manslaughter under § 18.2-36.1, following conviction in district court for the underlying driving while intoxicated (which conviction occurred at the same time as the preliminary hearing for the manslaughter), did not violate the protection against double jeopardy.

Gaitan v. Arlington Cir. Ct. Clk. Orig. juris. Granted writ of mandamus, in part, and directed the clerk to issue a subpoena to himself to testify at a pretrial hearing, and denied the writ to the extent it sought to have the clerk issue subpoenas to the four Arlington County circuit court judges.


Hawkins v. Commonwealth. Dismissed appeal challenging order recommitting Hawkins, found not guilty by reason of insanity of attempted capital murder of police officer, to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services.


Hill v. Commonwealth. Reversed decision of Court of Appeals of Virginia, holding that a criminal defendant has no right to inform the jury during voir dire of the statutory range of punishment for the charged offense or any lesser-included offenses.

In re King. Orig. juris. Dismissed petition for writ of prohibition asserting that there was no manifest necessity to declare a mistrial and that the trial court, therefore, was without jurisdiction to try King.

Keene v. Commonwealth. Reversed trial court’s decision denying Keene’s posttrial motion to vacate his 1994 malicious wounding conviction due to a Baker notice error.

King v. Commonwealth. Reversed and remanded decision of Court of Appeals of Virginia finding that King had waived his challenge to the sufficiency of the evidence alleging malicious discharge of a firearm within an occupied dwelling, in violation of § 18.2-279.

Kirby v. Commonwealth. Affirmed decision of Court of Appeals of Virginia convicting Kirby of possession of a firearm by a convicted felon, finding that the object Kirby possessed was a firearm within the meaning of the statute.

Kirby v. Commonwealth. Affirmed decision of Court of Appeals of Virginia construing the spousal testimony statute, § 19.2-271.2, finding that, even though the endangered spouse was not struck by a bullet, she was properly permitted to testify against her husband on charges of reckless handling of a firearm and possession of a firearm by a convicted felon, because the prosecution was for offenses committed by Kirby against his wife.

Leighton v. Dep’t of Health. Denied petition for certiorari appealing dismissal by Court of Appeals of Virginia of Leighton’s challenge to neighbor’s septic tank permit.

Miles v. Commonwealth. Affirmed decision of Court of Appeals of Virginia 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.

Mills v. Va. Marine Res. Comm’n. Dismissed petition for review of decision of Court of Appeals of Virginia dismissing, for Mills’ failure to file opening brief on time, appeal of a circuit court order upholding Commission approval of Virginia Beach Wetlands Board’s decision denying permit to build a residence on a beach or sand dune.
Murphy v. Commonwealth. Held that the trial court erred in denying Murphy’s motion to suppress evidence of controlled substances found on his person because the items were seized after Murphy was arrested illegally based on a pocket search by a police officer without probable cause.

Murphy v. Reinhard. Orig. juris. Dismissed petition for writ of habeas corpus to halt involuntary administration of antipsychotic drugs to Murphy, a criminal defendant found incompetent to stand trial on charge of murder. Court found petitioner’s claims challenging constitutionality of § 19.2-169.2 and trial court’s order authorizing forcible medication were not proper subjects of petition for writ of habeas corpus and were without merit.

Pritchett v. Commonwealth. Reversed decision of Court of Appeals of Virginia, holding that Pritchett was entitled to have an expert testify to the impact that his mental retardation had on his confession.

Rabey Est. v. Va. Marine Res. Comm’n. Dismissed petition for review of decision of Court of Appeals of Virginia dismissing, for Rabey’s failure to file opening brief on time, appeal of a circuit court order upholding Commission approval of Virginia Beach Wetlands Board’s decision denying permit to a build residence on a beach or sand dune.


Sheikh v. Buckingham Corr. Ctr. Affirmed dismissal of habeas corpus petition attacking conviction for malicious wounding by mob action and holding that counsel was effective in the penalty phase of the trial.

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

Stephens v. Commonwealth. Affirmed decision of Court of Appeals of Virginia concluding that Stephens was not placed in double jeopardy by convictions for shooting at an occupied vehicle and shooting while in a motor vehicle in a single episode.

Tauber v. Commonwealth. Affirmed the application of a constructive trust to the assets of a defunct charitable corporation; judgment for the Commonwealth in excess of $51 million. Affirmed the award of interests in real estate in Alexandria, Virginia, including the former Jefferson Memorial Hospital building. The Commonwealth alleged that various individuals and their corporate and partnership entities breached fiduciary duties and wrongfully appropriated the assets of Jefferson Memorial Hospital, Inc., a nonprofit charitable corporation that operated a hospital in Alexandria, Virginia. The Court entered judgment for the Commonwealth, as trustee on behalf of the public, in the amount of $26,372,438, with interest at the rate of 9% from July 13, 2000. The Court also imposed a constructive trust in the amount of $24,703,145 on the proceeds of a settlement the defendants had been receiving. The Court remanded the case to the chancellor for distribution of the assets in accord with the charitable purposes to which they should have been devoted.
Toller v. Commonwealth. Affirmed judgment of Court of Appeals of Virginia that the trial court did not err in convicting Toller of manslaughter, driving while intoxicated, maiming, and driving after having been declared a habitual offender. Rejected claim that Toller’s right to present evidence was chilled by a long-standing rule of Virginia law.

Velazquez v. Commonwealth. Reversed, in part, decision of Court of Appeals of Virginia, finding that expert testimony expressing opinion on the ultimate issue of fact—that the victim’s injuries resulted from nonconsensual intercourse—improperly invaded the province of the jury.


Ward v. Commonwealth. Affirmed decision of Court of Appeals of Virginia, finding that trial court did not err in admitting testimony that the rape victim suffered from post-traumatic stress disorder.

Wilkins v. West. Reversed trial court judge’s finding that numerous House and Senate electoral districts enacted by the 2001 Session of the General Assembly were racially gerrymandered and enjoined their use in elections.

Williams v. Commonwealth. Reversed and remanded en banc decision of Court of Appeals of Virginia transferring Williams’ case to the Supreme Court, pursuant to § 8.01-677.1, because his appeal from an untimely motion to withdraw a guilty plea, after entry by the circuit court of a final conviction order, is subject to the criminal appellate jurisdiction of the Court of Appeals under § 17.1-406(A).

CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Atkins v. Commonwealth. Remanding appeal of death sentence from Supreme Court of the United States.

Barbosa v. Commonwealth. Appealing decision of Court of Appeals of Virginia holding that Barbosa, convicted of aggravated malicious wounding, was properly denied a self-defense instruction.

Bothen v. Dept of Social Serv. Appealing decision of Court of Appeals of Virginia upholding administrative finding of child neglect/inadequate supervision, based on substantial evidence. Proceedings are on hold under the Soldiers’ and Sailors’ Relief Act because of Bothen’s military deployment.

Cilman v. Va. State Bar. Orig. juris. Challenging Part 6, § IV, former paragraph 13(K)(1) of the Court rules vesting jurisdiction in the Disciplinary Board to determine whether attorney whose license has been suspended or revoked has complied with notice provisions, alleging that paragraph 13(K)(1) violates § 54.1-3915, which provides that the Court shall not promulgate any rule that deprives courts of jurisdiction to discipline attorneys.

Commonwealth v. Diaz. Appealing decision of Court of Appeals of Virginia reversing and dismissing revocation of suspended sentence in misdemeanor habitual offender case, holding that the offense that gave rise to the revocation proceeding did not occur during the period of suspension.
Commonwealth v. Hudson. Appealing decision of Court of Appeals of Virginia that evidence was insufficient to sustain Hudson's convictions for second-degree murder and use of a firearm in the commission of murder.

Commonwealth v. Leal. Appealing decision of Court of Appeals of Virginia that trial court erred in refusing a defense instruction on assault and battery by mob, a lesser-included offense of maiming by mob.

Dickerson v. Commonwealth. Appealing decision of Court of Appeals of Virginia affirming trial court's denial of motion to suppress evidence—narcotics and paraphernalia—seized from Dickerson's automobile.

Fails v. Va. State Bar. Orig. juris. After Disciplinary Board revoked attorney's license, request was made that the matter be heard by a three-judge panel pursuant to § 54.1-3915, and the Board denied the request as untimely pursuant to Part 6, § IV, former paragraph 13(C)(6)(a)(i) of the Court rules. Appellant alleges in his petition that § 54.1-3915 supersedes the rule.

Friedline v. Commonwealth. Appealing decision denying and dismissing petition for writ of habeas corpus, raising ineffective assistance of counsel claims despite absence of affidavit from trial counsel.

Hash v. Commonwealth. Appealing decision of Court of Appeals of Virginia affirming capital murder conviction and life sentence.

Henry v. Warden, Riverside Reg'l Jail. Appealing trial court decision denying, on procedural grounds, petition for writ of habeas corpus raising substantive search and seizure issue.

In re Roanoke City Commw. Att'y. Petition commanding Court to accept defendants' guilty pleas and proceed with sentencing.

Lovitt v. Dir., Dep't of Correct. Challenging capital murder conviction and death sentence.

May Dep't Stores Co. v. Commonwealth. Appeal of decision of Court of Appeals of Virginia reversing circuit court order denying reimbursement from Virginia Petroleum Storage Tank Fund.

MCI WorldCom v. Jones. Appeal from State Corporation Commission questioning whether the Commission has jurisdiction to adjudicate a petition challenging rates charged for collect calls placed from the Department of Corrections' inmate telephone system.

Smith v. Commonwealth. Appealing decision of Court of Appeals of Virginia affirming trial court's admission of blood spatter evidence.

State Water Control Bd. v. Crutchfield. Appealing decision of Court of Appeals of Virginia affirming plaintiffs' standing to challenge Water Board permit and allowing amendment of petition for appeal.

Whitfield v. Commonwealth. Appealing decision of Court of Appeals of Virginia that officers properly stopped Whitfield when, in a high-crime area, he suddenly fled at the sight of the police.


**Cases in the Supreme Court of the United States**

**Bell v. Commonwealth.** Pending appeal of capital murder conviction and death sentence.

**Brown v. Dir., Dep't of Correct.** Pending appeal of Fourth Circuit’s denial of habeas relief in case alleging cruel and unusual punishment in sentencing Brown for aggravated sexual battery and indecent liberties convictions.

**Hamm v. Waste Mgmt. Holdings, Inc.** Denied petition for certiorari appealing Fourth Circuit decision upholding district court decision that Virginia waste control statutes violate the Commerce Clause.

**Kasi v. Dir., Dep’t of Correct.** Denied petition appealing Fourth Circuit denial of relief from capital murder conviction and death sentence.

**Mickens v. Taylor.** Affirming Fourth Circuit denial of habeas corpus relief in death penalty case.

**Murphy v. Alexandria Cir. Ct.** Denied petition for certiorari from Supreme Court of Virginia denying petition for writ of prohibition seeking to vacate trial court’s order authorizing involuntary administration of antipsychotic drugs to Murphy, a criminal defendant found incompetent to stand trial on charge of murder.

**Ortega v. Dir., Dep’t of Correct.** Pending petition appealing Fourth Circuit denial of habeas relief for convictions for abduction, robbery, assault and battery, statutory burglary, and illegal possession of a firearm.

**Schmitt v. Virginia.** Denied petition appealing decision of Supreme Court of Virginia upholding capital murder conviction and death sentence.

**Smyth v. Rivero.** Denied petition for certiorari from decision of Fourth Circuit ruling that the Commissioner of the Department of Social Services was not liable for $195,074 in attorneys’ fees, as petitioners could not be characterized as “prevailing parties,” because there had been no judgment on merits or court-ordered consent decree creating material alteration of parties’ legal relationship.

**Tauber v. Commonwealth.** Denied appeal of Supreme Court of Virginia decision affirming the application of a constructive trust to the assets of a defunct charitable corporation and awarding the Commonwealth, as trustee on behalf of the public, in excess of $51 million and interests in real estate in Alexandria, Virginia.

**Virginia v. Maryland.** Orig. juris. Suit against State of Maryland for injunctive and declaratory relief asserting that Maryland has used its police power to interfere with exercise of riparian rights by Virginia citizens guaranteed by compact. Special master’s report recommends that all issues be resolved in favor of the Commonwealth.

**Ward v. Dir., Dep’t of Correct.** Denied petition appealing Fourth Circuit denial of habeas relief in first degree murder case.
Woodfin v. Dir., Dep’t of Correct. Denied petition appealing Fourth Circuit denial of habeas relief from capital murder, first degree murder, and illegal use of a firearm convictions.

Yarbrough v. Virginia. Denied petition appealing decision of Supreme Court of Virginia upholding capital murder conviction and death sentence.

Yowell v. Virginia. Denied petition appealing Fourth Circuit’s denial of habeas relief for convictions for robbery, abduction, illegal use of a firearm, and possession of a firearm by a felon.
Official Opinions

of

Attorney General

Jerry W. Kilgore

January – December 2002
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: 2002 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.
You ask whether the Privacy Protection Act of 1976 will permit the Town of Christiansburg to install surveillance cameras and audio monitoring equipment, visible and concealed, throughout the building and grounds of a recreation center located in the town.

You relate that the Town of Christiansburg operates a newly constructed recreation center. You report, however, that disturbances have emanated from the public and employees at the center, and that thefts have occurred, as well as accidents, which are attributable to employee negligence. The town contemplates the installation of surveillance cameras and audio monitoring equipment, visible and concealed, throughout the building and possibly on the grounds surrounding the building. You advise that the town proposes to erect conspicuous signs on the premises and at the entrances of the building to notify all persons that such surveillance equipment has been installed and is operational. You conclude that the town may install such cameras and equipment, provided the notices you describe are conspicuously installed.¹

The 1976 Session of the General Assembly enacted the Privacy Protection Act of 1976² pursuant to a recommendation of the Virginia Advisory Legislative Council ("Council").³ The Council’s proposals were the result of a two-year study that included consideration of federal privacy legislation enacted by the Congress of the United States.⁴

The 2001 Session of the General Assembly replaced the Privacy Protection Act with the Government Data Collection and Dissemination Practices Act in Chapter 38 of Title 2.2, §§ 2.2-3800 through 2.2-3809.⁵ Chapter 38 imposes certain requirements on agencies that maintain personal information and on agencies that maintain an information system that includes personal information.⁶ Section 2.2-3803(A) provides, in part:

Any agency⁷ maintaining an information system that includes personal information shall:

5. Make no dissemination to another system without (i) specifying requirements for security and usage including limitations on access thereto, and (ii) receiving reasonable assurances that those requirements and limitations will be observed.
Section 2.2-3806(A) provides:

Any agency maintaining personal information shall:

....

2. Give notice to a data subject of the possible dissemination of part or all of [personal] information to another agency, nongovernmental organization or system not having regular access authority[

Section 2.2-3801(2) defines the term “personal information” as used in Chapter 38 as all information that describes, locates or indexes anything about an individual including his real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution. “Personal information” shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information.

The entire legislative history of the Government Data Collection and Dissemination Practices Act (formerly the Privacy Protection Act of 1976), as well as the legislative history of the Federal Privacy Act of 1974, emphasizes “a concern to protect the privacy rights of citizens” and to afford means for challenging “personal data the dissemination of which could work ... economic harm or damage ... personal reputation.”

It is the intent of the Council that affirmative steps be taken now by the General Assembly to obviate the possibility of the emergence of cradle-to-grave, detailed dossiers on individuals, the existence of which dossiers would, “at the push of a button”, lay bare to anyone’s scrutiny, every detail, however intimate, of an individual’s life.

The principles contained in the Government Data Collection and Dissemination Practices Act guide state agencies and political subdivisions in the collection and maintenance of information. The Supreme Court of Virginia has described the principles by which a personal information system may be established:

[N]o secret personal information system shall be established; the need to collect the information must be clearly established in advance; information must be relevant to the purpose for which it has been collected; it should not be used unless accurate; the individual should be able to learn the purpose for which it is collected.
and particulars about its use and dissemination; the individual should be permitted to correct or erase inaccurate or obsolete information; and any agency maintaining such data should assure its reliability and prevent its misuse.\[^{11}\]

Consistent with these principles, the Government Data Collection and Dissemination Practices Act authorizes agencies to "[c]ollect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency."\[^{13}\] Chapter 38 requires that an agency collecting such information maintain it "with accuracy, completeness, timeliness, and pertinence as necessary to ensure fairness in determinations relating to a data subject."\[^{14}\] Finally, § 2.2-3800(C)(1) requires that political subdivisions of the Commonwealth adhere to the principle that "there shall be no personal information system whose existence is secret."

A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning, without resort to the rules of statutory interpretation.\[^{15}\] "A related principle is that the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."\[^{16}\] When the town places signs that are clearly visible warning that surveillance cameras and audio monitoring equipment are in operation and collecting data, then such collection is not a secret. Implied in your request is that the information collected by such a system may be used in enforcement of criminal penalties for destruction or damage to town property, as well as potential disciplinary action against town employees for acts of negligence. Consequently, I shall assume that the maintenance of the information collected by such a system will be pursuant to the requirements of the Government Data Collection and Dissemination Practices Act.

Therefore, I must conclude that the Government Data Collection and Dissemination Practices Act permits the installation of surveillance cameras and audio monitoring equipment in and on the premises of the recreation center, along with the described notices advising of such surveillance.

\[^{1}\] Any request by a town 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." VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).


\[^{5}\] See 2001 Va. Acts ch. 844, at 1194, 1410-13; see id. cl. 11, 14, at 1550 (repealing Title 2.1, inclusive of Privacy Protection Act of 1976, and enacting Title 2.2, effective October 1, 2001).

\[^{6}\] See §§ 2.2-3806(A), 2.2-3803(A) (LexisNexis Repl. Vol. 2001).
You ask whether the term “agency,” as used in the Government Data Collection and Dissemination Practices Act (the “Act”), includes a local constitutional officer. In my opinion, the Act’s definition of the term “agency” includes a local constitutional officer.

APPLICABLE LAW

You observe that the Act allows any “agency” that maintains an information system containing personal information to “disseminate only that personal information ... necessary to accomplish a proper purpose of the agency.” The term “agency,” as used in the Act, means

any agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth or of any unit of local government including counties, cities, towns and regional governments and the departments and including any entity, whether public or private, with which any of the foregoing has entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function. Any such entity included in this definition by reason of a contractual relationship shall only be deemed an agency as relates to
services performed pursuant to that contractual relationship, pro­vided that if any such entity is a consumer reporting agency, it shall be deemed to have satisfied all of the requirements of this [Act] if it fully complies with the requirements of the Federal Fair Credit Reporting Act as applicable to services performed pursuant to such contractual relationship.\(^3\)

**DISCUSSION**

The offices of treasurer, sheriff, Commonwealth’s attorney, circuit court clerk, and commissioner of the revenue are constitutional offices created pursuant to Article VII, § 4 of the Constitution of Virginia, and the duties of such officers “shall be prescribed by general law or special act” of the General Assembly. While the powers and duties of a constitutional officer are those prescribed by statute,\(^4\) except as limited by law, the constitutional officer is free to discharge his prescribed powers and duties in the manner he deems appropriate.

Where the language of an enactment is plain and unambiguous, as in this case, its plain meaning must be applied.\(^5\) Accordingly, the words must be taken as written and the history of the particular enactment, extrinsic facts, or general rules of construction of enactments that have a doubtful meaning are not used.\(^6\) Prior opinions of the Attorney General implicitly assume that local constitutional officers are “agencies” under the Act.\(^7\) The offices of treasurer, sheriff, Commonwealth’s attorney, circuit court clerk, and commissioner of the revenue, however, clearly do not constitute an “agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth.”\(^8\) Such constitutional offices constitute a “unit of local government,” which is designated as an “agency” for the purposes of the Act.\(^9\)

In construing a general term, such as “unit of local government,” I am required to relate the general to the more specific terms found elsewhere in the definition, employing the principle of *ejusdem generis*.\(^10\) Therefore, the term “unit of local government,” as included in the definition of “agency” in the Act, must be restricted to the entities enumerated in the definition, i.e., “authority, board, department, division, commission, institution, bureau, or like governmental entity.”\(^11\) The common thread shared by those entities specified in the Act’s definition of “agency” is that they are bodies constitutionally or legislatively charged with the governance of, and ultimate responsibility for, a discrete agency of government. Therefore, using the familiar principle of statutory construction, *noscitur a sociis*,\(^12\) the term “unit of local government” must take on a limited meaning and not the global meaning that may be applied to the term. This principle requires that the term be construsted with reference to the words with which it is used. Like the words that precede it—“authority, board, department, division, commission, institution, bureau, or like governmental entity”—the term “unit of local government”\(^13\) must be construed to mean an entity charged with the governance of, and ultimate responsibility for, a discrete agency of government.
CONCLUSION

Accordingly, it is my opinion that a local elected constitutional officer is a "unit of local government" falling within the definition of "agency" under the Act. Therefore, I must also conclude that the Act's definition of the term "agency" includes a local constitutional officer.

2 Section 2.2-3803(A)(1).
3 Section 2.2-3801(6).
8 Section 2.2-3801(6) (emphasis added).
9 Id.
10 Where a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. See Ea. Coast Fr. Lines v. City of Richmond, 194 Va. 517, 525, 74 S.E.2d 283, 288 (1953); Rockingham Bureau v. Harrisonburg, 171 Va. 339, 198 S.E. 908 (1938).
11 Section 2.2-3801(6).
12 "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). "[I]t is known by its associates." BLACK'S LAW DICTIONARY 1084 (7th ed. 1999) (noting Latin derivation of noscitur a sociis).
13 Section 2.2-3801(6).

OP. NO. 02-002
ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Records' custodian has discretion in determining whether to release to minor's parent(s) library records for purpose of identifying overdue books checked out by minor.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
FEBRUARY 15, 2002

You request an interpretation of § 2.2-3705(A)(10) of the Code of Virginia, a portion of The Virginia Freedom of Information Act, 1 regarding disclosure of library records. 2

Though you request that no fact be determinative of this opinion, you relate, as an example, that a minor has a library card separate from his parent, 3 and that liability for
fines incurred by the minor lies with the parent. You ask whether the library may allow the parent access to library records for the purpose of identifying and locating books checked out by the minor that are overdue.

Section 2.2-3700(B) of The Virginia Freedom of Information Act “ensures the people of the Commonwealth ready access to records in the custody of public officials.” Section 2.2-3705(A) excludes certain records from the mandatory disclosure requirements of the Act, but also provides that the records “may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law.” Section 2.2-3705(A)(10) specifically excludes “[l]ibrary records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.”

Section 2.2-3700(B) also provides that “[t]he provisions of [The Virginia Freedom of Information Act] shall be liberally construed.” Further, § 2.2-3700(B) requires that “[a]ny exemption from public access to records ... shall be narrowly construed and no record shall be withheld ... to the public unless specifically made exempt pursuant to the [Act] or other specific provision of law.”

You relate that the parent desires access to library records to determine the books checked out by the minor that are overdue. The library records at issue are excluded from the mandatory disclosure requirements of the Act by the precise language of § 2.2-3705(A)(10). Records excluded from the mandatory disclosure provisions of the Act, however, may be disclosed unless “such disclosure is prohibited by law.” I am aware of no other law which prohibits the release of library records. Therefore, pursuant to § 2.2-3705(A), it is within the discretion of the records’ custodian whether to release the library records at issue to the minor’s parent.

2You inquire regarding § 2.1-342.01, which has been recodified at § 2.2-3705. See 2001 Va. Acts ch. 844, at 1194, 1396 1410 (revising and recodifying Virginia Freedom of Information Act).
3Where the singular term “parent” is used in this opinion, it shall also include the plural of that term.
5Section 2.2-3705(A).

OP. NO. 02-095
ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.
COURTS OF RECORD: CLERKS, CLERKS’ OFFICES AND RECORDS.
Presumption of openness regarding requests for court records in digital format. Duty of circuit court clerks to furnish copies of records requested by citizens, without distinction between paper and digital formats, provided records are not sealed by court order or otherwise exempt from disclosure by law.
THE HONORABLE J. JACK KENNEDY, JR.
CLERK, CIRCUIT COURT FOR WISE COUNTY AND CITY OF NORTON
DECEMBER 19, 2002

ISSUES PRESENTED

You pose two questions regarding digital databases held as part of a public record. You first ask whether circuit court clerks are bound by two decisions of the Supreme Court of the United States as they relate to First Amendment access to civil and criminal documents that are stored exclusively in digital format. You next ask whether The Virginia Freedom of Information Act and § 17.1-208 impose a duty on the clerk of a circuit court to provide public access to digital copies of the court’s database of land conveyance documents and other documents relating to civil and criminal proceedings, unless otherwise sealed by court order.

RESPONSE

It is my opinion that the two United States Supreme Court decisions you reference are not applicable to whether a circuit court clerk has a duty to provide public access to digital copies of the court’s database of judicial or court records. It is my opinion that there is a presumption of openness of court records that has its origins in the common law, and that Virginia statutory law creates a presumption of openness with regard to requests for court records in digital format. Specifically, The Virginia Freedom of Information Act and § 17.1-208 impose a duty on circuit court clerks to furnish copies of records requested by a citizen, without distinction between paper and digital formats, provided the records are not sealed by court order or otherwise exempt from disclosure by law.

APPLICABLE LAW AND DISCUSSION

You first inquire concerning the applicability of two United States Supreme Court decisions as they relate to access to civil and criminal documents that are stored exclusively in digital format. In the case of Richmond Newspapers, Inc. v. Virginia, the Supreme Court of the United States specifically held, for the first time, that a trial judge cannot exclude members of the press from a criminal trial, stating that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” The Court further notes that the First Amendment protects “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial,” and that such a right “would lose much meaning if access to observe the trial could ... be foreclosed arbitrarily.”

The limits of this presumption of openness for criminal trials were at issue in Globe Newspaper Co. v. Superior Court for the County of Norfolk, where a Massachusetts statute required the exclusion of the press and general public during the testimony of a minor victim regarding certain sexual offenses. The Court rejected the application of mandatory exclusions, noting that where “the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information,” such exclusion may stand only if it is “shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” The right of access, however,
is not absolute.6 "[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State’s justification in denying access must be a weighty one."7 Exclusions from criminal proceedings, therefore, are not unconstitutional but must meet both the “compelling governmental interests” and “narrow tailoring” tests to be sustained.

These two cases pertain to the openness of criminal trials and not to the openness of court records. The United States Supreme Court has held that “the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records,” and that such right is of common law origin.8 The right of access to court records is preserved at common law rather than under the First Amendment, and is fully subject to applicable statutes and other constitutional provisions.9

There are numerous exceptions to the presumption of openness. A court may seal records under its inherent power to control trial proceedings. As observed by the Supreme Court, “[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”10 Nor does this presumption permit the independent testing of evidence in criminal proceedings.11 Additionally, the General Assembly has provided for the sealing of and the denial of access to specific records, with certain exceptions.12 Most records, however, held in a circuit court clerk’s office, including land records,13 are nonconfidential records required to be open to the public and are not subject to exception.14

Your next inquiry concerns the statutory obligations imposed on a circuit court clerk to provide copies of digital databases requested by a citizen. Your question pertains to court records and digital databases of land records in the custody of the clerk.

Section 2.2-3701 of The Virginia Freedom of Information Act15 defines “public records” as “all writings and recordings ... 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.” This definition is sufficient to include the court and land records in a circuit court clerk’s office. Section 2.2-3704(A) of the Act further requires that “all public records shall be open to inspection and copying,” and § 2.2-3704(G) requires that records in electronic format “shall be made available to a requester at a reasonable cost.” Section 2.2-3705(A) contains eighty-one exemptions to the mandatory disclosure provisions of the Act. If an electronic record contains both exempt and nonexempt information, access must be provided to that portion of the record that is nonexempt.16

Section 17.1-208 mandates that “the records and papers of every circuit court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided.” Section 17.1-208 further requires that such inspection will not interfere with the business of the clerk’s office or reasonable use by the public. Section 17.1-242 provides that the clerk “shall
have custody of and shall keep all ... records, [including] records stored in electronic format whether the storage media for such electronics records are on premises or elsewhere.” The Supreme Court of Virginia has noted that “[§ 17.1-208] makes no distinction between criminal and civil proceedings.” Moreover, the Court has held that § 17.1-208 creates “a rebuttable presumption of public access ... in civil proceedings to judicial records.”

The clerk’s affirmative duty to provide records, as set forth in The Virginia Freedom of Information Act and under § 17.1-208, applies to both paper and electronic records. Section 2.2-3700(B) of the Act requires that “[a]ny exemption from public access to records ... shall be narrowly construed” and that any such exemption must relate to a “specific provision of law.” I also note that § 17.1-279(B) imposes an obligation on circuit court clerks who seek funding from the Technology Trust Fund to develop systems providing “statewide remote access to land records.”

Consequently, the clerk of a circuit court has a statutory duty to provide copies of digital databases of all records requested by a citizen, unless sealed by court order or otherwise specifically exempted by law. This duty applies to court records as well as to land records.

**CONCLUSION**

It is my opinion that the two United States Supreme Court decisions you reference are not applicable to whether a circuit court clerk has a duty to provide public access to digital copies of the court’s database of judicial or court records. It is my opinion that there is a presumption of openness of court records that has its origins in the common law, and that Virginia statutory law creates a presumption of openness with regard to requests for court records in digital format. Specifically, The Virginia Freedom of Information Act and § 17.1-208 impose a duty on circuit court clerks to furnish copies of records requested by a citizen, without distinction between paper and digital formats, provided the records are not sealed by court order or otherwise exempt from disclosure by law.

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2Richmond Newspapers, 448 U.S. at 573.
3Id. at 576-77.
4Globe Newspaper, 475 U.S. at 596.
5Id. at 606-07.
6"Although the right of access to criminal trials is of constitutional stature, it is not absolute." Id. at 606. “The First and Fourteenth Amendments of the United States Constitution implicitly guarantee the public a qualified right of access to a criminal trial.” Shenandoah Publishing v. Fanning, 235 Va. 253, 257, 368 S.E.2d 253, 255 (1988) (citing Richmond Newspapers, 448 U.S. at 580).
7Globe Newspaper, 475 U.S. at 606.

See VA. CODE ANN. § 1-10 (LexisNexis Repl. Vol. 2001) (continuing common law of England, insofar as it is not repugnant to principles of Bill of Rights and Constitution of Virginia and is not altered by General Assembly).


Globe Newspaper Company v. Commonwealth, No. 012682, 2002 Va. LEXIS 156 (Nov. 1, 2002) (refusing to expand right of access to courts to include right of newspapers to conduct independent testing of evidence using modern methods that could establish guilt of defendant already executed for offense).


I note, however, that certain personal information, such as social security numbers, may not be appropriate for inclusion in a public record. The Identity Theft Task Force of the Attorney General has recommended that Virginia law be modified in this area to prevent identity theft. See The Report of the Attorney General’s Identity Theft Task Force (Oct. 29, 2002), at http://www.oag.state.va.us/Protecting/Consumer%20Fraud/ID%20TASK%20Force/IDTHEFTFINALRPT.pdf.


See § 2.2-3705(D) (LexisNexis Supp. 2002).

Shenandoah Publishing, 235 Va. at 258, 368 S.E.2d at 255 (interpreting predecessor § 17-43).

"For the purposes of [The Virginia Freedom of Information Act] applicable to access to public records, constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records." Section § 2.2-3701 (LexisNexis Supp. 2002) (defining “public body”).

The 2002 Session of the General Assembly established a joint legislative study committee to study the protection of information contained in court records available on the Internet and will submit its written findings and recommendations to the Governor and the 2003 Session of the General Assembly. 2002 Va. Acts H.J. Res. 89, at 2769, 2769-70.

OP. NO. 02-107
ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT.

‘Living wage’ requirement is matter of general social or economic policy that is unrelated to goods or services sought to be procured under Act. Locality has no authority to require contractors to provide living wage to employees as condition to award of public contract.

THE HONORABLE SAMUEL A. NIXON, JR.
MEMBER, HOUSE OF DELEGATES
DECEMBER 10, 2002
ISSUE PRESENTED
You ask whether localities in the Commonwealth have the authority to require contractors responding to a request for proposal to provide a “living wage” to their employees as a requirement for submission or, in the alternative, to provide a “living wage” to their employees as a condition in any contract.¹

RESPONSE
It is my opinion that a “living wage” requirement is unrelated to the goods or services to be procured and, therefore, is not authorized under the Virginia Public Procurement Act. Accordingly, a locality does not have the authority to require contractors to provide a “living wage” to their employees as a condition to the award of a public contract.

BACKGROUND
You advise that the 2000 Session of the General Assembly amended §§ 11-35 and 11-37 of the Virginia Public Procurement Act to permit parties purchasing on behalf of government to consider “best value” when making procurement decisions.² You relate that other parties interpret the 2000 amendment to permit localities to require that contractors pay specific wages in excess of the minimum wage required by law.

APPLICABLE AUTHORITIES AND DISCUSSION
The 2000 Session of the General Assembly added the following sentences to § 11-35(G): “Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.”³ Further, the 2000 Session added the following definition to § 11-37: “‘Best value,’ as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body’s needs.”⁴

The 2001 Session of the General Assembly repealed §§ 11-35 through 11-80 of the Virginia Public Procurement Act, and revised and recodified the Act at §§ 2.2-4300 through 2.2-4377.⁵ Section 11-35(G) and the definition of “best value” as contained in § 11-37 were recodified verbatim at §§ 2.2-4300(C) and 2.2-4301, respectively. The purpose of the Act “is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources.”⁶ Section 2.2-4303(A) provides that “[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.”

Given the context of your question, it appears your inquiry concerns the use of best value considerations in competitive negotiation solicitations. Competitive negotiation allows a governmental unit to consider factors related to the goods or services being solicited other than price. Although the definition of “best value” is broadly worded,
it may not be read to include social and economic policies deemed important by the procuring body. The purpose of the Virginia Public Procurement Act is to ensure that solicitations by governmental units are presented and awarded in a fair manner to promote competition.\(^7\)

A 1992 opinion of the Attorney General concludes that it is inconsistent with the policy of the Procurement Act to condition award of a contract on factors that are unrelated to the goods or services being procured.\(^8\) This Office previously has concluded that a county seeking to impose an affordable housing requirement on the selection of a depository for county funds is impermissible.\(^9\) Moreover, a 1986 opinion determined that a city may not adopt an ordinance prohibiting discrimination on the basis of sexual orientation in the award of government contracts,\(^10\) and a 1983 opinion concluded that a locality may not adopt a policy granting preference to local bidders.\(^11\)

Like the policy initiatives examined in these previous opinions of the Attorney General, a living wage requirement is a matter of general social or economic policy that is unrelated to the goods or services sought to be procured. The 2000 amendment does not justify a departure from the long-standing interpretation of the Virginia Public Procurement Act as discussed in the previous opinions of the Attorney General. To the contrary, the Act's definition of "best value" makes clear that "best value" inheres in elements of the required goods or elements of the required services, and in both cases, relates to the public body's needs. There is nothing in § 2.2-4300(C) or § 2.2-4301 to suggest that the General Assembly intended any change in the basic policy of the Act that specifications reflect the procurement needs of the public body, and that those needs relate to the products or services being procured. Therefore, a locality does not have authority to require contractors to provide a "living wage" to their employees as a requirement of receiving public contracts.

**CONCLUSION**

Accordingly, it is my opinion that a "living wage" requirement is unrelated to the goods or services to be procured and, therefore, is not authorized under the Virginia Public Procurement Act. Accordingly, a locality does not have the authority to require contractors to provide a "living wage" to their employees as a condition to the award of a public contract.


\(^3\) 2000 Va. Acts, supra note 2, at 1199 (quoting language recodified at § 2.2-4300(C)).

\(^4\) Id. (quoting language recodified at § 2.2-4301).


\(^6\) VA. CODE ANN. § 2.2-4300(B) (LexisNexis Repl. Vol. 2001).
Section 2.2-4300(C).


Section 2.2-4327(A), however, now permits any county or city authorized pursuant to the statute to consider a depository’s promotion of affordable housing as a selection criterion.


OP. NO. 02-059

ALCOHOLIC BEVERAGE CONTROL ACT: PROHIBITED PRACTICES; PENALTIES; PROCEDURAL MATTERS.

CRIMINAL PROCEDURE: ARREST.

Police officer may not arrest, without warrant, underage person for unlawful possession of alcoholic beverages, unless offense is committed in presence of officer within his territorial jurisdiction.

THE HONORABLE MARSHA L. GARST
COMMONWEALTH’S ATTORNEY, CITY OF HARRISONBURG & ROCKINGHAM COUNTY
JULY 24, 2002

ISSUE PRESENTED

You ask whether law-enforcement personnel may arrest a person under the age of twenty-one (“underage person(s)”) for possession of alcohol, in violation of § 4.1-305, if the person consumed the alcohol within the local court’s jurisdiction, but outside the law-enforcement personnel’s territorial jurisdiction.

RESPONSE

It is my opinion that a police officer may not arrest an underage person, without a warrant, for violating § 4.1-305, unless the offense is committed in the presence of the officer within his territorial jurisdiction.

FACTS

You relate that town police officers and campus police officers of a local university may encounter underage persons who have consumed alcohol, and that they desire to charge those persons with violating § 4.1-305, based on the alcohol presently being metabolized. You also relate that, in many instances, the suspected underage person will claim to have consumed the alcohol in the county surrounding the town or, in the case of university students, off campus.

APPLICABLE LAW AND DISCUSSION

Section 4.1-305(A) provides that “[n]o person to whom an alcoholic beverage may not lawfully be sold under § 4.1-304 shall purchase or possess, or attempt to purchase or possess, any alcoholic beverage.” Virginia courts have not ruled whether a person possesses an alcoholic beverage he has recently ingested. In considering cases involving possession of narcotics, however, the Supreme Court of Virginia consistently
has required the Commonwealth to prove the defendant exercised "‘dominion and control’" over the drugs.¹

The question concerning whether a person who has consumed alcohol possesses that alcohol has been answered uniformly in the negative by other state courts that have considered the issue.² These courts reason that, once a substance has been taken into the digestive system, a person no longer can control it.³ Thus, in the situation you present, although the officer has strong evidence that the underage person before him previously possessed alcohol, it cannot be said that the person presently possesses the alcoholic beverage.

In order to determine whether the town or campus police officers have authority to arrest the persons you describe, it also is necessary to consider the officers’ general authority to arrest. Section 19.2-81 restates the common-law rule that police officers may only arrest, without a warrant, a “person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence.” Section 19.2-81 further permits an officer to arrest without a warrant for an alleged misdemeanor not committed in the officer’s presence involving certain enumerated offenses.⁴ Section 19.2-81 generally codifies the common-law rule that, except where the gravity of the offense appears to justify an immediate arrest without a warrant, or where a crime has been committed in the presence of the arresting officer, no arrest may lawfully be made until a warrant has been issued.⁵ By allowing a law-enforcement officer to make a warrantless arrest for certain misdemeanors not committed in the officer’s presence, § 19.2-81 alters the common-law rule.⁶ The common-law rule, however, will not be considered as altered or changed by statute unless the legislative intent is plainly manifested.⁷ Thus, “[w]hen an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule.”⁸

Since the offense proscribed by § 4.1-305 is punishable as a misdemeanor and is not among the offenses enumerated in § 19.2-81 that abrogate the common-law rule, the police officer may effect an arrest for this offense, without a warrant, only if the offense is committed in the officer’s presence. Therefore, the police officer may not arrest, without a warrant, for a violation of § 4.1-305, an underage person who has consumed alcoholic beverages outside the officer’s presence, regardless of whether it is inside or outside the officer’s territorial jurisdiction.

CONCLUSION

Accordingly, it is my opinion that a police officer may not arrest an underage person, without a warrant, for violating § 4.1-305, unless the offense is committed in the presence of the officer within his territorial jurisdiction.

See, e.g., Evans v. State, 24 Ala. App. 196, 197, 132 So. 601, 601 (1931) (alcohol is not possessed when it “is in the man” after consumption); Nethercutt v. Commonwealth, 241 Ky. 47, 47, 43 S.W.2d 330, 330 (1931) (“liquor in one’s stomach does not constitute possession”); see also State v. Griffin, 584 N.W.2d 127, 131 & n.2 (Wis. Ct. App. 1998) (noting that courts in other jurisdictions have held that presence of controlled substance in one’s urine or blood, without more, is insufficient evidence on which to base conviction for possession); People v. Spann, 232 Cal. Rptr. 31, 32 (Cal. Ct. App. 1986) (holding that after consumption, user no longer has dominion and control over substance consumed and therefore does not possess it).

See Evans, 24 Ala. App. at 197, 132 So. at 601 (noting that possession of whisky within meaning of Alabama’s prohibition law contemplates control over whisky; however, “when the whisky is in the man the whisky controls the man”); Griffin, 584 N.W.2d at 131 (following jurisdictions which have held that mere presence of drugs in person’s system is insufficient to prove that drugs are within person’s control); Spann, 232 Cal. Rptr. at 32 (holding that person is not in control of substance “that is en route through his digestive system”).

"[O]fficers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving (i) shoplifting in violation of § 18.2-96 or § 18.2-103 or a similar local ordinance, (ii) carrying a weapon on school property in violation of § 18.2-308.1, (iii) assault and battery, (iv) brandishing a firearm in violation of § 18.2-282, or (v) destruction of property in violation of § 18.2-137, when such property is located on premises used for business or commercial purposes, or a similar local ordinance, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense. The arresting officer may issue a summons to any person arrested under this section for a misdemeanor violation involving shoplifting.” VA. CODE ANN. § 19.2-81 (Michie Repl. Vol. 2000).

The arrest is to be “based on probable cause upon reasonable complaint of the person who observed the alleged offense.” Section 19.2-81.


OP. NO. 02-045

APPROPRIATION ACT: ADJUSTMENTS AND MODIFICATIONS TO TAXES AND FEES – ASSES RECORDATION FEE.

TAXATION: STATE RECORDATION TAX.

Circuit court clerk must collect, beginning May 1, 2002, $10 assessment fee on every deed subject to recordation tax. Fee is collected in jurisdiction where instrument is first recorded. Assessment of $10 fee for recordation of deed of easement, dedication or subdivision depends on clerk’s current treatment of such deeds for state recordation tax purposes.

THE HONORABLE JOHN T. FREY
CLERK OF THE CIRCUIT COURT OF FAIRFAX COUNTY
MAY 15, 2002
ISSUES PRESENTED

You pose six questions regarding the correct assessment of an additional recordation fee imposed by § 3-5.03 in 2002 House Bill 29.

RESPONSE

It is my opinion that the new assessment mandated by § 3-5.03 in House Bill 29 should be collected on every deed presented for recordation that is subject to state recordation tax pursuant to § 58.1-801(A) of the Code of Virginia.

BACKGROUND AND APPLICABLE LAW

House Bill 29 contains language concerning the assessment of a ten-dollar fee on deeds submitted for recordation. Specifically, § 3-5.03 in House Bill 29 provides:

In addition to the state recordation tax collected pursuant to § 58.1-801 A, Code of Virginia, there is hereby assessed a 10 dollar fee on every deed admitted to record on or after May 1, 2002. Proceeds collected are to be deposited into the general fund of the state treasury.

Section 58.1-801(A) provides, in part:

On every deed admitted to record, except a deed exempt from taxation by law, there is hereby levied a state recordation tax. The rate of the tax shall be fifteen cents on every $100 or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater.

You relate that the Executive Secretary of the Supreme Court of Virginia has advised circuit court clerks to collect the $10 fee on all deeds. Under the terms of § 3-5.03, the new $10 fee became effective on May 1, 2002.

DISCUSSION

I. Are deeds exempt from state recordation taxes also exempt from the new $10 fee assessed on deeds admitted to record?

When interpreting a statute or legislative enactment, one must first look at the plain meaning of the statute or enactment to determine if there is any ambiguity in its meaning. If the meaning of the enactment is clear and unambiguous, there is no cause to resort to the rules of statutory construction. If there is genuine ambiguity as to the meaning of a statute or legislative enactment, then resort to the rules of statutory construction to determine legislative intent may be appropriate.

In reviewing a statute for ambiguity, the words or expressions are given their "commonly understood meaning, unless a contrary intent is expressed" by the legislature. Accordingly, it follows that the correct interpretation of § 3-5.03 rests on its words as they are written. In reading § 3-5.03, its plain meaning is evident, in that the section requires, in addition to the tax levy collected under § 58.1-801(A), the assessment of...
a $10 fee on all deeds recorded "on or after May 1, 2002." Section 58.1-801(A) stipulates that all deeds admitted to record, except those "exempt from taxation by law," are to be assessed a recordation tax as set forth in that section. Therefore, a clerk of court must determine if the deed submitted for recordation is subject to the state recordation tax. If the deed is subject to taxation under § 58.1-801(A), § 3-5.03 requires an additional $10 fee to be assessed. Therefore, the clerk of court must collect the additional $10 fee on every deed admitted to record for which a recordation tax is collected under § 58.1-801(A). The plain meaning of the words "[i]n addition to" in § 3-5.03 requires the deed offered for recordation to be subject to the recordation tax prior to assessment of the $10 fee.

Even assuming that the plain meaning is not evident and that ambiguity exists regarding the meaning of the budget language, resort to the rules of statutory construction yields the same result. You relate that one interpretation of § 3-5.03 is that a circuit court clerk is required to assess the $10 fee on every deed admitted to record, regardless of whether it is subject to the recordation tax imposed by § 58.1-801(A). This interpretation arises from focusing on the last clause in the first sentence of the section to the exclusion of the first clause. A basic precept of statutory construction is that statutes are read to give every word meaning and effect. A corollary rule of statutory construction is that a statute is examined in "its entirety, rather than by isolating particular words or phrases." An interpretation that the $10 fee be assessed on every deed submitted for recordation is not supported when the rules of statutory construction are applied. If § 3-5.03 were read to mean every deed admitted to record shall be assessed a $10 fee, the first clause of the section would have no meaning or effect. Had the General Assembly intended to impose a $10 fee on every deed admitted to record, it could have plainly done so by eliminating the first clause of the section. Eliminating the first clause in § 3-5.03, "[i]n addition to the state recordation tax collected pursuant to § 58.1-801 A," and leaving the last clause, "there is hereby assessed a 10 dollar fee on every deed admitted to record on or after May 1, 2002," would indicate a clear directive to all circuit court clerks to impose the $10 fee on every deed admitted to record. The legislature has chosen, instead, to mandate that a deed be subject to the recordation tax in § 58.1-801(A) as a predicate to being assessed the additional $10 fee.

Finally, "[t]axes can be imposed only in the manner prescribed by express statutory authority. Taxing statutes must be construed strongly in the taxpayer's favor, and will not be extended by implication beyond the clear import of the statutory language." As such, an interpretation that extends the new $10 recordation fee to every deed submitted for recordation, regardless of whether a recordation tax is imposed under § 58.1-801(A), disregards the "clear import of the statutory language" contained in § 3-5.03. Therefore, the plain meaning of the statute controls and the new $10 fee imposed by § 3-5.03 should be collected only on deeds admitted to record on which the state recordation tax under § 58.1-801(A) is assessed.
II. Are deeds that are recorded to correct errors subject to an additional $10 fee?
The answer to this inquiry flows directly from the answer to the preceding question. A predicate to imposing the $10 fee authorized and mandated by § 3-5.03 is that the deed be subject to the recordation tax provided in § 58.1-801(A). Pursuant to § 58.1-810(2), “[a] deed of correction,” i.e., a deed that is recorded to correct errors, is not subject to the recordation tax. Therefore, a deed of correction would not be subject to the new $10 fee.

III. If a piece of land is located in more than one jurisdiction, does the clerk in each jurisdiction collect the new $10 fee, or is the $10 fee collected only by the clerk in the first jurisdiction in which the document is recorded, as authorized in § 58.1-812?
The state recordation tax is collected only in the jurisdiction where “an instrument is first offered for recordation” pursuant to § 58.1-812(A). Therefore, it is my opinion that the $10 fee would be collected only in the jurisdiction where an instrument is first recorded. Nothing contained in § 3-5.03 would change the normal course of conduct regarding the recordation of the same deed for real estate that is located in more than one jurisdiction.

IV. Are documents, such as a deed of release or deed of partition on which is levied a fifty-cent recordation tax, subject to the new $10 fee?
The recordation tax for deeds of release and deeds of partition in §§ 58.1-805 and § 58.1-806, respectively, is fifty cents per deed, and neither deed is subject to the recordation tax imposed by § 58.1-801(A). As such, neither deed is subject to the $10 assessment imposed by § 3-5.03.

V. Are documents, such as a deed of easement, deed of dedication or deed of subdivision, subject to the new $10 fee?
Virginia law does not specifically address the assessment of fees or taxes for the deeds described in this question. You relate that the treatment of these deeds for the purpose of imposing the state recordation tax varies by locality. While some localities charge a clerk’s fee and a recordation fee based on a nominal value of $100, others do not. It is my opinion that such deeds are not subject to the new $10 fee if they are not assessed a state recordation tax under § 58.1-801(A). Therefore, whether a particular deed of this type is subject to the new $10 fee depends on the local circuit court clerk’s current treatment of such deeds for state recordation tax purposes.

VI. Should the new $10 fee be assessed only on those documents subject to a transfer tax under § 58.1-3314?
Again, the new $10 fee should be imposed only on deeds that are subject to the recordation tax imposed by § 58.1-801(A). Section 58.1-3314 sets forth a fee structure for entering and transferring lands on the land books of commissioners of the revenue. The imposition of the fee imposed by § 58.1-3314 has no impact on the responsibility of a clerk of court to collect the new $10 fee on all deeds admitted to record that are subject to the recordation tax imposed by § 58.1-801(A).
CONCLUSION

A clerk of court should collect the $10 fee imposed by § 3-5.03 in House Bill 29 on every deed recorded on or after May 1, 2002, on which a state recordation tax is levied pursuant to § 58.1-801(A).

2Id. at 1921; see also id. ch. 899, at 2222, 2697 (providing for recordation tax fee in § 3-6.01, which contains essentially same language as § 3-5.03 in Chapter 814, except that date is July 1, 2002, reflecting beginning of new biennium).
3A "deed" is defined at common law as "any written instrument that is signed, sealed, and delivered and that conveys some interest in property." Black's Law Dictionary 423 (7th ed. 1999). In accordance with § 1-10, the Commonwealth has adopted the common law of England and recognizes a deed as "the method by which the title of real estate is transferred." American Net, &c. Co. v. Mayo, 97 Va. 182, 186, 33 S.E. 523, 525 (1899). Types of deeds in the Virginia Code generally are referenced without specific definitions, relying on the common and market usage of applicable terms. See, e.g., Rountree Corp. v. City of Richmond, 188 Va. 701, 51 S.E.2d 256 (1949) (holding that specific legislative definition of certain words is not necessary when those words have commonly accepted meaning).


5See Yates v. Pitman Manufacturing, Inc., 257 Va. 601, 605, 514 S.E.2d 605, 607 (1999) ("It is firmly established that, when a statute is clear and unambiguous, a court must accept its plain meaning and not resort to extrinsic evidence or rules of construction.").


9In determining whether to assess a state recordation tax, it is necessary for the circuit court clerk to determine (1) the consideration of the deed involved, and (2) whether the parties to the deed or the type of deed qualifies for an exemption. Numerous exemptions to the state recordation tax on deeds are contained in § 58.1-811. Exemptions from state recordation tax for specific types of deeds are contained in §§ 58.1-809 and 58.1-810.

10See In Re Kitchin Equipment Co. of Virginia, Inc., 940 F.2d 1242, 1247 (4th Cir. 1992) ("It is an axiom of statutory construction that courts are obliged to give effect, if possible, to every word used by the legislature.").


13Id.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.
COURTS OF RECORD: CIRCUIT COURTS.

Requirement in Act that court order reimbursement of guardian ad litem costs from parent(s) does not include authority to order reimbursement from guardian of child. Court may order reimbursement by parent(s) when appointment of guardian ad litem is required in child abuse or neglect cases.

THE HONORABLE J. DEAN LEWIS
JUDGE, FIFTEENTH DISTRICT JUVENILE AND DOMESTIC RELATIONS COURT
JULY 16, 2002

ISSUES PRESENTED

You pose two questions regarding Item 34(G) of the 2002 Appropriation Act. First, you ask whether a judge is authorized to require a guardian of a child, as opposed to the child’s parents, to reimburse the court for the cost of an appointed guardian ad litem’s services rendered on behalf of the child. Second, you ask whether the court may impose the reimbursement requirement on a parent when state and federal law require the appointment of a guardian ad litem for a child alleged to be abused or neglected.

RESPONSE

It is my opinion that (1) a judge is not authorized to require a guardian of a child to reimburse the court for the cost of an appointed guardian ad litem for the child; and (2) the court may order reimbursement by the parent(s) when the appointment of a guardian ad litem for the child is required in abuse or neglect cases.

FACTS

You relate that Item 34(G) of the 2002 Appropriation Act contains language requiring a juvenile and domestic relations court to order the parent(s) of a child, for whom a guardian ad litem has been appointed, to reimburse the Commonwealth for the cost of the guardian ad litem’s services for the child. The Act also provides that the Executive Secretary of the Supreme Court shall report to the General Assembly twice each year on the “amounts reimbursed by parents and/or guardians.”

APPLICABLE LAW AND DISCUSSION

Item 34(G) of the 2002 Appropriation Act provides:

Notwithstanding any other provision of law, when a Guardian ad Litem is appointed for a child by the Commonwealth, the juvenile and domestic relations district court or the circuit court, as the case may be, shall order the parent or parents of the child to reimburse the Commonwealth the costs of such services in an amount not to exceed the amount awarded the Guardian ad Litem by the court. If the court determines the parents are unable to pay, the required reimbursement may be reduced or eliminated. In addition, it is the intent of the General Assembly that the Supreme Court actively administer the Guardian ad Litem program to ensure that payments made to Guardians ad Litem do not exceed that which is required.
The Executive Secretary of the Supreme Court shall report August 1 and January 1 of each year to the Chairmen of the House Appropriations and Senate Finance Committees on the amounts paid for Guardian ad Litem purposes, amounts reimbursed by parents and/or guardians, savings achieved, and management actions taken to further enhance savings under this program.

A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning, without resort to the rules of statutory interpretation. By its plain language, Item 34(G) clearly requires the parent(s) to reimburse the court for the cost of an appointed guardian ad litem. The portion of Item 34(G) that requires the court to order the reimbursement of guardian ad litem costs does not make reference to a guardian of the child and, therefore, does not grant the court authority to order reimbursement from guardians. Instead, the court is only permitted to assess allowable costs upon the parent(s) of the child. Had the General Assembly intended to impose the reimbursement requirement on guardians of juveniles, it could have plainly done so by including the word “guardian” in that portion of the legislation.

When the term “guardian,” as opposed to “guardian ad litem,” appears in the Item 34(G), it is only in reference to the reporting requirements imposed on the Executive Secretary of the Supreme Court. It is this reference that prompts your inquiry. While it is a well-settled rule of statutory construction that “an enactment should be interpreted, if possible, in a manner which gives meaning to every word,” this rule is not absolute. A corollary to this rule is that, “if a word or clause be found in a statute which appears to have been inserted through inadvertence or mistake, ... such word or clause may be rejected as surplusage.” To the extent there is nothing to report by way of costs reimbursed by guardians, this supports the conclusion that the phrase “and/or guardians” is surplusage.

The word “parent” is not synonymous with the word “guardian.” The distinction between a parent and a guardian is recognized throughout Virginia law. Accepting the words as written in Item 34(G), the juvenile or circuit court is only granted the power to require the costs of a guardian ad litem’s service to be reimbursed by a child’s parent(s). The portion of Item 34(G) authorizing the costs to be reimbursed only by the parent(s) is clear and unambiguous. The term “guardian” does not appear in the portion of Item 34(G) that gives the court the authority to require reimbursement. As such, the court does not have the authority to assess the costs of a guardian ad litem on a guardian.

You next inquire whether the court may order reimbursement from a parent when state and federal law require the appointment of a guardian ad litem for a child alleged to be abused or neglected. Specifically, you refer to § 16.1-266(A), which requires the juvenile court to appoint a guardian ad litem for “a child who is alleged to be abused or neglected.” Section 5106a(b)(2)(A)(ix) of the Federal Child Abuse Prevention and Treatment Act also requires states to certify that they have provisions and procedures
requiring a guardian ad litem to be appointed in every case involving an abused or neglected child in order to receive certain federal grants.

Item 34(G) clearly states that the guardian ad litem fee shall be reimbursed to the Commonwealth by the parent(s) to the extent of their ability to pay, and no distinction is made as to cases where the appointment of the guardian ad litem is required or merely permitted. The Child Abuse Prevention and Treatment Act does not prohibit requiring the parent(s) to reimburse the costs of a guardian ad litem’s services. Item 34(G) grants the court latitude in assessing the amount of reimbursement based on the ability of the parent(s) to pay.

CONCLUSION

Accordingly, it is my opinion that (1) a judge is not authorized to require a guardian of a child to reimburse the court for the cost of an appointed guardian ad litem for the child; and (2) the court may order reimbursement by the parent(s) when the appointment of a guardian ad litem for the child is required in abuse or neglect cases.

2Id. at 2245 (quoting Item 34(G)).
3Id. (emphasis added).

OP. NO. 02-034

2002 APPROPRIATION ACT: VIRGINIA EMPLOYMENT COMMISSION

CONSTITUTION OF VIRGINIA: EXECUTIVE (ATTORNEY GENERAL).

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW – GENERAL PROVISIONS

OFFICIAL OPINIONS OF ATTORNEY GENERAL.

Workforce Investment Act precludes General Assembly from directing Governor to reallocate unobligated WIA funds to community college located within same geographic area from which funds were obtained. Attorney General declines to comment on action community colleges may take to seek reallocation of such funds.
ISSUES PRESENTED

You pose two questions regarding funds provided to the Commonwealth by the United States Department of Labor under the Workforce Investment Act of 1998 ("WIA funds"). Specifically, you ask whether the General Assembly lawfully may include language in the Commonwealth’s biennial budget directing the Governor to reallocate WIA funds returned to the Commonwealth from a local workforce investment board ("unobligated WIA funds") to a community college that is located within the geographic area of the local board. If such reallocation is not permissible, you ask what action community colleges may take to implement such a result.

RESPONSE

It is my opinion that the Workforce Investment Act precludes the General Assembly from directing the Governor to reallocate unobligated WIA funds to a community college located within the same geographic area from which the funds were obtained. Consistent with the historical practice of prior Attorneys General, I am unable to comment on any action community colleges may take to seek reallocation of such funds.

BACKGROUND

The purpose of the Workforce Investment Act is to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation. [2]

Eligible states receive allotments under the Workforce Investment Act for uses consistent with the purposes of the Act. [3] The allocations to the participating states are further appropriated by the states’ legislative bodies, consistent with the Workforce Investment Act, to fund statewide and local workforce investment activities. [4]

During the 2002 Session, the General Assembly provided in House Bills 29 and 30:

It is the intent of the General Assembly that unobligated funds appropriated by the General Assembly for the use of local Workforce Investment Boards and returned to the Commonwealth shall be reallocated by the Governor to the same geographic areas from which the unobligated funds were obtained. The reallocated funds shall be used for high-priority education programs, including allied health professions, plumbing, tractor-trailer driver training, industrial maintenance, heavy-equipment operator training, automotive technician training, industrial machinist training, and high-skills manufacturing. [5]
Although the above language does not explicitly state that community colleges are to provide these "high-priority education programs," your letter indicates that to be the case, and for the purposes of this opinion, I assume that to be the case.

**APPLICABLE LAW AND DISCUSSION**

The Workforce Investment Act allocates WIA funds to any state whose state plan has been approved by the Secretary of Labor. The allocated funds are used for adult employment and training activities and for youth services. The funds are disbursed either through local workforce investment boards or through a state workforce investment board. The local workforce investment boards serve certain geographic areas in the state as designated by the Governor.

Funds allocated to a state for youth activities and adult employment and training activities for any program year are available for expenditure by the receiving state "during that program year and the two succeeding program years." Local workforce investment boards are required to obligate the funds allocated to them within the year of receipt of such funds and the year following receipt. If the funds allocated to the local area are not obligated within the two-year period, the funds are returned to the state for reallocation during the third year for use in statewide projects, or by local areas that are eligible to receive reallocated funds.

It is the reallocation process that is central to your inquiry. Items 125(F) and 130(E.1) of House Bills 29 and 30, respectively, express the intent of the General Assembly that unobligated WIA funds be reallocated by the Governor to the same geographic areas from which WIA funds were obtained, for use in "high-priority education programs." Items 125(F) and 130(E.1) also detail some of the programs to be included as high priority.

Sections 2853 and 2863 of the Workforce Investment Act govern reallocation of the unobligated balance of the local area allocation. Section 2853(c) governs the reallocation of funds for youth activities, and § 2863(c) governs the reallocation of funds for adult employment and training activities. Specifically, § 2853(c)(1) permits the Governor to reallocate to eligible "local areas" funds "allocated ... for youth activities and that are available for reallocation." Section 2863(c)(1) provides the same discretion in the case of funds "allocated ... for adult employment and training activities and that are available for reallocation." The amount available for reallocation under both statutes is "the amount by which the unobligated balance of the local area allocation ... at the end of the program year prior to the program year for which the determination [of availability of funds for reallocation] is made exceeds 20 percent of such allocation for the prior program year." In other words, if more than 20 percent of the funds allocated to a particular local area are not obligated by the local area within the appropriate time, the Governor may reallocate those funds to local areas eligible to receive such funds.

A local area eligible to receive reallocated funds is one that "has obligated at least 80 percent of [its] allocation ... for the program year prior to the program year for which the determination ... is made." It follows that, if the source of reallocated
funds is a local area that has failed to obligate more than 20 percent of its allocation at
the end of the program year in question, that local area would not be eligible to share
in funds reallocated by the Governor. This requirement precludes the reallocation of
funds by the Governor directly to the same local areas that did not expend the required
percentage of funds in the appropriate program year. Additionally, the Workforce
Investment Act requires that reallocated funds go to "local areas," as that term is
defined in the Act, for uses consistent with the Act. The Act requires reallocated
funds to be awarded to local workforce investment boards for disbursement within
the "local area." Although a community college may be located within the geographic
area designated as a "local area" under the Act, it is not an appropriate entity to
receive unobligated WIA funds directly from the Governor. Unobligated WIA funds,
as are the initial allotments, are given directly to the workforce investment boards that
utilize the funds within the local geographic area of its jurisdiction. As such, the Gov­
ernor does not have the authority to reallocate unobligated WIA funds directly to
community colleges.

Whether unobligated WIA funds are reallocated as a matter of discretion under the
provisions of the Workforce Investment Act or recaptured for use statewide as
mandated in the WIA regulations, neither the Act nor the regulations direct that
unobligated WIA funds may be reallocated to community colleges located within the
areas to which such funds initially were allocated.

Turning to your second inquiry, Article V, § 15 of the Constitution of Virginia provides
that the Attorney General of Virginia "shall perform such duties ... as may be prescribed
by law." Historically, the Office has limited responses to requests for official opinions
to matters that concern an interpretation of federal or state law, rule or regulation.
The constitutional provision declaring that the Attorney General shall perform such
duties as may be prescribed by law is implemented by those sections of the Virginia
Code 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. It is
acknowledged that official opinions of the Attorney General must be confined to
matters of law. The second question that you raise, concerning any action community
colleges may take to receive reallocated workforce training funds, should I determine
that the budget language is inconsistent with the requirements of the Workforce
Investment Act, does not concern the interpretation of a federal or state law, rule or
regulation. Instead, it asks this Office to offer prospective guidance to community
colleges to obtain funds under the Act that they are prohibited from receiving.

Therefore, consistent with the historical practice of prior Attorneys General, I am
unable to comment on any action community colleges may take to seek reallocation of
unobligated WIA funds.

CONCLUSION

Accordingly, I am of the opinion that Items 125(F) and 130(E.1) in House Bills 29 and
30, respectively, are inconsistent with the Workforce Investment Act, to the extent
the legislation directs the Governor to reallocate unobligated WIA funds directly to community colleges that are located within the same geographic areas from which the funds were obtained.

3Id. § 2822 (West 1999 & Supp. 2001) (authorizing governor of state to submit state plan to Secretary of Labor for approval).
4Id. §§ 2852, 2862 (West 1999) (granting state allotments for youth activities and adult and dislocated worker employment and training activities).
5See id. § 2941(a) (West 1999).
62002 Va. Acts ch. 814, at 1367, 1465; id. ch. 899, at 2222, 2317 (quoting Items 125(F), 130(E.1), respectively).
8See id. §§ 2852, 2862.
10See id. § 2831 (West 1999 & Supp. 2001).
12See id. § 667.107(b)(1).
13See id. § 667.107(b)(2).
14See supra legislation under “Background” heading.
15See id.
16"The term ‘local area’ means a local workforce investment area designated under [29 U.S.C. § 2831]." 29 U.S.C.A. § 2801(20) (West 1999). Section 2831 authorizes the Governor, consistent with the considerations and mandates of the section, to designate certain geographic areas as local workforce investment areas.
1729 U.S.C.A. §§ 2853(c)(2), 2863(c)(2) (West 1999). The Secretary of Labor’s WIA regulations allow the local area from which funds are recaptured to retain up to ten percent of those funds to defray its administrative costs. See 20 C.F.R. § 667.160(b).
18Presumably, the purpose behind this reallocation policy is to ensure that unused funds are put to their highest and best use by reallocating the funds from areas that are not utilizing them to areas that are utilizing the funds. Thus, unused funds are reallocated to areas that are in more need or are more efficient in using funds initially allocated to them.
20See id. §§ 2853(c)(3), 2863(c)(3) (West 1999).
22See id. §§ 2853, 2863 (West 1999).
You ask whether § 6.1-422(C) of the Code of Virginia permits a mortgage broker, who entered the business after February 25, 1989, to provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services. In addition, you ask whether the term “partner,” as used in defining an “affiliated person of a mortgage broker” in § 6.1-422(B)(5), encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

Responding to your first question, the mortgage broker may not provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services. In response to your second question, the term “partner” in § 6.1-422(B)(5) encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

APPLICABLE LAW AND DISCUSSION

Chapter 16 of Title 6.1 constitutes the Mortgage Lender and Broker Act and governs the licensing and activities of mortgage brokers. Specifically, § 6.1-422 of the Act lists “[p]rohibited predatory practices” of such brokers. Subsections A and B of § 6.1-422 require full disclosure to borrowers of all various fees charged by licensed mortgage brokers. These subsections also prohibit such brokers from obtaining compensation or fees without notice to the borrower. Additionally, § 6.1-422(B)(5) prohibits a mortgage broker from obtaining any benefit for referrals without the borrower’s written consent, and states that a licensed mortgage broker shall not

[r]ecieve compensation for negotiating, placing or finding a mortgage loan where such mortgage broker, or any person affiliated with such mortgage broker, has otherwise acted as a real estate broker, agent or salesman in connection with the sale of the real estate which secures the mortgage loan and such mortgage broker or affiliated person has received or will receive any other compensation or thing of value from the lender, borrower, seller or any other person, unless the borrower is given ... notice in writing.
Section 6.1-422(C) provides:

Notwithstanding the provisions of [§ 6.1-422(B)(5)], no person shall act as a mortgage broker in connection with any real estate sales transaction in which such person, or any person affiliated with such person (as defined in [§ 6.1-422(B)(5)], has acted as a real estate broker, agent or salesman and has received or will receive compensation in connection with such transaction .... [Emphasis added.]

The 2001 Session of the General Assembly added the following language to § 6.1-422(C):

However, the provisions of [the Mortgage Lender and Broker Act] shall not be construed to prohibit a real estate broker ... who is either an owner of an interest in a real estate firm or acts as a real estate broker in a sole proprietorship from having an ownership interest in a mortgage broker ..., or from receiving returns on investment arising from such ownership interest or payment of compensation for services actually performed for such mortgage broker .... [2]

Several rules of statutory construction apply to your requests. First, “the primary objective of statutory construction is to ascertain and give effect to legislative intent.”[3] Additionally, statutes relating to the same subject should be considered in pari materia.[4] Furthermore, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.[5] Lastly, “the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.”[6]

The obvious intent of § 6.1-422 is to protect a borrower by prohibiting a mortgage broker from profiting by self-dealing.[7] Specifically, the plain language of § 6.1-422(C) prohibits a licensed mortgage broker and an affiliated real estate broker from providing services in the same transaction. Although § 6.1-422(C) contains language outlining certain permissible activities between such brokers,[8] reading subsection C in harmony with all provisions of § 6.1-422, it is my opinion that such language does not negate the prohibition against a mortgage broker and an affiliated real estate broker acting for compensation in the same transaction.

Accordingly, in answer to your first question, § 6.1-422(C) does not authorize a mortgage broker to provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services.

Turning to your second question, an “affiliated person of a mortgage broker,” as used in § 6.1-422(B)(5), is defined as “any person which is a subsidiary, stockholder, partner, trustee, director, officer or employee of a mortgage broker.” By the plain language of the statute, the use of the term “partner” in defining an “affiliated person” encompasses
a limited partner in a mortgage broker that is organized as a limited partnership. A limited partner of a limited partnership is analogous to a stockholder of a corporation, because both are affiliated with the other entity by reason of their ownership interests, and a stockholder is defined by § 6.1-422(B)(5) as an “affiliated person.”

Accordingly, in answer to your second question, the use of the term “partner” in § 6.1-422(B)(5) encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

CONCLUSION

It is my opinion that § 6.1-422(C) does not authorize a mortgage broker to provide compensated services in the same real estate sales transaction in which an affiliated real estate broker is providing compensated services, and it is my opinion that the use of the term “partner” in § 6.1-422(B)(5) encompasses a limited partner in a mortgage broker that is organized as a limited partnership.

8The language of the 2001 amendment to § 6.1-422(C) makes clear the intent to allow real estate brokers to be affiliated with a mortgage broker and receive returns on investment arising from the ownership interest and compensation for services performed by the mortgage broker.

OP. NO. 01-067
CIVIL REMEDIES AND PROCEDURE: GARNISHMENT — ATTACHMENTS AND BAIL IN CIVIL CASES.


Advanced legal fees remain property of judgment debtor. Judgment creditor may garnish unearned advance fees paid by judgment debtor to attorney. Potential judgment creditor may attach such funds.

THE HONORABLE WILLIAM D. HEATWOLE
JUDGE, GENERAL DISTRICT COURT FOR THE TWENTY-FIFTH DISTRICT
FEBRUARY 28, 2002
You ask whether a judgment creditor may garnish the funds of a judgment debtor held in an account by an attorney as unearned retainer funds.

Initially, it must be noted that an important distinction exists between retainers and advanced legal fees. The word "retainer" technically refers to "[a] fee paid to a lawyer to secure legal representation." Because the attorney's availability is the consideration for the funds paid, such funds become the property of the attorney upon payment. On the other hand, "advanced legal fees" are fees paid to an attorney prior to the performance of work. Such fees must be deposited in a trust account and identified as property of the client. Advanced legal fees "remain the property of the client until they are earned by the attorney," at which time they must be transferred from the trust account. Because you describe the funds at issue as "unapplied or unearned," it appears that such funds are advanced legal fees. The Supreme Court of Virginia has ruled that such fees remain the property of the judgment debtor:

Clients' funds deposited in an attorney's trust account are funds held in trust. As such, the claim of such clients for return of the funds is more than merely a personal claim against the attorney for the payment of the sum of money on deposit. The client retains an equitable or beneficial ownership interest in the funds.

The Virginia Rules of Professional Conduct require that an attorney "promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the [attorney] which such person is entitled to receive," and "render appropriate accounts to the client regarding them." Therefore, an attorney has a duty to produce client funds to the client or to a third party authorized to receive them.

Section 8.01-511 of the Code of Virginia details the requirements for the institution of garnishment proceedings. In the case of a garnishment proceeding under this statute, the judgment creditor assumes the legal position of the judgment debtor in his suit against the garnishee and "has no rights greater than those possessed by the judgment debtor." A "garnishment effectively is a proceeding by the judgment debtor in the name of the judgment creditor against the garnishee." Since the judgment creditor in a garnishment proceeding occupies the place of the judgment debtor with regard to the unearned advanced fees held by an attorney, such creditor may garnish the unearned funds.

You also ask whether, pursuant to § 8.01-537, a potential judgment creditor may attach such funds paid by a potential judgment debtor.

The analysis set forth in the response to your first inquiry applies to your second question, since the client retains ownership of unearned funds in an attorney's trust account. Assuming the potential judgment creditor meets the requirements of § 8.01-537.1, the Virginia Rules of Professional Conduct will not bar the attachment of funds of the potential judgment debtor held by the attorney as unearned client funds.
CONSERVATION: ACTIVITIES ADMINISTERED BY THE DEPARTMENT OF CONSERVATION AND RECREATION.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY.

Department has no authority to issue regulation prohibiting, within state parks, carrying of concealed handguns by valid permit holders.

THE HONORABLE RICHARD H. BLACK
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 9, 2002

ISSUE PRESENTED

You ask whether the Department of Conservation and Recreation exceeded its authority in issuing a regulation prohibiting, within state parks, the carrying of concealed handguns by holders of valid permits.

RESPONSE

It is my opinion that the Department of Conservation and Recreation exceeded its statutory authority in prohibiting the carrying of concealed handguns by holders of valid permits.

BACKGROUND

The Department of Conservation and Recreation is established under Article 1, Chapter 1 of Title 10.1, §§ 10.1-100 through 10.1-104.3. 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.” In accord with this authority, the Department has adopted the following firearm regulation:
No person except employees, police officers, or officers of the department 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.\[1\]

The Department is the state agency responsible for the management of all state parks.\[7\] State parks are open to the general public and are located in areas of the Commonwealth suitable to the development of outdoor recreational activities, including, but not limited to, camping, boating, hunting, fishing, horseback riding, and swimming.

**APPLICABLE AUTHORITIES AND DISCUSSION**

Section 10.1-104(A) empowers the Department of Conservation and Recreation to employ personnel to carry out the duties of the Department;\[4\] enter into contracts;\[5\] accept funds and grants and gifts of real and personal property;\[6\] and assess civil penalties for state park admittance and parking violations.\[7\] In addition, the Director of the Department may request the Governor to commission designated conservation officers\[8\] "to uphold and enforce the laws of the Commonwealth."\[9\]

Section 10.1-200 sets out the duties of the Department of Conservation and Recreation related to parks and outdoor recreation and grants the Department the power to administer funds to accomplish the purposes of parks and recreation;\[10\] study and develop a comprehensive plan for the Commonwealth’s outdoor recreational needs and programs and establish standards for outdoor recreational facilities;\[11\] apply for federal aid respecting outdoor recreation;\[12\] act independently or jointly with another department to carry out the Department’s powers and duties;\[13\] and report annually to the Governor and General Assembly on the development of a standard by which the public may determine whether park and recreational needs are being met by the Commonwealth.\[14\] In addition, the Department shall engage in state park master planning;\[15\] prescribe and impose penalties for littering;\[16\] prohibit admission to a state park for which a charge has been assessed and regulate vehicle parking in such parks;\[17\] acquire property by gift, purchase or eminent domain;\[18\] pay gifts and funds for state parks to the Conservation Resources Fund;\[19\] establish a card authorizing persons receiving social security disability payments to enter state parks free of charge;\[20\] protect and maintain the Appalachian Trail and the statewide system of trails;\[21\] and manage False Cape State Park.\[22\]

Read as a whole, the duties imposed on the Department may be summarized into four categories: the acquisition of property; the development of recreational facilities; the handling of funds; and cooperation with other agencies. Authority to govern the recreational activities of parks is implicit in these general duties, including regulations related to safety. Particular authority to proscribe the conduct of individual citizens is limited to littering, parking and the payment of charges. Otherwise, an individual’s conduct must comport with the general laws of the Commonwealth and is enforceable by Department officers charged with that responsibility.
The construction of statutes by agencies charged with administration of those statutes is entitled to great weight. A decision of an agency charged by the General Assembly with statewide administration, unless it is clearly wrong, carries great weight and is entitled to deference. The grant of regulatory authority extends only to duties or powers conferred by law. As such, “regulations, promulgated ... pursuant to definitive statutory authority, have the force and effect of law.” Moreover, those regulations which “clearly and explicitly mirror” statutory authority are likeliest to be sustained. Any regulation of the Department must be reasonably grounded in an identifiable and definitive statutory foundation.

Regulatory authority may also be reasonably implied from statutes. The General Assembly, by grant of regulatory authority to the Department, recognizes that the legislature cannot effectively or efficiently dictate the minutia of operating parks. Regulations by implication will be upheld, even if they conflict with other statutes, unless there is “a manifest intent on the part of the legislature to preempt the field.” There is no basis for an agency regulation where the legislature has plainly, broadly and comprehensively addressed the same object.

Whereas there is no specific statutory authority granted to the Department to prohibit the carrying of concealed handguns in state parks, § 18.2-308(D) specifically establishes the privilege to carry a concealed handgun upon the issuance of a valid permit. An individual may obtain a permit to carry a concealed handgun upon application, made under oath, to the circuit court in the locality where the applicant resides. The permit shall be issued upon the successful completion of a criminal record check and the person is not otherwise disqualified and complies with other requirements of the court. The permittee must carry the permit and photographic identification in his or her possession at all times while carrying a concealed handgun, and must display the permit and photographic identification to any law-enforcement officer when requested to do so.

A person’s privilege to carry a concealed handgun is considered universal within the Commonwealth subject to limited circumstances. The General Assembly has specifically set out those places where the carrying of a concealed handgun is prohibited: places of worship, courthouses, schools, places licensed for on-premises alcoholic beverage consumption, and such property as may be prohibited by the owner. Section 18.2-287.4 permits the carrying of concealed handguns in public places where the unconcealed carrying of loaded firearms is otherwise prohibited. Section 18.2-308 does not identify state parks as areas of prohibition for the carrying of a concealed handgun. Under accepted rules of statutory construction, the mention of one thing in a statute implies the exclusion of another. Further, the Department’s enabling legislation does not specifically authorize the Department to prohibit the carrying of a concealed handgun by valid permit holders.

In light of the General Assembly’s explicit statements regarding the limits of carrying concealed handguns, the Department may not infer authority from its enabling legislation to change those limits by prohibiting the carrying of concealed handguns by
holders with valid permits within state parks. It is solely within the discretion of the General Assembly to add parks to the list of places where the carrying of concealed handguns is prohibited, or to grant explicit statutory authorization to the Department for that purpose. Therefore, the Department of Conservation and Recreation is without authority to prohibit, within state parks, the carrying of concealed handguns by holders of valid permits.

CONCLUSION

Accordingly, it is my opinion that the Department of Conservation and Recreation does not have the authority to issue regulations prohibiting, within state parks, the carrying of concealed handguns by valid permit holders.39

5 Section 10.1-104(A)(2).
6 Section 10.1-104(A)(3).
7 Section 10.1-104(A)(6); see also § 10.1-200.3 (LexisNexis Supp. 2002).
10 Section 10.1-200(1).
11 Section 10.1-200(2)-(4).
12 Section 10.1-200(6).
13 Section 10.1-200(7).
14 Section 10.1-200(8).
17 Section 10.1-200.3 (LexisNexis Supp. 2002).
27 City of Va. Beach v. Restaurant Assoc., 231 Va. 130, 133, 341 S.E.2d 198, 199 (1986); see also
City of Norfolk v. Tiny House, 222 Va. 414, 281 S.E.2d 836 (1981); Maritime Union v. City of
adopt ordinances regulating sale of handguns except as specifically permitted by statute).
29 The legislature’s prohibition against carrying concealed weapons and the privilege of granting
exceptions to that prohibition have long been recognized. See 1838 Va. Acts ch. 101, at 76;
31 Id.
32 Section 18.2-308(H). Properly appointed conservation officers are “law-enforcement officers.”
Section 10.1-117(B).
36 Section 18.2-308(J3).
37 Section 18.2-308(O).
39 This opinion is distinguished from the opinion issued to you on December 6, 2001. See 2001
between a Department of Conservation and Recreation regulation and § 18.2-308. The analysis
of the prior opinion depended on whether a regulation may be considered a “law” for the purpose
of exceptions to § 18.2-308. The answer to that question is correct: regulations may be considered
laws under § 18.2-308. This opinion, however, questions whether the Department of Conservation
and Recreation has the authority to issue the specified regulation. Your question is directly related
to authority granted to the Department by the General Assembly. This opinion concludes that the
General Assembly did not grant the Department the authority to issue a regulation prohibiting the
carrying of a concealed weapon by a valid permit holder.

OP. NO. 02-052
CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.
Amendments to Chesapeake Bay Preservation Area Designation and Management
Regulations, limiting encroachment upon 100-foot resource protection area for
development purposes, but allowing encroachment for agricultural and silvicultural
activities, do not violate Equal Protection Clause.

MR. W. LESLIE KILDUFF, JR.
COUNTY ATTORNEY FOR NORTHUMBERLAND COUNTY
OCTOBER 30, 2002

ISSUE PRESENTED
You ask whether the recent amendments to the Chesapeake Bay Preservation Area
Designation and Management Regulations, limiting encroachment upon the 100-foot
resource protection area for development purposes, but allowing some encroachment
for agricultural and silvicultural activities, violate the Equal Protection Clause of the Constitution of the United States.

RESPONSE

It is my opinion that the amendments by the Chesapeake Bay Local Assistance Board to its Chesapeake Bay Preservation Area Designation and Management Regulations do not violate the Equal Protection Clause of the United States Constitution.

FACTS

The Chesapeake Bay Preservation Act creates the Chesapeake Bay Local Assistance Board. The Act requires the Board to adopt regulations designed to protect the Chesapeake Bay, primarily through regulation of land use in Tidewater Virginia designed to protect water quality. Localities in Tidewater Virginia must adopt zoning ordinances consistent with the Act and Board regulations. The Board is responsible for ensuring that local zoning ordinances comply with the Act.

The Chesapeake Bay Local Assistance Board has adopted comprehensive amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations. Among other revisions, the Board adopted amendments to the regulation setting forth the development criteria for Resource Protection Areas. The buffer area requirements adopted by the Board provide for 100-foot buffer areas landward of areas designated as Resource Protection Areas. Buffer areas are intended to minimize the adverse effects of human activities on Resource Protection Areas, as well as on state waters and aquatic life. The regulations allow encroachments into buffer areas for agricultural and silvicultural activities when the latter are conducted in accordance with best management practices. The provisions allowing encroachment upon the 100-foot buffer area for agriculture and silviculture are not new. Before the amendments were adopted, the regulations allowed encroachments upon the 100-foot buffer area for agricultural and silvicultural activities under certain conditions while limiting encroachments for certain other types of activities or development. The amendments did not substantively change what activity or development is allowed within the 100-foot buffer area.

Best management practices generally involve the use of nutrient management plans, including soil tests, and erosion and pest chemical control practices, to achieve stated acceptable levels of water quality protection.

APPLICABLE LAW AND DISCUSSION

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that states cannot “deny to any person ... the equal protection of the laws.” Often, a decision made by a governmental agency or official affects some group at the expense of another or creates one or more classifications. The Supreme Court of the United States and the Supreme Court of Virginia have established judicial standards for gauging the proper limits on governmental-established classifications, and have recognized that these standards must grant the wide latitude needed for the daily management of effective government while prohibiting illegal discrimination, the
effects of which fall too heavily on individuals or identifiable groups of individuals.  
The Equal Protection Clause does not require government to refrain from making classifications. "[A] statutory classification that neither employs inherently suspect distinctions nor burdens the exercise of a fundamental constitutional right will be upheld if the classification is rationally related to a legitimate state interest."17

The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. 18 The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike."19 But so, too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."20 A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.21 It is not uncommon for "regulations [to] define groups to which they apply or to which benefits are conferred and when any such group is defined, of necessity, the regulation favors or disadvantages other groups."22 When a classification is challenged upon equal protection grounds, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."23 An equal protection analysis "does not demand for purposes of rational basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification."24 The party challenging such a classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."25

There are no suspect classes or fundamental rights affected by the amendments made by the Chesapeake Bay Local Assistance Board to its regulations. Therefore, a rational basis analysis is appropriate in reviewing the amendments. Under Virginia law, regulations, like statutes26 and ordinances,27 carry with them a presumption of validity that courts are required to recognize.28 As noted, an analysis under the Equal Protection Clause does not require specific findings by the Board that the best management practices of one form of economic activity are inferior to another form of activity. Under a rational basis review, as long as there is a conceivable set of facts to support the classifications of a statute or regulation that are rationally related to a legitimate state interest, the challenged statute or regulation does not violate the Equal Protection Clause.

You question whether the amendments to the regulations violate the Equal Protection Clause since the Board has made no findings that best management practices for residential development within the Resource Protection Areas are inferior to best management practices employed for agricultural and silvicultural development within those areas. It is not difficult to discern a legitimate state interest to which the amendments relate. Environmental protection in the form of improving water quality, particularly as it relates to the Chesapeake Bay, is a vital and legitimate interest of the Commonwealth. The Act’s purpose is protecting the water quality of the Chesapeake Bay and its tributaries.29
The amendments adopted by the Chesapeake Bay Local Assistance Board appear to be related to the purpose of protecting the water quality of the Chesapeake Bay and its tributaries. The amendments make a distinction between more permanent development and agricultural and silvicultural development of property located in the 100-foot buffer within a Resource Protection Area. The Board might have considered any number of factors for making a distinction between the two forms of development. There is no requirement that the Board make a specific finding that the best management practices for agricultural and silvicultural activities are superior to best management practices for residential development. As long as the factors are rationally related to improving water quality, the differences between agricultural or silvicultural activities and more permanent development are sufficient to permit the differing treatment with respect to encroachments into the buffer area. For example, while construction generally results in permanent and impervious coverage of the land, agriculture and silviculture are ongoing, renewable economic activities that generally result in temporary land disturbance. In addition, implementation of best management practices for agricultural and silvicultural development on such lands may accomplish more pollution reduction than would a full 100-foot buffer area. Consequently, there appears to be a cognizable basis for the differing treatment of the two activities. As such, the differing treatment appears to be rationally related to the legitimate interest of improving water quality and protecting the Chesapeake Bay.

**CONCLUSION**

Accordingly, it is my opinion that the amendments by the Chesapeake Bay Local Assistance Board to its Chesapeake Bay Preservation Area Designation and Management Regulations do not violate the Equal Protection Clause of the Constitution of the United States.

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2 Section 10.1-2102.
3 Section 10.1-2107.
4 The counties that comprise Tidewater Virginia include Northumberland County. Section 10.1-2101 (defining "Tidewater Virginia").
5 Section 10.1-2109(C); see also § 10.1-2109(E) (authorizing localities to incorporate penalties into their zoning ordinances for violation of such ordinances).
6 Sections 10.1-2103(8).
8 9 VA. ADMIN. CODE 10-20-130.
9 9 VA. ADMIN. CODE 10-20-130(3).
10 "Resource Protection Area" means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of state waters. 9 VA. ADMIN. CODE 10-20-40; see also 9 VA. ADMIN. CODE 10-20-80.
'Best management practice' means a practice, or combination of practices, that is determined by a state or designated area-wide planning agency to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals. See 9 Va. Admin. Code 10-20-40.

Although the Constitution of Virginia does not contain an equal protection clause similar to that found in the Fourteenth Amendment of the United States Constitution, the antidiscrimination clause in Article I, §11 and the prohibition against special legislation in Article IV, §14 of the Virginia Constitution provide analogous limitations on legislative authority. Neither of these constitutional provisions, however, provides broader rights than those guaranteed by the Fourteenth Amendment. See Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986); Archer and Johnson v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973); see also 1987-1988 Op. Va. Att'y Gen. 397, 400 n.1.


Tigner v. Texas, 310 U.S. 141, 147 (1940).


Lindsley, 220 U.S. at 78.


Lindsley, 220 U.S. at 79.

See, e.g., Taylor v. Worrell Enterprises, 242 Va. 219, 221, 409 S.E.2d 136, 137 (1991) (stating that presumption of validity that attaches to statute requires court to resolve any reasonable doubt as to its constitutionality in favor of its legality if possible).

See, e.g., Board of Supervisors v. Stickley, 263 Va. 1, 6, 556 S.E.2d 748, 751 (2002) (according presumption of validity to action taken by county board of supervisors pursuant to its zoning ordinance); Board of Tuckahoe Ass'n v. City of Richmond, 257 Va. 110, 116, 510 S.E.2d 238, 241 (1999) (holding that tax classifications, like ordinance in which they are found, are presumptively valid).

See Water Control Bd. v. Appalachian Power, 9 Va. App. 254, 259, 386 S.E.2d 633, 635 (1989) (stating that interpretation and enforcement of water quality standards and stream designation by Water Control Board are presumed valid), aff'd en banc, 12 Va. App. 73, 402 S.E.2d 703 (1991); see, e.g., Virginia Real Estate Board v. Clay, 9 Va. App. 152, 160, 384 S.E.2d 622, 626 (1989) (holding that regulations requiring real estate broker to disclose to prospective purchasers information affecting character or condition of property served statutory purpose of full disclosure when dealing with public and was proper exercise of Board's authority to regulate licensed brokers).

§ 10.1-2100(A).

Although your request appears to treat the regulations as providing differing treatment between groups of property owners, it is clear from the language of 9 Va. Admin. Code 10-20-130(3) and 5(b) that they are based not on the identity or any characteristic of the individual owner but entirely on the type of activities to be conducted on the land.
Consideration of aesthetics, public safety concerns, and nature and character of zoning classification in determining constitutionality of local ordinance limiting time period within which political signs may be displayed on private property, before and after primary or general election.

MR. JAMES E. BARNETT
COUNTY ATTORNEY FOR YORK COUNTY
MAY 10, 2002

ISSUE PRESENTED

You ask whether a local ordinance may limit the time period within which political signs advocating a particular candidate or political party may be displayed on private property, either before or after a primary or general election.

FACTS

You advise that York County has adopted a zoning ordinance, providing specifically for the erection, alteration, expansion, reconstruction, replacement or relocation of signs on any property in conformance with the ordinance. The term "political sign" is defined in the ordinance to mean "[a] temporary sign which pertains to an issue of public concern or to an issue or candidate in a pending election." You explain that the ordinance contains a table indicating the function, structure, footage, height, and type of illumination permitted for signs within each zoning district.

You advise further that certain categories of signs are exempt from the zoning district sign regulations and may be erected, altered or maintained in any zoning district. Among the categories of exempt signs are nonilluminated political signs and posters ranging up to six square feet in area, which must be removed within seven days following an election, canvass or primary. You also explain that permits are not required for political signs, nor is there any limitation on the number of political signs permitted on any property, provided that no single sign exceeds the maximum permitted area, and all political signs are removed within the specified time period. You provide no rationale or purpose underlying the county's seven-day limitation on the display of political signs following an election, canvass or primary.

DISCUSSION

It is clear that political signs exist for the sole purpose of communicating messages. Therefore, any regulation of signs is inevitably a regulation of speech protected by the First Amendment to the Constitution of the United States. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." "For speech concerning public affairs is more than self-expression; it is the essence of self-government." Political signs generally pertain to events with definite dates, such as the dates for holding primary or general elections, and therefore generally are susceptible to time limit restrictions simply because the importance of such signs are bound by time. The Supreme Court of the United States has permitted local regulation of political signs in certain factual contexts.
In the case of *Burson v. Freeman*, an ordinance prohibited the display of political campaign signs within one hundred feet of a polling place. Since only political signs were banned, the ordinance clearly was content-based. The state, therefore, had to show that the regulation was necessary to serve a compelling state interest, and that it was narrowly drawn to achieve that end. The Court upheld the ordinance, determining that it served the compelling governmental interest of protecting voters from intimidation and fraud.

In *Lehman v. City of Shaker Heights*, the Court approved a city’s refusal to permit political advertising on its transit system, because “[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.” In the case of *Greer v. Spock*, the Court upheld a federal military reservation regulation that banned speeches and demonstrations of a partisan political nature and prohibited the distribution of literature without prior approval of post headquarters. These cases stand for the general proposition that singling out political speech for regulation is not per se unconstitutional.

You observe that a Fourth Circuit case appears to endorse the idea of durational limits as a means of controlling visual congestion. In *Arlington County Republican Committee v. Arlington County, Virginia*, the Fourth Circuit considered a county ordinance that limited the number of temporary signs that could be posted by an owner on his property in residential districts to two signs. The Court observed that the county could promote its interest in aesthetics by, among other means, “limiting the duration of these [political] signs.” The Court did not specifically address that which constitutes a reasonable time limit restriction, noting only that the county limitations were seventy days before and ten days after an event. Furthermore, the Court did not comment on the county’s periods of limitation.

In the process of declaring election sign regulations unconstitutional for other reasons, however, several other courts have stated that reasonable time limits would be allowed. Such a time limit regulation may limit the length of time a sign may be displayed or retained, or both, before or after an election. It is, however, easier to define the period subsequent to an event, because the message on a sign has no utility after the event, unless the covered event is not the final election scheduled to resolve the subject. Where the election is one of a sequence, such as a primary election leading up to a general election, the sign’s utility is not ended until the general election is held. Several ordinances considered by the courts specifically have allowed the signs of the winners of the primary election to remain on display throughout the period between the primary and general election. Finally, in two cases, ten-day limits have been approved for the removal of political signs following elections.

**CONCLUSION**

I, therefore, conclude that decisions of the United States Supreme Court may be read so as to permit localities to impose reasonable time restrictions on political signs.
Defining the date when political signs may begin to be displayed, however, is extremely problematic. Courts have struck down ordinances with sixty-day limits.\textsuperscript{23} Another court invalidated a forty-five-day period.\textsuperscript{24} In addition, the First Circuit declared that a three-week limit was inadequate.\textsuperscript{25} A New Jersey community’s ordinance that limited signs advertising political events or viewpoints to ten days before the event was found to be content-based; however the court noted that signs advertising yard sales, town festivities, or athletic events presumably could be posted at any time within thirty days of the event.\textsuperscript{26} Finally, other courts have upheld general restrictions on the total time for the display of temporary signs which made no specific reference to election dates.\textsuperscript{27}

While preelection restrictions are looked on unfavorably, postelection removal requirements create fewer problems for the courts. While striking down the ordinance placing a ten-day restriction on political signs prior to the election, the New Jersey district court found that the locality’s interests in safety and aesthetics were adequately served by a provision requiring removal of all temporary signs within ten days after termination of the special event.\textsuperscript{28} In addition, the same court that rejected a preelection restriction on the posting of campaign signs in Washington upheld a provision requiring removal of campaign signs within ten days following the election.\textsuperscript{29} The court reasoned that preelection political speech interests that may outweigh a locality’s regulatory interests are not present following the event and may be outweighed by a locality’s demonstrated interests in aesthetics and traffic safety. It, therefore, appears that the safest method for imposing durational requirements on political campaign signs is to aim the requirement at special event signs generally, rather than political signs in particular, and to target the limitation to the postevent or postelection period.

I cannot conclude with certainty, therefore, that the time limitation used by York County for the display of political signs will withstand a constitutional challenge. Absent a controlling decision from the Supreme Court of the United States, the appropriate time periods for regulation of political signs will have to be established on a case-by-case basis, depending on the testimony and other evidence offered on aesthetics, public safety concerns, and nature and character of the zoning classification.

\textsuperscript{1}YORK COUNTY, VA., CODE ch. 24.1, art. VII, § 24.1-700 (2001).
\textsuperscript{2}Id. § 24.1-701.
\textsuperscript{3}Id. § 24.1-703.
\textsuperscript{4}Id. § 24.1-707.
\textsuperscript{5}Id. § 24.1-707(g).
\textsuperscript{6}Baldwin v. Redwood City, 540 F.2d 1360, 1366 (posting of temporary political campaign signs “is virtually pure free speech”) & n.10 (9th Cir. 1976) (citing California v. LaRue, 409 U.S. 109, 117 (1972) for fact that extent of permissible regulations increases significantly as mode of expression moves from pure speech to speech combined with conduct).


Id. at 197-98.


Id. at 211.


Section 2.2-505(B) requires that any 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.”

983 F.2d 587 (4th Cir. 1993).

Id. at 594.

17 Id. at 594 n.8.

19 See Verrilli v. City of Concord, 548 F.2d 262, 265, appeal after remand, 557 F.2d 664 (9th Cir. 1977); Baldwin v. Redwood City, 540 F.2d 1360, 1370 (9th Cir. 1976); McCormack v. Township of Clinton, 872 F. Supp. 1320, 1326 (D.N.J. 1994); City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52, 63 n.15 (Colo. 1981) (en banc) (per curiam).

The regulation also would have to cover other time-bound events in order to satisfy the ruling in Cincinnati v. Discovery Network, Inc., where the categorical ban by the City of Cincinnati on commercial handbills, but not newspapers, was content-based, was not narrowly tailored, and was not a legitimate time, place, or manner restriction on protected speech. 507 U.S. 410 (1993).

21 See, e.g., Curry v. Prince George's County, Md., 33 F. Supp. 2d 447, 449, 456 (D. Md. 1999) (striking down § 27-628(b)(1) of Prince George's County Code, which required removal of signs ten days after general election and ten days after primary for unsuccessful candidates); Dimas v. City of Warren, 939 F. Supp. 554, 555 n.1, 557 (E.D. Mich. 1996) (finding § 31-20(b) of City of Warren “Political Signs” ordinance not content-neutral where signs could not be posted more than forty-five days prior to election).


24 Curry, 33 F. Supp. 2d at 455.


26 McCormack, 872 F. Supp. at 1323-24, 1328 (ordering grant of preliminary injunction against enforcement of ten-day time restriction).

27 Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994) (upholding ordinance allowing resident to post one opinion sign or campaign sign on property year round and additional signs during election season); City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. Ct. 1992) (upholding zoning ordinance requirement that all temporary signs be removed after ninety days, regardless of sign’s message).

28 McCormack, 872 F. Supp. at 1326.

29 Collier, 854 P.2d at 1058-59 (citing Baldwin, 540 F.2d at 1374).
ISSUE PRESENTED

You ask whether the clerk of a circuit court may accept and hold an equity interest in a Virginia stock corporation in his capacity as clerk, subject to the direction of the court.

RESPONSE

It is my opinion that the clerk of a circuit court may not accept the transfer by a commissioner of accounts of an equity interest in a Virginia stock corporation, which is subject to the direction of the court, when the transfer is not part of a case or controversy properly before the court.

FACTS

You relate that a commissioner of accounts has separated the assets and operations of the professional corporation in which he practices law from the commissioner’s office by collecting the fees in his capacity as commissioner through a Virginia stock corporation that is a subsidiary of the professional corporation (“law firm”). The stock corporation owns the furniture, fixtures and equipment, including computer hardware and software, and is a repository for cash reserves generated from fees in excess of the commissioner’s expenses. The law firm and commissioner of accounts have agreed to transfer and convey all outstanding stock of the corporation. You further relate that the clerk of the circuit court has agreed to accept ownership of the corporation’s stock, subject to the direction of the court.

You advise that the court desires to accept the commissioner’s offer. Accordingly, the court intends that the commissioner’s office will continue to operate through the stock corporation and employ personnel of the law firm, the stock corporation will reimburse the firm for employee expenses, and the assets of the stock corporation will be used, at the direction of the court, for purposes related to the commissioner’s office.

APPLICABLE AUTHORITIES AND DISCUSSION

A commissioner of accounts is appointed by the judges of the local circuit court and is removable at their pleasure.1 “[A] commissioner ... is a quasi judicial character,”
who “acts in a judicial capacity” and is charged with the responsibility for reviewing and approving inventories and fiduciary accountings and making appropriate reports to the court. Established in lieu of a probate court, a commissioner of accounts provides “a less expensive method and at the same time an equally efficient method of administering estates.” Reports of a commissioner of accounts are subject to review by the circuit court, using the same standards applicable to a commissioner in chancery. The commissioner is paid for services rendered on a fee basis prescribed by the appointing court.

Accordingly, the two methods by which a circuit court exercises control over a commissioner of accounts are by (1) the power of appointment and removal, and (2) the power to set the fees a commissioner may charge. A commissioner is not an employee; rather, he is an independent, quasi-judicial officer of the circuit court subject to statutory authority. Presumably, the court monitors the performance of a commissioner by reviewing the reports submitted by the commissioner.

A clerk of court is an elected local government official whose duties are “prescribed by general law or special act.” The clerk holds money, pursuant to § 8.01-600, “when the court orders.” If reasonable, such orders of the court shall include a designated beneficiary and the proposed dates of disbursements. Court orders or decrees involving money are predicated on a case or controversy being before the court, normally with adversarial parties, where such money is held for the benefit of individual persons. Section 8.01-600 envisions that the party(ies) to the litigation have remitted the money held by the clerk.

Article I, § 5 of the Constitution of Virginia provides that “the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.” This proscriptive language is made mandatory by Article III, § 1, which provides that “[t]he legislative, executive, and judicial departments shall be separate and distinct,” with the sole exception for administrative agencies created by the General Assembly. Article IV, § 1 vests “[t]he legislative power of the Commonwealth” in the General Assembly. Article VI, § 1 vests “[t]he judicial power of the Commonwealth” in the Supreme Court of Virginia and such other courts as the General Assembly may establish.

Issues involving the separation of powers are by no means absolute. The Supreme Court of Virginia has observed “the well accepted view that the administration of the government would be wholly impracticable if that general maxim were strictly, literally and unyieldingly applied in every possible situation.” Ambiguity is inherent in a system of government that is based on the checks and balances between its branches. It is also clear that courts shall not assume legislative functions, unless the legislative branch, without improperly breaching the separation of powers, expressly delegates such authority. The question, therefore, is whether the proposed acceptance and disbursement of money is a legislative or judicial function.
"[L]egislative powers include the control of finances of the government." There is no more fundamental principle underlying the founding of this Commonwealth than the power to tax, and to appropriate the revenue from such taxes is a legislative function. Article IV, § 11 of the Constitution requires a majority vote of members elected to each house for any bill "which makes, continues, or revives any appropriation of public or trust money or property." Similarly, Article VII, § 7 provides that "[n]o ordinance or resolution appropriating money exceeding the sum of five hundred dollars" shall be passed without a majority of members elected to local governing bodies.

The "power of jurisdiction" extends in the first instance to "all cases of controversy." The term jurisdiction embraces several concepts, but rests on the foundation that there is some case or controversy before the court which requires adjudication. Money, in this context, is held by the clerk and subject to order of the court. Such money ultimately should be paid to a party or beneficiary of the litigation before the court.

Read as a whole, the constitutional provisions dictate that the judicial branch may not expend unappropriated funds. "[T]he Legislature within the limits of the Constitution is the judge of how its own appropriations shall be applied, and the Judiciary, subject also to limitations noted, may use money set apart for it in such manner as may appear to be wise and proper." Broad discretion is vested in the judicial branch to spend money for public purposes, but funds must have been appropriated initially by the legislature.

In the circumstances described, the commissioner, appointed by the court to serve a quasi-judicial function, has charged fees on a schedule set by the court. The commissioner apparently has chosen to use the fees to fund a stock corporation and not as ordinary income. Once received, the funds no longer are public property but are funds of the commissioner. You propose accepting otherwise private assets and, in essence, appropriating them back to the commissioner or using them for such purposes as the court may specify. This is not the judicial function of controlling the money of others in the context of a case or controversy before the court. Nor is this a mechanism authorized by statute for the court's oversight of the commissioner but, rather, impermissibly assumes a legislative prerogative.

CONCLUSION

Accordingly, it is my opinion that the clerk of a circuit court may not accept the transfer by a commissioner of accounts of an equity interest in a Virginia stock corporation, which is subject to the direction of the court, when the transfer is not part of a case or controversy properly before the court.


VA. CONST. art. 7, § 4.

VA. CODE ANN. § 8.01-600(A) (LexisNexis Supp. 2002). I note that § 8.01-582 permits circuit courts to appoint general receivers for the same purpose.

Section 8.01-600(B).

This exception memorializes a Supreme Court of Virginia decision recognizing that the State Corporation Commission, which is vested with legislative, executive and judicial powers, is a legitimate and valid tribunal. See Winchester, &c., R. Co. v. Com’th, 106 Va. 264, 55 S.E. 692 (1906).


Winchester, &c., R. Co., 106 Va. at 268, 55 S.E. at 693.

See HOWARD, supra note 12, at 433-46.

See Tran v. Gwinn, 262 Va. 572, 554 S.E.2d 63 (2001) (ruling that trial court improperly breached separation of powers by ordering landowner, who used his property as place of worship without special use permit, in violation of zoning ordinance, to remove certain items from property, because zoning ordinance addressed use of, and not objects located on, property); 1991 Op. Va. Att’y Gen. 41, 43.


Any such proceeds that remain unclaimed within the times provided in Chapter 11.1 of Title 55 are subject to The Uniform Disposition of Unclaimed Property Act.


Additionally, I note that § 15.2-951 authorizes localities to accept gifts. Should the commissioner desire, the assets of the stock corporation—stock, cash or tangible property—could be tendered to the locality in which the court is located and thereafter properly liquidated and appropriated by the governing body of the locality for purposes it deems appropriate.

OP. NO. 02-035

CONSTITUTION OF VIRGINIA: EDUCATION.

EDUCATION: BOARD OF EDUCATION — TEACHERS, OFFICERS AND EMPLOYEES.

Transference of authority for teacher licensure from Board of Education to independent licensure board is inconsistent with constitutional mandate charging Board with general supervision of Commonwealth’s school system.

THE HONORABLE MITCHELL VAN YAHRES
MEMBER, HOUSE OF DELEGATES
AUGUST 8, 2002
ISSUE PRESENTED

You ask whether, under the Constitution of Virginia, the General Assembly may lawfully establish and designate a professional licensing board, independent from the Board of Education, as the entity responsible for the licensure of teachers.

RESPONSE

It is my opinion that transferring responsibility for teacher licensure from the Board of Education to an independent licensure board would violate the mandatory provision of Article VIII, § 4 of the Constitution of Virginia, vesting general supervision of the Commonwealth’s schools in the Board.

BACKGROUND

During the 2002 Session of the General Assembly, you introduced House Bill 1011, which would have created an independent professional licensure board for teachers by eliminating the Advisory Board on Teacher Education and Licensure and establishing the Virginia Professional Standards Board for Education. The Professional Standards Board would license teachers and other professional staff; a responsibility presently held by the Board of Education. Under the proposed legislation, the Board of Education would continue to license principals and supervisors and determine eligibility for appointment as division superintendent.

The legislation provides that the Governor shall appoint teachers, administrators, representatives of higher education and the business community, and parents to serve on the Professional Standards Board. The Professional Standards Board would also include as ex officio nonvoting members, the Superintendent of Public Instruction, the Director of the State Council of Higher Education, and the Chancellor of the Virginia Community College System, or their respective designees. The Professional Standards Board would have authority to promulgate regulations pursuant to the Administrative Process Act, §§ 2.2-4000 through 2.2-4033, adopt standards for teacher preparation programs, establish and collect licensure fees, employ an executive director, and appoint advisory committees.

During the 2002 Session of the General Assembly, the House Committee on Education passed by indefinitely House Bill 1011. You relate that the committee debate centered on the constitutionality of the bill. It is this debate that prompts your inquiry.

APPLICABLE AUTHORITIES

Under Article VIII, § 1 of the Constitution of Virginia, the General Assembly ultimately is responsible for the public educational system in Virginia. Article VIII, § 4 of the Constitution vests “[t]he general supervision of the public school system ... in [the] Board of Education.” The Board is “virtually the only administrative agency of state government in Virginia that is of constitutional stature.”

The powers and duties of the Board of Education are outlined in Article VIII, § 5. The Board is vested with the power to “divide the Commonwealth into school divisions,” report to the Governor and General Assembly “concerning the condition and needs
of public education in the Commonwealth";\textsuperscript{15} certify to local school boards "a list of qualified persons for the office of division superintendent of schools";\textsuperscript{16} and "approve textbooks and instructional aides and materials for use in courses in the public schools of the Commonwealth."\textsuperscript{17} Finally, "[s]ubject to the ultimate authority of the General Assembly, the Board shall have primary responsibility and authority for effectuating the educational policy set forth in [Article VIII], and it shall have such other powers and duties as may be prescribed by law."\textsuperscript{18}

**DISCUSSION**

The Constitution of Virginia signifies the consent of the people to be governed.\textsuperscript{19} In giving that consent, the citizens of the Commonwealth have placed certain duties, responsibilities and powers in various branches and departments of government. The Virginia Constitution delineates the duties and responsibilities of the Board of Education in Article VIII. Constitutional provisions are either self-executing, mandatory or directory. A self-executing provision does not require enabling legislation for its enforcement.\textsuperscript{20} A mandatory provision declares or imposes a duty or requirement that must be followed.\textsuperscript{21} A directory provision sets forth procedures or "confer[s] discretion on the legislature" for its implementation.\textsuperscript{22}

The Supreme Court of Virginia has not squarely addressed the nature of Article VIII, § 4, or of § 7, which charges local school boards with "[t]he supervision of schools in each school division." The Court's decisions concerning Article VIII, § 7, however, leave no room to doubt that both provisions are mandatory rather than self-executing.\textsuperscript{23}

The Court has determined that it is unconstitutional to take away a power, conferred on local school boards by the General Assembly, that is "essential and indispensable" to the supervision of schools vested in local school boards by the Constitution.\textsuperscript{24} Similarly, there cannot be a conferral of authority contrary to the Board's constitutionally mandated general supervision and its charge as the primary body to effectuate the education policy of the Commonwealth, at least if the delegation is of a function that is "essential and indispensable" to its power of supervision.\textsuperscript{25}

It is evident that, if the General Assembly determines that provision should be made for teacher licensure, that function is essential and indispensable to the Board of Education's general supervision of the Commonwealth's public school system.\textsuperscript{26} Alternatively, the Board of Education could determine that teacher licensure is essential and indispensable to effectively carrying out the Commonwealth's educational policy, and the General Assembly could disagree. Such disagreement, however, could only result in the General Assembly directing that there be no teacher licensure, rather than establishing the responsibility for licensure in an entity other than the Board of Education. Teachers are in the classroom every school day effectuating Virginia's educational policies. Determining who shall become a teacher is essential and indispensable to ensuring that the Commonwealth's children receive a quality education. Taking that power away from the constitutionally created body charged with the general supervision of the Commonwealth's public school system and placing it in an independent board created by the General Assembly and appointed by the Governor
would violate the mandatory provision of Article VIII, § 4 of the Constitution of Virginia, vesting general supervision of the schools in the Board of Education. Ensuring that teachers meet the licensing requirements of the Commonwealth is an integral part of supervising Virginia’s public education system and “effectuating the educational policy set forth in [Article VIII of the Constitution of Virginia].”

If enacted, House Bill 1011 would have divested the Board of Education of its teacher licensure function, thus stripping it of all authority to exercise its judgment in a matter that is essential and indispensable to the supervision of the Commonwealth’s public school system. Divesting the Board of the power to license teachers and lodging it in the Professional Standards Board would deprive the Board of Education of the exercise of an essential and indispensable function. In essence, this would strip the Board “of any or all authority to exercise its judgment in the matter.” The power of general supervision of the Commonwealth’s public school system would indeed be hollow if the Board of Education were not to have the ultimate decision concerning teacher licensure. Recognizing this, the General Assembly has authorized the Board of Education to prescribe regulations governing teacher licensure.

CONCLUSION

Accordingly, it is my opinion that transferring responsibility for teacher licensure from the Board of Education to an independent licensure board would violate the mandatory provision of Article VIII, § 4 of the Constitution of Virginia, vesting general supervision of the Commonwealth’s schools in the Board.

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2 See id. (amending and reenacting § 22.1-253.13:3(C)).
3 See id. (amending and reenacting § 22.1-253.13:3(C)).
4 See id. (adding § 22.1-305.3(B)).
5 See id.
6 See id. (adding § 22.1-305.5(11)).
7 See id. (adding § 22.1-305.5(6)).
8 See id. (adding § 22.1-305.5(5)).
9 See id. (adding § 22.1-305.6).
10 House Bill 1011 was passed by indefinitely on January 28, 2002. See id. (summary).
12 A.E. Dick Howard, Commentaries on the Constitution of Virginia 913 (1974). “The State Corporation Commission is also a creature of the Constitution, but it is far more than an administrative agency.” Id. at 913 n.1.
20 A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Newport News v. Woodward, 104 Va. 58, 61 62, 51 S.E. 193, 194 (1905) (citation omitted).

16 C.J.S. Constitutional Law § 52, at 137 (1984) ("Mandatory constitutional provisions are binding on all departments of the government.").

22 Albemarle Oil Co. v. Morris, 138 Va. 1, 10, 121 S.E. 60, 62 (1924).

25 The School Board in Parham requested that the Court "abandon the 'essential-indispensable function' test employed in Howard ... in favor of an approach which recognizes that § 7 of Article VIII encompasses any function, 'essential ... or otherwise,' related to the supervision of schools." 218 Va. at 958 n.6, 243 S.E.2d at 473 n.6. The Court declined to consider the request, however, "[b]ecause ... we are satisfied that the function involved here is essential and indispensable." Id.

26 Although the Board of Education is responsible for carrying out the educational policy of the Commonwealth, this charge is subject to the ultimate authority of the General Assembly. See Va. Const. art. VIII, § 5(e). Once the General Assembly has made the decision to pursue a certain educational policy, e.g., the licensure of teachers, it may not then place the implementation of that policy, if it involves general supervision, in the hands of an entity other than the Board of Education.

29 Howard, 203 Va. at 58, 122 S.E.2d at 894.

29 Va. Code Ann. § 22.1-298 (LexisNexis Supp. 2002); see also § 22.1-305.2 (Michie Repl. Vol. 2000) (establishing Advisory Board on Teacher Education and Licensure whose advice and recommendations are not binding on Board of Education). Additionally, recognizing that teacher licensure is desirable for a quality educational system, and in implementing § 2 of Article VIII, the General Assembly has provided in the statewide standards of quality that the Board of Education "shall ... establish requirements for licensure of teachers." Section 22.1-253.13:3(C) (LexisNexis Supp. 2002). Thus, the General Assembly has further acknowledged the key supervisory role of the Board in teacher licensure.

OP. NO. 02-024

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS — LEGISLATURE — LOCAL GOVERNMENT.

No constitutional prohibition against member of House of Delegates serving as temporary assistant Commonwealth's attorney when General Assembly is not in session.
The qualifications to hold office as a member of the General Assembly 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 officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision.

Specific constitutional provisions contain the required qualifications for General Assembly members and the prohibition against multiple officeholding at the local level. Article IV, § 4 describes the qualifications necessary to be elected to the General Assembly:

No person holding a salaried office under the government of the Commonwealth, and no judge of any court, attorney for the Commonwealth, sheriff, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes, or clerk of any court shall be a member of either house of the General Assembly during his continuance in office; and his qualification as a member shall vacate any such office held by him. No person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, shall be eligible to either house.
Prior opinions of the Attorney General consistently conclude that the deputies of constitutional officers are themselves officers and, therefore, are subject to the same requirements and disabilities as the principal officer. A 1991 opinion responds to the specific inquiry regarding whether an assistant Commonwealth's attorney may serve concurrently as a member of the General Assembly. The opinion concludes that Article IV, § 4 prohibits an assistant Commonwealth’s attorney from simultaneously serving as a member of the General Assembly.

In 1999, however, the Supreme Court of Virginia considered the question whether Article VII, § 6 bars a deputy sheriff from also serving on a town council. Article VII, § 6 is the constitutional prohibition against holding multiple public offices. The Court concluded that the prohibition against holding multiple public offices set forth in Article VII, § 6 is “clearly and unambiguously limited to persons who hold more than one of the various offices expressly mentioned in Article VII, §§ 4 and 5 of the Constitution of Virginia.” Furthermore, the Court observed that “Article VII, § 4 ... mentions ‘a sheriff’ and Article VII, § 5 mentions ‘[members of] the governing body of each ... town.’” The Court held that there is “nothing in Article VII, § 6 which extends its proscription against multiple public office holding beyond the holders of the offices described or referred to therein.”

The language of Article IV, § 4 specifically prohibits only the “attorney for the Commonwealth” from serving as a “member of either house of the General Assembly during his continuance in office.” Just as was indicated by the Supreme Court, the language in Article IV, § 4 does not expressly include assistant attorneys for the Commonwealth within its scope. The two constitutional provisions are virtually identical in prohibiting the holding of multiple offices, and neither specifically restricts the ability of assistants to the principal officer to hold office. Therefore, it is my opinion that the logic of the Supreme Court decision that provisions and prohibitions applicable to constitutional officers do not apply to their assistants will apply with equal force to both Article IV, § 4 and Article VII, § 6. Accordingly, the prior opinions of the Attorney General concluding that deputies of constitutional officers are themselves officers subject to the same requirements and disabilities as the principal officer are expressly overruled.

It is, therefore, my opinion that there is no constitutional prohibition against you, as a member of the House of Delegates, serving as a temporary assistant Commonwealth’s attorney for approximately three months during the time that the General Assembly is not in session.

1See Va. Const. art. IV, § 4.
2See id. art. VII, § 6.
3See Op. Va. Att’y Gen.: 1991 at 55 (assistant Commonwealth’s attorney may not serve as member of General Assembly); 1979-1980 at 282 (deputy clerk may not serve as member of city council); 1975-1976 at 50 (deputy commissioner of revenue must meet residency requirement); 1974-1975 at 384 (deputy sheriff must meet age and residency requirements).
Proposed amendment requesting increase in appropriation for secure confinement does not constitute special legislation and favors no specific organization that provides enhanced faith-based services to inmates or is controlled by church or sectarian society.

THE HONORABLE M. KIRKLAND COX
MEMBER, HOUSE OF DELEGATES
JANUARY 29, 2002

You ask whether an amendment to the 2000 and 2002 Appropriation Acts, requesting an increase in funds appropriated for secure confinement to be distributed to organizations that offer enhanced faith-based services to inmates within the Commonwealth's correctional system, violates the prohibitions set forth in Article IV, §§ 14 and 16 of the Constitution of Virginia. The source of the increase addressed in the amendment will be derived from profits generated by prison commissary operations.

The Supreme Court of Virginia has defined "special laws" prohibited by Article IV, § 14 of the Constitution 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 Commonwealth where similar conditions exist.

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, I discern no limitation on any particular organization or entity, and, further, the proposed amendment bears a reasonable and substantial relation to the object sought to be accomplished. Consequently, it is my opinion that the proposed amendment does not constitute special legislation that is forbidden by the Constitution.

Article IV, § 16 of the Constitution also prohibits the General Assembly from appropriating any public funds for the benefit of any church, sectarian society, association or institution of any kind whatever, which is entirely or partially, directly or indirectly,
controlled by any church or sectarian society, nor is the General Assembly permitted to make any appropriation to any charitable institution which is not owned or controlled by the state. I discern nothing in the proposed amendment that favors any specific organization that provides enhanced faith-based services to inmates or is controlled by a church or sectarian society. From the facts you present, I must conclude that the proposed amendment does not, in any manner, violate the constitutional prohibitions contained in Article IV, § 16.


2You are the chief patron of a request to amend Item 452 in 2002 House Bill 29 and Item 421 in 2002 House Bill 30 (see also 2002 H. Doc. No. 1), to increase the total appropriation by $100,000 for secure confinement and to add a paragraph F appropriating funds for organizations providing enhanced inmate services.

3Article IV, § 14 states that “[t]he General Assembly shall not enact any local, special, or private law.” Article IV, § 16 provides:

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

4County Bd. of Sup’rs v. Am. Trailer Co., 193 Va. 72, 79, 68 S.E.2d 115, 120 (1951); Martin’s Ex’rs v. Commonwealth, 126 Va. 603, 610, 102 S.E. 77, 79 (1920).

5County Bd. of Sup’rs v. Am. Trailer Co., 193 Va. at 78, 68 S.E.2d at 120.

6Id. at 78, 68 S.E.2d at 120.

7Martin’s Ex’rs v. Commonwealth, 126 Va. at 612, 102 S.E. at 80.

8Id.

OP. NO. 02-003

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).
COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

MILITARY AND EMERGENCY LAWS: MILITARY LAWS OF VIRGINIA.

TAXATION: LOCAL OFFICERS – TREASURERS — REVIEW OF LOCAL TAXES – COLLECTION BY TREASURERS, ETC.

ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES.

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty.
Your inquiries concern the treasurer of New Kent County, a local constitutional officer, and his involuntary recall to active military duty. You first ask whether the treasurer is required to relinquish his office when involuntarily recalled to active duty.¹

You advise that the treasurer of New Kent County is a member of the United States Army Reserve. You advise further that he has received orders involuntarily recalling him to active duty with the United States Army for a period of one year. You relate that he will be stationed in Suffolk, Virginia, during the period of his recall to active duty. Therefore, to the extent permitted by the treasurer’s military supervisors, the treasurer intends to continue to perform the duties of his office, and to oversee and manage the office via use of the internet, or in person during the evening hours and weekends when he is physically present in New Kent County.

In addition, you advise that the treasurer accrues no sick leave and vacation time during his four-year term of office. Therefore, the county makes no lump sum payment to the treasurer for unused accrued sick leave or vacation time at the end of the officer’s term.

The office of treasurer is a constitutional office whose “duties and compensation ... shall be prescribed by general law or special act.”² The powers and duties of a treasurer are generally set out in Article 2, Chapters 31³ and 39⁴ of Title 58.1 of the Code of Virginia. 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.”

Section 2.2-2800 prohibits any person from holding “any office of honor, profit or trust under the Constitution of Virginia, who ... is in the employment [of the government of the United States]; or ... receives from it in any way any emolument whatever.” Section 2.2-2802, however, specifically provides that “no ... county ... officer ... shall forfeit his title to office ... or vacate the same by reason of ... [being] called to active duty in the armed forces of the United States.” The use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.⁵ “The manifest intention of the legislature, clearly disclosed by its language, must be applied.”⁶

Applying the clear intent expressed in § 2.2-2802, it is my opinion that the county treasurer, who is a constitutional officer and also a member of the organized reserves of the United States, is not required to relinquish his office when involuntarily recalled to active military duty.⁷

You next ask whether the treasurer may continue to receive compensation as treasurer of New Kent County by performing his duties via use of the Internet or in person during the evening hours and weekends when he is physically present in the county.

Section 44-93 provides for paid leaves of absence for military training as follows:
All officers ... of the Commonwealth or of any political subdivision of the Commonwealth who are ... members ... of the organized reserve forces of any of the armed services of the United States, National Guard, or naval militia shall be entitled to leaves of absence from their respective duties, without loss of seniority, accrued leave, or efficiency rating, on all days during which they are engaged in federally funded military duty, to include training duty .... There shall be no loss of pay during such leaves of absence, except that paid leaves of absence for federally funded military duty, to include training duty, shall not exceed fifteen workdays per federal fiscal year, and except that no officers ... shall receive paid leave for more than fifteen workdays per federally funded tour of active military duty. When relieved from such duty, they shall be restored to positions held by them when ordered to duty.

A 1985 opinion of the Attorney General considers the question whether this statutory provision applies to employees of constitutional officers. The opinion concludes that § 44-93 applies to constitutional officers and their employees. The General Assembly has taken no action to significantly alter the conclusion of the 1985 opinion. In the case of Deal v. Commonwealth, the Supreme Court of Virginia states 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.”

A treasurer, as a constitutional officer, is independent of the control of the local governing body and, except as abrogated by statute, retains complete discretion in the day-to-day operations of the office, personnel matters, and the manner in which the duties of the office are performed. Numerous prior opinions of the Attorney General conclude that local governing bodies have no authority to supervise or intervene in the management and control of a constitutional officer’s duties. These opinions support the long-standing rule that constitutional officers are independent of their respective localities’ management and control. Furthermore, numerous other prior opinions of the Attorney General conclude that the establishment and maintenance of the working hours of constitutional officers, such as treasurers, is the direct responsibility of the officers themselves, subject to any controlling statute dealing directly with the matter.

As noted, a treasurer, as a constitutional officer, is generally independent of the local governing body. This independence derives from the constitutional status of the office and the popular election of the individual filling the office. A 1987 opinion of the Attorney General concludes that a county has no authority unilaterally to place a constitutional officer on leave of absence. I am unaware of any statute that prevents the New Kent County treasurer from continuing to oversee and manage his office via use of the Internet, or in person during the evening hours and weekends when he is physically present in the county. As long as the treasurer is actually performing the
duties for which the qualified voters of New Kent County elected him, whether such duties are performed via use of the Internet or during the evening hours and weekends, I can find no statutory prohibition to his receipt of compensation as treasurer. Therefore, I conclude that the treasurer may continue to receive compensation as treasurer for New Kent County while involuntarily recalled to active military duty.\(^{17}\)

\(1^{\text{By Executive Order dated September 14, 2001, the President of the United States provided authority to the Secretary of the Department of Defense to order any unit in the Ready Reserve, and any member of the Ready Reserve not assigned to an organized unit, to active duty for not more than 24 consecutive months. See Exec. Order No. 13223, 66 Fed. Reg. 48,201 (Sept. 18, 2001).}}\)


\(7^{\text{See also Lynchburg v. Suttenfield, 177 Va. 212, 13 S.E.2d 323 (1941) (holding that city councilman, inducted into active military service as officer of National Guard unit, does not forfeit office as councilman under predecessor statute to § 2.2-2802).}}\)


\(9^{\text{Id. at 200.}}\)

\(10^{\text{224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).}}\)


\(12^{\text{See Op. Va. Att'y Gen.: 1993 at 59, 66-67 (county administrator may not require constitutional officer to agree to management or performance audit); 1989 at 71, 72-73 (no authority for board of supervisors to approve or deny purchases or change equipment specifications determined by constitutional officer); 1986-1987 at 69 (commissioner of revenue has exclusive control over personnel policies of office); 1978-1979 at 237 (board of supervisors may not compel constitutional officer to assume additional duties not imposed by statute, although officer may agree to accept such duties voluntarily); id. at 289 (treasurer is not subject to control of board of supervisors in determining what tax collection methods to employ); 1976-1977 at 46 (county government may not investigate personnel practices of constitutional officer).}}\)


\(17^{\text{I express no view regarding whether the military supervisors of the treasurer must permit him to perform the duties of his office while he is serving on active duty as a result of the recall to active duty. Furthermore, I express no view in this opinion regarding whether the requirements of the treasurer's recall to active military duty subject him to military duty twenty-four hours a day, seven days a week, thus preventing him from performing the duties of treasurer.}}\)
You ask whether circuit court judges have the authority to direct that the clerk grant access to automated case management systems maintained by the clerk to individuals employed outside the clerk’s office beyond the level of “inquiry only.”

Under the reasoning provided below, I conclude that a circuit court clerk, as custodian of the records maintained in an automated case management system, has the discretion to grant access to such a system.

**BACKGROUND**

You relate that the automated case management system that exists in circuit court clerks’ offices is the official docketing and indexing system for the court and constitutes the official court record as reported by the clerk to the Department of Motor Vehicles and Department of State Police. Furthermore, the system’s data is relied on for court schedules, dockets and case records. Thus, the data contained on the system must be accurate.

**APPLICABLE LAW AND DISCUSSION**

Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk’s duties “shall be prescribed by general law or special act.” As a general rule, clerks of court have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.

A prior opinion of the Attorney General notes that the clerk’s office is an integral part of the administrative operations of the circuit court and provides numerous services to judicial and other public officials, as well as to the public. Clerks of the circuit courts are the custodians of recorded documents, and as such are under an obligation to keep and carefully preserve all such books, records, maps, and papers deposited in their offices.

A 1996 opinion of the Attorney General concludes that, in the absence of a legislative mandate specifying a particular method, a clerk may establish a system that satisfies the statutory purpose for maintaining the records. As an elected constitutional officer, considerable deference should be paid to the decisions made by a clerk of court, unless such decisions are contrary to law. Electronic systems are used for all operations...
You ask whether a county may enact an ordinance requiring that a person apply for a conditional use permit1 prior to applying or storing biosolids in the county.2 You attach a draft of a proposed ordinance amending the Sussex County Code adding a provision on land application of biosolids. You note that the Virginia Waste Management Act3 requires the governing body of a locality to certify to the Department of Environmental Quality that the location and operation of solid waste facilities are consistent with applicable local ordinances.4 You conclude that a county, in the exercise of its police powers, may require a person to submit an application for a conditional use permit.5
In light of the applicable authorities and the comprehensive state program regulating the use of biosolids in the Commonwealth, it is my opinion that a local ordinance requiring an applicant to obtain a conditional use permit before applying or storing biosolids in the locality is preempted by the comprehensive state program.

**APPLICABLE LAW**

Article 1, Chapter 6 of Title 32.1, §§ 32.1-163 through 32.1-166, authorizes the State Board of Health to implement a comprehensive plan for the handling, treatment, disposal and storage of sewage sludge. Specifically, § 32.1-164.5(A) provides that no person shall "land apply" sewage without a proper state permit. Section 32.1-164.5(B) further provides:

The Board of Health ... shall promulgate regulations to ensure that (i) sewage sludge permitted for land application, marketing or distribution is properly treated or stabilized, (ii) land application, marketing and distribution of sewage sludge is performed in a manner that will protect public health and the environment, and (iii) the escape, flow or discharge of sewage sludge into state waters, in a manner that would cause pollution of state waters ... will be prevented.

The overriding goal of statutory interpretation is to discern and give effect to legislative intent. Virginia adheres to the Dillon Rule of strict construction, which provides that local governing bodies "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Local ordinances adopted under the broad police power authority of § 15.2-1200 of the Code of Virginia must not 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.

**DISCUSSION**

In accordance with § 32.1-164.5(B), the Department of Health has adopted comprehensive regulations prescribing standards for treating and stabilizing sewage sludge, also referred to as "biosolids," prior to land application. These Biosolids Use Regulations also create a sampling and testing program, define restrictions for land application sites, prescribe minimum levels of biosolids treatment, and set forth the procedures for treating, utilizing, transporting, storing, and marketing biosolids.

The Virginia Waste Management Act authorizes the Virginia Waste Management Board to regulate sanitary landfills, prohibit open dumps, and generally to regulate and control solids waste activities within the state. The Waste Management Act does not authorize localities to adopt ordinances; it merely requires them to have "solid waste management plans." It is my opinion that this Act is not intended to govern biosolids activities within the Commonwealth; rather, such responsibility resides with the Department of Health pursuant to § 32.1-164.5.
Section 32.1-164.5(A) requires a person to obtain the appropriate permit for the storage and land application of sewage sludge. Section 32.1-164.5(C)(7) provides for notification of local governing bodies when a land application permit is processed. Where the state and the county share jurisdiction in the area, however, the powers of the respective state boards are paramount, and any local ordinance must not operate in a conflicting manner. Accordingly, a prior opinion of the Attorney General concludes that, even though the Department of Health must consider land use concerns expressed by a county board of supervisors with regard to a sludge storage facility seeking reissuance of its state permit, a local ordinance may not subject a facility falling within state purview to restrictions more stringent than those proposed by the state.

Additionally, when the General Assembly expressly bestows certain powers in a statute, it intends to exclude those powers which have been omitted. For example, § 62.1-44.19:3(C) expressly limits the authority of localities to regulate biosolids activities:

Any county, city or town may adopt an ordinance that provides for the testing and monitoring of the land application of sewage sludge within its political boundaries to ensure compliance with applicable laws and regulations.

Thus, a locality may adopt ordinances that pertain only to the testing and monitoring of land application of biosolids within its political boundaries. It is my opinion, therefore, that § 62.1-44.19:3(C) indicates a legislative intent to restrict the locality's authority to enact ordinances related only to the functions expressed in the statute.

To summarize, § 32.1-164.5 and the Biosolids Use Regulations contain the Commonwealth's comprehensive program for regulating biosolids use, including sewage sludge, in the Commonwealth. The General Assembly has delegated the principal responsibility for regulating and managing the storage and land application of sewage sludge to specific state boards. The pertinent regulations vest the State Health Commissioner with the authority to "impose standards and requirements more stringent than those contained in [the Biosolids Use Regulations] when required to protect public health or prevent nuisance conditions from developing." The Virginia Waste Management Act does not govern biosolids activities within the Commonwealth, nor does § 62.1-44.19:3(C) grant to localities the authority to restrict or prohibit the land application of biosolids beyond adopting ordinances pertaining to testing and monitoring.

CONCLUSION

In light of these statutes and the comprehensive state program regulating the use of biosolids in the Commonwealth, it is apparent that the state occupies the field of sewage sludge disposal, treatment and management. Accordingly, it is my opinion that a local ordinance requiring an applicant to obtain a conditional use permit before applying or storing biosolids in the locality is preempted by the comprehensive state program.
her home for several electoral candidates and gave them bracelets as gifts. You advise that both the Association's treasurer and the Association deny that the gathering and gifts were sponsored or paid by the Association.

You also relate that the Association holds an annual "Regatta" at the town's wharf facilities and at other locations within the town. The Regatta is a festival designed to attract boaters and others to the town. Numerous activities, entertainment and informational displays are available to the public at the Regatta. You advise that, although the primary purpose of the Regatta is not to raise funds, the Association has donated excess income generated by the Regatta, after the payment of expenses, to a community, charitable or nonprofit organization chosen by the Association. You explain that the town has no formal role in the organization of the Regatta nor input into the Association's choice of a beneficiary.

You also advise that, at a regular meeting of the town council on August 28, 2000, the council voted to donate in-kind support to the Association's Regatta. Specifically, several town employees assisted in the setup of the Regatta and the loan of town-owned equipment to the Association. The mayor broke the council's tie vote by voting in favor of the donation. The Association reimbursed the town for its in-kind services totaling $431.64.

Finally, you advise that several town citizens challenge the propriety of the donation of in-kind support to the Association for the Regatta, and question whether the public has a right under The Virginia Freedom of Information Act to obtain copies of the Association's governing documents, minutes and other internal documents in light of the town's contributions. You relate that the citizens have inquired regarding whether the town is obligated to obtain and review the governing documents of any organization to which it makes a contribution.

APPLICABLE AUTHORITIES AND DISCUSSION

I. Town May Not Contribute In-kind Services to Association

You first ask whether the Town of Onancock may contribute in-kind support to the Association for the Regatta.

The Dillon Rule of strict construction provides that local governments "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Article IV, § 16 of the Constitution of Virginia provides that "the General Assembly ... may ... authorize counties, cities, or towns to make ... appropriations to any charitable institution or association." Section 15.2-953(A) of the Code of Virginia implements this constitutional provision and authorizes counties, cities and towns to make appropriations of public funds, of personal property or of any real estate to ... any charitable institution or association, located within their respective limits or outside their limits if such institution or association provides services to residents of the locality;
however, such institution or association shall not be controlled in whole or in part by any church or sectarian society.

"The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms." In addition, 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. It is further an accepted principle of statutory interpretation that the mention of one thing in a statute implies the exclusion of another. Both the constitutional and statutory provisions address the "appropriation" of public funds to a charitable institution or association. Budgets adopted by local governing bodies are for planning and informative purposes and are statutorily distinguished from appropriations. A local governing body may disburse money only pursuant to an appropriation for a contemplated expenditure. Thus, adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose.

"[W]here 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." Both the constitutional and statutory provisions are clear in permitting appropriations of public funds by local governing bodies to charitable institutions or associations "located within their respective limits or outside their limits if such institution or association provides services to residents of the locality." Consequently, the General Assembly clearly permits the town to appropriate public funds in support of the Association's annual Regatta. The General Assembly, however, has not clearly authorized localities to provide the type of in-kind support that you describe. Section 15.2-953(A) authorizes only the appropriation of "public funds, of personal property or of any real estate," which does not include the in-kind services you describe. Accordingly, I must conclude that the express language of § 15.2-953(A) does not contemplate the contribution of the in-kind services described. I am of the opinion, therefore, that the town is permitted only to appropriate public funds, personal property or real estate for such purpose.

Section 15.2-940 provides that a locality "may, in its discretion, expend funds from the locally derived revenues o: the locality for the purpose of promoting the resources and advantages of the locality." Clearly, the described Regatta attracts persons to the town's wharf and surrounding facilities, thus promoting the wharf and area businesses. The clear language of § 15.2-940, however, permits a locality to expend funds from locally derived revenues for the promotion of the locality's resources and advantages. The provision of the type of in-kind services you describe is not contemplated by the General Assembly in this regard. Consequently, it is not possible for me to conclude that the town is permitted to contribute in-kind services to the Association for the holding of the annual Regatta.
II. No Requirement that Town Examine Documents of Organizations to Which It Makes Contributions

Because the Town of Onancock may appropriate public funds, you ask whether the town is required to obtain and examine the governing documents of organizations to which it makes contributions pursuant to § 15.2-953.

The power of a governing body to expend funds is limited to those granted in express words, and those necessarily or fairly implied in the powers expressly granted.\(^1\) I am unaware of any legislative requirement that a locality review the governing documents and internal papers of a charitable organization prior to appropriating public funds pursuant to § 15.2-953. I am, likewise, unaware of any legislative requirement that localities concern themselves with the daily affairs of private foundations prior to such appropriation.\(^12\) This is not to suggest, however, that contributions by localities to foundations may legally be spent irresponsibly.\(^13\) Such contributions by a locality exist because of public-spirited donations and publicly enacted appropriations.\(^14\) The fiduciary responsibilities of undivided loyalty and prudent management are imposed by law on the trustees and custodians of such funds so as to safeguard the public interest at stake.\(^15\) I can, however, find no statute that requires the town to obtain and examine the governing documents of organizations to which it makes contributions pursuant to § 15.2-953.

III. Association Documents Are Not Subject to Public Disclosure

Once an organization receives public funds from a locality, you ask whether the documents of the charitable organization are subject to the disclosure requirements of The Virginia Freedom of Information Act\(^16\) (the “Act”).

A 1995 opinion of the Attorney General considers whether a private corporation receiving public funds for the provision of property, goods or services is a “public body” subject to the Act.\(^17\) The opinion concludes that the Act does not apply to such private corporations that are not supported wholly or principally by public funds.\(^18\) Several prior opinions of the Attorney General also 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.”\(^19\) It is not clear from the facts that the Association is supported wholly or principally by public funds. Therefore, I must conclude that the Association is not a “public body” as that term is defined in the Act.

Section 2.2-3701 of the Act broadly defines “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." All public records are open for inspection and copying during regular office hours, unless otherwise specifically provided by law. The Act’s definition of “public records” 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.” Since I cannot conclude that an organization such as the Association is a “public body” as defined in the Act, I must also conclude that records generated by the Association are not “public records” prepared, owned or possessed by a public body. Consequently, I must also conclude, based entirely on the facts provided, that the documents of the Association are not subject to the disclosure requirements of the Act.

IV. Duties of Town Manager Are Not Governed by Statute

You next ask whether the town manager is obligated to take action in response to a citizen complaint regarding alleged improper action by the town council or mayor.

Typically, the town manager is under the control of the town council, and is generally charged with managing the administrative affairs and work of the town and performing such other duties as may be required of him. The duties of the position of town manager must be examined in the context of the town charter and general statute. I, however, find no statute that governs the duties of a town manager. Furthermore, the charter for the Town of Onancock is silent as to the duties and responsibilities of the town manager. Accordingly, I am unable to comment regarding the obligation, if any, of the town manager to take action in response to a citizens’ complaint regarding alleged improper action by the town council or mayor.

V. Town May Contribute to Little League

Your final inquiry is whether the Town of Onancock has the statutory authority to make a contribution to the Central Accomack Little League.

You advise that the Central Accomack Little League is a Little League baseball organization that operates largely on the baseball fields located within the town. Furthermore, you explain that children from both within and without the town participate in the activities of the Little League. You relate that there are no facts suggesting that a church or sectarian society controls the Little League.

Section 15.2-953(B) provides:

Any locality may make gifts and donations of property, real or personal, or money, to ... nonprofit recreational associations or organizations; provided the nonprofit recreational association or organization is not controlled in whole or in part by any church or sectarian society.
"The manifest intention of the legislature, clearly disclosed by its language, must be applied." For the purposes of responding to this inquiry, I shall assume that the Central Accomack Little League is a nonprofit recreational association. You advise that there is no evidence indicating that the Little League is controlled in whole or in part by any church or sectarian society. Accordingly, it is my opinion that the town may make a cash contribution to the Little League pursuant to the authority granted in § 15.2-953(B).

1See Onancock Business and Civic Association Bylaws pmbl. (1997).
2The Internal Revenue Code provides an exemption for “corporations ... organized and operated exclusively for ... charitable ... purposes.” I.R.C. § 501(c)(3) (West Supp. 2001).
6See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Singer, supra note 5, § 47:23 (expressio unius est exclusio alterius).
8Section 15.2-2506 provides that “[n]o money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semi-annual, quarterly or monthly appropriation for such contemplated expenditure by the governing body.”
9Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).
13Id. at 55.
14See id.
15See id.
18Id. at 6.
19See, e.g., Op. Va. Att'y Gen.: 1984-1985 at 431 (Student Senate of Old Dominion University); 1983-1984 at 447, 448 (meetings of Governor's Advisory Board of Economists and Governor's Advisory Board on Revenue Estimates must be public meetings); 1982-1983 at 719 (Fairfax Hospital Association); id. at 726 (volunteer fire department); 1977-1978 at 482 (university honor committee); 1974-1975 at 584 (General Professional Advisory Committee, composed of university presidents, established by State Council of Higher Education to serve Council in advisory capacity).
You ask whether the City of Radford may prescribe a $200 fine for violation of its ordinance pertaining to permit parking.¹

You observe that § 46.2-1230 of the Code of Virginia authorizes the governing body of a locality to adopt an ordinance providing for the issuance of parking permits on public streets. You advise that Virginia law does not provide a penalty for violating such an ordinance. Further, you observe that § 46.2-1300 permits localities to adopt ordinances regulating the operation of motor vehicles on the highways. You note that § 46.2-113 makes it unlawful to violate the motor vehicles laws of the Commonwealth,² or any local ordinance adopted under § 46.2-1300. Such violations under § 46.2-113 “constitute traffic infractions punishable by a fine of not more than $200.” You relate that § 46.2-1300 provides no authority for localities to regulate permit parking; rather, it provides guidance to localities pertaining to authorized penalties for violation of local ordinances regulating the operation of motor vehicles. Finally, you advise that application of Dillon’s Rule appears to prohibit the City of Radford from amending a parking ordinance to provide for a fine of $200 as punishment for a violation.

Under the Dillon Rule of strict construction, it is well-established that political subdivisions of the Commonwealth have only those powers expressly granted or necessarily implied from express powers.³ Accordingly, municipalities have only such legislative and fiscal powers as are expressly or impliedly delegated to them by statute.⁴ When doubtful, the question of whether a municipality has a particular power is to be...
answered in the negative. Thus, the Dillon Rule requires a narrow interpretation of all powers conferred on local governments, as they are delegated powers.

Section 15.2-1429 provides:

Any locality may prescribe fines and other punishments for violations of ordinances, which shall be enforced by proceedings as if such violations were misdemeanors. However, no fine or term of confinement for the violation of ordinances shall exceed the penalties provided by general law for the violation of a Class 1 misdemeanor, and such penalties shall not exceed those penalties prescribed by general law for like offenses.

Section 55-73(1) of the Code of Ordinances for the City of Radford pertains to permit parking. The city seeks to amend the ordinance by deleting certain language and adding the language in italics:

If any person should obtain, use, possess, transfer or allow others to use or possess a parking permit issued to him, or give false answers upon application therefor, or use or continue to use such parking permit after termination or expiration thereof, by expiration of time or operation of law or cessation of residence, or violate any other terms, conditions, rules or regulations applicable to the same, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than $7.50 nor more than $25.00. He shall be punished by a fine in the amount of $200.00. Each day or portion thereof during which such permit or its use shall violate the terms of this article shall constitute a separate violation.

Where the language of a statute is free from ambiguity, its plain meaning will control. Section 15.2-1429 expressly authorizes a locality to prescribe a criminal fine for violation of an ordinance, provided the fine does not exceed the penalty under state law for a Class 1 misdemeanor. In ordinances prohibiting acts of a continuing nature, Virginia localities frequently specify that each day the violation continues will constitute a separate offense.

Therefore, it is my opinion that the City of Radford has the authority to amend its ordinance regarding permit parking to provide that the violation of § 55-73(1) is punishable by a fine of $200.

You inquire whether a hospital authority may sell its assets to a for-profit corporation. You also ask whether the declaratory language in § 15.2-5300 prevents such a transfer.

RESPONSE

It is my opinion that a hospital authority organized as a political subdivision under Chapter 53 of Title 15.2 may sell its assets to a for-profit corporation; however, before dissolving it must seek court approval. Further, it is my opinion that the declaratory language in § 15.2-5300 does not prevent such a sale or dissolution.

APPLICABLE LAW AND DISCUSSION

Chapter 53 of Title 15.2, §§ 15.2-5300 through 15.2-5367 comprises the statutory scheme governing hospital authorities and provides for the establishment of such authorities. Chapter 53 provides the framework for determining the need for such an authority, its subsequent powers, its bonding authority, and the method for its dissolution. Pursuant to § 15.2-5302, hospital authorities are organized “with such public and corporate powers as set forth in [Chapter 53].” Section 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 “[t]he governing body of any city in which the authority is located may make appropriations” to aid
the authority; and § 15.2-5349 provides that “[t]he bonds and other obligations of the authority … shall not be a debt … of the Commonwealth.” Section 15.2-5337 provides that a hospital authority “shall have power to sell, exchange, transfer, or assign any of its property real or personal or any interest therein to any person, locality or government.” A hospital authority is also given all the powers granted to a nonstock corporation. One of the powers granted nonstock corporations is the power to “[s]ell, … exchange, and otherwise dispose of all or any part of its property.” The power given to an authority to dispose of its assets is broad. As a result, a hospital authority has the power to sell all of its assets.

Section 15.2-5365 provides:

Whenever it appears to the commissioners of an authority that the need, as provided in § 15.2-5305, for such authority in the city in which it was created no longer exists, upon petition by the commissioners to the circuit court for such city, after giving to the city ten days’ notice and upon the production of satisfactory evidence in support of such petition, the court may, in its discretion, enter an order declaring that the need for such authority in the city no longer exits and approving a plan for completing the business of the authority, the payment or assumption of its obligations, and the transfer of its assets.

If the court enters such an order, the hospital authority’s “powers and duties to transact business or to function shall cease to exist as of the date set forth in the order of the court.” Either the hospital authority or the city may appeal the judgment of the court.

Section 15.2-5300 sets forth a declaration by the General Assembly concerning the necessity for hospital authorities in cities of the Commonwealth. Section 15.2-5300 also delineates the conditions that gave rise to the need to enact the statutory scheme. Further, § 15.2-5300 provides that these “conditions also exist in certain areas surrounding such cities, and these conditions cannot be remedied by the ordinary operations of private enterprises.”

You inquire whether a hospital authority may sell its assets to a for-profit corporation. You also ask whether the declaratory language in § 15.2-5300 prevents such a transfer. The statutory scheme for hospital authorities contemplates a time when such authorities are no longer needed. By explicitly providing a procedure to dissolve an authority, the General Assembly contemplates a time when the authority may no longer be needed.

In order to dissolve a hospital authority, the commissioners of the authority must make a finding that the need for the “authority in the city in which it was created no longer exists.” Moreover, there is an additional safeguard by making the commissioners petition the circuit court for approval to dissolve the authority. The commis-
sioners must produce "satisfactory evidence in support of such petition." Upon the consideration of such evidence, "the court may, in its discretion, enter an order declaring that the need for such authority in the city no longer exists." This procedure ensures that there is some review of a decision by the commissioners to dissolve the authority. In making the determination whether to approve such dissolution, the court will consider whether the evidence produced by the commissioners of the authority is sufficient. In addition, the court must approve the proposed plan of dissolution that provides for the transfer of the authority's assets.

The language contained in § 15.2-5300 concerning the legislature's determination that private enterprise may not be equipped to correct certain conditions does not, in and of itself, prevent a sale of a hospital authority's assets. Section 15.2-5300 sets forth the General Assembly's reasons for enacting the legislation. Such statutory provisions are akin to the preamble in certain legislation. A court may look at the preamble if the issue before the court is ambiguous. Likewise, the court may use a statute that sets forth the policy considerations for the enactment of a statutory scheme in its consideration of a case if such review is merited. Nevertheless, this particular language, in and of itself, does not prevent the sale of a hospital authority's assets to a for-profit corporation. Moreover, if private enterprise were never able to provide such medical services, there would be no need for the dissolution provisions in Chapter 53.

CONCLUSION

Accordingly, it is my opinion that a hospital authority organized as a political subdivision under Chapter 53 of Title 15.2 may sell its assets to a for-profit corporation; however, before dissolving it must seek court approval. Further, it is my opinion that the declaratory language in § 15.2-5300 does not prevent such a sale or dissolution.

2 Section 13.1-826(A)(4).
3 Section 15.2-5366 (Michie Repl. Vol. 1997).
5 See tit. 15.2, ch. 53, art. 4, §§ 15.2-5365 to 15.2-5367 (Michie Repl. Vol. 1997).
6 See id.
7 Id.
8 Id.
9 Id.
10 Id.
Va. Acts ch. 357, at 558, 558-59, states the need in preamble for the supervision, regulation and control of the milk industry in Virginia (see Reynolds v. Milk Commission, 163 Va. 957, 963, 179 S.E. 507, 509 (1935)).

OP. NO. 01-105
COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT.
ADMINISTRATION OF GOVERNMENT: BOARDS – DESIGN-BUILD/CONSTRUCTION MANAGEMENT REVIEW BOARD — VIRGINIA PUBLIC PROCUREMENT ACT.

Industrial development authorities may use design-build contracts for construction of “authority facilities” or “facilities,” as defined in Industrial Development and Revenue Bond Act, without having to engage in competitive bidding or involve Design-Build/Construction Management Review Board.

THE HONORABLE CLARENCE E. PHILLIPS
MEMBER, HOUSE OF DELEGATES
APRIL 2, 2002

You ask whether industrial development authorities may use design-build contracts for the construction of “authority facilities” or “facilities,” as those terms are defined in § 15.2-4902 of the Code of Virginia, without having to engage in competitive bidding and without having to involve the Design-Build/Construction Management Review Board.1

Industrial development authorities may use design-build contracts for the construction of “authority facilities” or “facilities,” as those terms are defined in § 15.2-4902, without engaging in competitive bidding or involving the Design-Build/Construction Management Review Board, for the reasons that follow.

APPLICABLE AUTHORITIES AND DISCUSSION

The Industrial Development and Revenue Bond Act, §§ 15.2-4900 through 15.2-4920, authorizes localities to create industrial development authorities.2 The express legislative intent in authorizing the creation of industrial development authorities is “so that such authorities may acquire, own, lease, and dispose of properties and make loans” in furtherance of the purpose(s) for which the authorities are created.3

Section 2.2-4344(B) authorizes industrial development authorities to “enter into contracts without competition with respect to any item of cost of ‘authority facilities’ or ‘facilities’ as defined in § 15.2-4902.” Section 2.2-4344(B) clearly provides as an exemption from the competitive bidding requirements of the Virginia Public Procurement Act,4 contracts with respect to the costs associated with “authority facilities” or “facilities,” as defined in § 15.2-4902. Section 15.2-4902 contains, among others, definitions of “authority facilities,” “facilities,” and “cost” as each of those terms is used in the Industrial Development and Revenue Bond Act. “Cost” includes “the cost of construction” and the “cost of engineering, ... plans, specifications, studies, surveys, estimates of cost and of revenues, ... and such other expenses as may be necessary or incident to the construction of the authority facilities.”5 A basic rule of statutory
construction requires that, where there is no ambiguity in a statute, the statute is not to be construed but is to be given effect in accordance with its plain meaning and intent.\textsuperscript{6}

The Procurement Act defines the term "design-build contract" to mean "a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract."\textsuperscript{7} A "public body" is defined to mean "any ... 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 Procurement Act.]"\textsuperscript{8} An industrial development authority is a "political subdivision, a body politic and corporate."\textsuperscript{9} Competitive negotiation and specific findings regarding the competitive bidding process are required by the General Assembly before the Design-Build/Construction Management Review Board may review submissions by public bodies.\textsuperscript{10} Industrial development authorities are exempt from the competitive bidding requirements of the Procurement Act, and therefore do not have to comply with the competitive negotiation and bidding process. The Procurement Act must be considered together with the specific provisions of \S 15.2-4902.\textsuperscript{11}

CONCLUSION

It is my opinion that industrial development authorities may use design-build contracts for the construction of "authority facilities" or "facilities," as those terms are defined in \S 15.2-4902, without having to engage in competitive bidding and without having to involve the Design-Build/Construction Management Review Board.

\textsuperscript{1}See VA. CODE ANN. \S\S 2.2-2404 to 2.2-2406 (LexisNexis Repl. Vol. 2001) (establishing and listing powers and duties of Design-Build/Construction Management Review Board).
\textsuperscript{2}VA. CODE ANN. \S 15.2-4901 (Michie Repl. Vol. 1997); \S 15.2-4903 (Michie Supp. 2001).
\textsuperscript{3}Section 15.2-4901.
\textsuperscript{4}Sections 2.2-4300 to 2.2-4377 (LexisNexis Repl. Vol. 2001).
\textsuperscript{5}Section 15.2-4902 (Michie Supp. 2001).
\textsuperscript{7}Section 2.2-4301.
\textsuperscript{8}Id.
\textsuperscript{9}See \S 15.2-4902 (defining "authority").
\textsuperscript{10}See \S 2.2-2406.
\textsuperscript{11}See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att’y Gen. 134, 135 (noting that statutes relating to same subject should be considered \textit{in pari materia}).

OP. NO. 02-118
COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC. – SHERIFF.
Processing fee authorized by ordinance to be collected by clerk on convicted individuals admitted into county, city, or regional jails is reserved solely for use by local sheriff’s office, even though county or city may participate in regional jail.

MS. SHARON E. PANDAK
COUNTY ATTORNEY FOR PRINCE WILLIAM COUNTY
NOVEMBER 18, 2002

ISSUE PRESENTED
You ask whether § 15.2-1613.1 allows Prince William County to adopt an ordinance imposing a processing fee on convicted individuals admitted to a county, city, or regional jail to be used by the regional adult detention center, rather than the local sheriff’s office, to defray the cost of processing such individuals.

RESPONSE
It is my opinion that the processing fee authorized by § 15.2-1613.1 is reserved solely for use by the local sheriff’s office.

APPLICABLE LAW AND DISCUSSION
Section 15.2-1613.1 provides:

Any county or city may by ordinance authorize a processing fee not to exceed twenty-five dollars on any individual admitted to a county, city, or regional jail following conviction. The fee shall be ordered as a part of court costs collected by the clerk, deposited into the account of the treasurer of the county or city and shall be used by the local sheriff’s office to defray the costs of processing arrested persons into local or regional jails.

Virginia adheres to the Dillon Rule of strict construction, which provides that “[l]ocal governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.” Any doubt as to the existence of a power must be resolved against the locality. The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth, which, in turn, rests on the foundation of Article I, § 14 of the Constitution of Virginia. Absent ambiguity, the plain meaning of a statute must prevail. Section 15.2-1613.1 grants counties and cities the authority to impose a fee on individuals “admitted to a county, city, or regional jail following conviction.” The use of the word “may” in the statute implies that the adoption of the ordinance is discretionary. You relate that, in Prince William County, the processing of arrested persons is performed by adult detention center personnel rather than by the sheriff.

A county or city may enact an ordinance imposing a processing fee; however, a sheriff’s office must use such fee for costs associated with processing convicted individuals into county, city, or regional jails. Section 15.2-1613.1 mandates that the processing fee authorized by ordinance “shall be used by the local sheriff’s office to defray the
costs of processing." 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. The statute cannot be read to allow the collection of the fee to be used by regional jail staff. Section 15.2-1613.1 clearly delineates that such funds "shall be used by the local sheriff's office to defray the costs of processing." The use of the word "shall" in a statute generally indicates that the procedure is mandatory, while "may" indicates that it is permissive. Consequently, any funds collected under such an ordinance must be reserved for use by the sheriff's office to defray the cost of processing such persons.

CONCLUSION

Accordingly, it is my opinion that the processing fee authorized by § 15.2-1613.1 is reserved solely for use by the local sheriff's office.


3"County government ... is ... one of the instruments or agencies through which the State performs its functions of government. It is an arm of the State." Board of Supervisors v. Cox, 155 Va. 687, 710, 156 S.E. 755, 762 (1931).

4Article I, § 14 guarantees "[t]hat the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This language is identical to Article I, § 14 of the 1902 Constitution and remains unchanged from § 14 of the Declaration of Rights, adopted June 12, 1776.


6"Unless it is manifest that the purpose of the legislature was to use the word "may" in the sense of "shall" or "must" then "may" should be given its ordinary meaning—permission, importing discretion." Board of Sup'rs v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952) (quoting Masters v. Hart, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949)); see also Op. Va. Att'y Gen.: 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12; 1978-1979 at 61, 62.


ISSUE PRESENTED
You ask whether the City of Chesapeake may adopt a proffer policy as part of the city's comprehensive plan to encourage rezoning applicants to proffer to develop rezoned property only when public facilities are deemed adequate to support the public needs that will be generated by the proposed development. You provide a draft of the "Chesapeake Comprehensive Plan Proffer Policy" ("city proffer policy") for review.

RESPONSE
It is my opinion that a Virginia locality may adopt, as part of its comprehensive plan, a proffer policy that considers an adequate public facilities requirement, with criteria as set forth below, before applications for rezoning may be approved.

BACKGROUND
You advise that the City of Chesapeake applies levels-of-service tests for roads, schools and sewer capacity to all rezoning applications to ensure that these public facilities are capable of serving the proposed development at the time of rezoning. You state that, in cases of delayed development of rezoned properties, the levels of service may have decreased below acceptable standards.

You advise that the intention of the proposed city proffer policy is to ensure the timely development of rezoned properties and orderly development of land, and to ensure that adequate public facilities and services are available to meet the needs generated by development of the rezoned property. The proffer states that city council will anticipate, but not mandate, that three proffers be considered when evaluating the merits of a rezoning application. The city proffer policy encourages proffers where the property owner agrees (1) to coordinate the commencement of plan review and construction with the availability of adequate public facilities and services, as measured by the city's level-of-service standards; (2) to reconsideration of a rezoning application that is submitted at a time when public facilities and services no longer adequately serve the needs of the proposed development; and (3) to revocation of the rezoning, unless assurances are proffered that the developer will correct such deficiencies in public facilities and services to the satisfaction of the city. Finally, the city proffer policy requires that the city council consider all other factors relevant to land use decisions and act in the best interest of the public on each zoning application.

LIMITATION OF OPINION
This Office 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 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, Virginia Attorneys General traditionally have declined to render such opinions when the request involves a matter of purely local concern or procedure. Accordingly, I have
limited my comments to the authority of a Virginia locality to adopt such a policy, and have refrained from interpreting the specific city proffer policy that you forward with your request.

APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon Rule of strict construction in that "'municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.'" 6 The powers of county boards of supervisors in the Commonwealth are also limited to those "'conferred expressly or by necessary implication.'" 7 Any doubt as to the existence of a power must be resolved against the locality. 8 Accordingly, because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly. 9

Virginia's zoning enabling statutes are detailed in Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316 of the Code of Virginia. Among the purposes underlying zoning ordinances are the promotion of rational development of land, the availability of adequate public utilities, the economic development of communities, and protection against overcrowding of land and undue density of population in relation to community facilities. 10 Section 15.2-2284 provides:

Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality.

Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279, details the requirements and procedures for the adoption of local subdivision ordinances regulating land subdivision and development. Section 15.2-2240 requires every locality to adopt such an ordinance, and § 15.2-2241 mandates the provisions to be included in all subdivision ordinances.

Section 15.2-2283 contains the purposes of a zoning ordinance. Among the purposes to be considered in a zoning ordinance are the provision of "'adequate police and fire protection, ... transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, ... and other public requirements.'" 11 As the Supreme Court of Virginia indicated in reviewing this section and provisions similar
to it, the General Assembly has vested the legislative branch of local governments with wide discretion in the enactment and amendment of zoning ordinances.\textsuperscript{12}

Section 15.2-2284 requires that “[z]oning ordinances and districts shall be drawn and applied with reasonable consideration for ... the comprehensive plan.” Sections 15.2-2223 through 15.2-2228 provide for the development and adoption of the comprehensive plan. By virtue of § 15.2-2223, every local governing body in the Commonwealth was required to adopt a comprehensive plan by July 1, 1980.\textsuperscript{13} Section 15.2-2232 generally provides for the legal status of a comprehensive plan, and § 15.2-2232(A) provides that a comprehensive plan shall control the general development of land within a locality. “A comprehensive plan provides a guideline for future development and systematic change, reached after consultation with experts and the public.”\textsuperscript{14} “[T]he Virginia statutes assure [landowners] that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning.”\textsuperscript{15} A comprehensive plan, by itself, however, generally does not act as an instrument of land use control.\textsuperscript{16} Rather, the plan serves as a guideline for the development and implementation of zoning ordinances.\textsuperscript{17} As noted in a 1988 opinion of the Attorney General, “[a] comprehensive plan ... acts as an indirect instrument of land use control with respect to public areas, public buildings, [and] public structures, ... whether publicly or privately owned.”\textsuperscript{18} Once the plan has been recommended by the local planning commission and adopted by the governing body, such proposed public facilities must be submitted and approved by the local commission as being substantially compliant with the adopted comprehensive plan.\textsuperscript{19} The Supreme Court of Virginia has recognized that a governing body may base its denial of a rezoning request, in part, on inconsistencies between the proposed development and the comprehensive plan.\textsuperscript{20}

The Supreme Court of Virginia also has acknowledged that the provisions of a comprehensive plan can be an important factor in land use decisions.\textsuperscript{21} For example, in the context of the special exception process, the Court has specifically approved zoning ordinance provisions governing the grant or denial of special exceptions that require the consideration of the comprehensive plan or the general purposes of the local zoning ordinance as part of the special exception process.\textsuperscript{22}

Section 15.2-2296 authorizes certain localities to use conditional zoning, whereby a use otherwise prohibited in a district may be permitted “subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned.” Therefore, § 15.2-2296 authorizes the zoning ordinance of the additional localities to provide for the voluntary proffer of reasonable conditions as part of a rezoning or an amendment to a zoning map. A county, city or town may qualify if its population has grown ten percent or more from the 1980 to the 1990 census.\textsuperscript{23} Additionally, a county may qualify if it is contiguous to at least three such high-growth counties, a city may qualify if it adjoins such a high-growth city or county, and a town may qualify if it is located within such a high-growth county.\textsuperscript{24} Conditional zoning addresses the effects of changing land use
patterns within these communities. Its purpose is to permit differing land uses within those communities while protecting the community as a whole.

In 1975, the Supreme Court of Virginia reversed a Fairfax zoning denial, noting that, "[a]s a practical matter, and because of the ever-existing problem of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services." The Court found that the board of supervisors had denied a zoning application "primarily because of its timing, rather than because of its impact on public facilities" that were or would become available in the reasonably foreseeable future. Within the same year, the Court, again reversing a Fairfax zoning denial, noted that "[w]e have no quarrel with the Board concerning its contention ... that in its zoning actions it must protect against 'undue density of population in relation to the community facilities existing or available' and must make provision for public facilities 'consonant with the efficient and economical use of public funds.'"  

In 1980, the Supreme Court considered the comprehensive development plan adopted in 1969 by the Loudoun County board of supervisors. An applicant for rezoning owned a large parcel of land and requested rezoning from an existing planned industrial classification to a category that permitted construction of a large regional shopping center. The comprehensive development plan expressly anticipated that a shopping center would be feasible to the area when a certain population density was reached in the surrounding market area. The supervisors' position was that the development of the shopping center was premature under the plan. The application for rezoning, therefore, was denied. The applicant contended that the minimum population required by the plan existed. The Court held that the supervisors' interpretation of the county's comprehensive plan was entitled to a presumption of reasonableness and that it was fairly debatable whether the county or the applicant was correct.

CONCLUSION

From these cases, I conclude that the Virginia Supreme Court approves the consideration of the following criteria by a locality reviewing zoning applications for new development:

1. the impact of the proposed new development on public facilities;
2. the protection against undue density of population with respect to the public facilities in existence to service the proposed new development;
3. the planning by the locality for the provision of public facilities consonant with the efficient and economical use of public funds to service the proposed new development; and
4. the locality's interpretation and application of its comprehensive plan concerning the timing of the development as determined by reasonably objective criteria.
Therefore, I must conclude that a Virginia locality may adopt, as part of its comprehensive plan, a proffer policy that considers these criteria in an adequate public facilities requirement before applications for rezoning may be approved.\(^3\)1

\(^1\)You do not provide for review with your request any "level-of-service" standards that are deemed to be acceptable with your request. Accordingly, for the purposes of this opinion, I shall assume that such standards are extensive and comprehensive.


\(^7\)Id. at 572, 232 S.E.2d at 39.


\(^9\)See Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967) (county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power was expressly implied from act of legislature allowing local governing body to lend money to any authority created by such governing body).


\(^11\)Section 15.2-2283(iv).

\(^12\)See City of Manassas v. Rosson, 224 Va. 12, 17, 294 S.E.2d 799, 802 (1982).

\(^13\)See 1977 Va. Acts ch. 228, at 271, 271-72 (reenacting § 15.1-446.1, repealed and codified as § 15.2-2223).


\(^19\)See § 15.2-2232(A) (Michie Supp. 2001).

\(^20\)See, e.g., Loudoun Co. v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980).

\(^21\)See id.

\(^22\)See, e.g., National Memorial Park v. Board of Zoning, 232 Va. 89, 348 S.E.2d 248 (1986) (applying standards set out in county zoning ordinance to deny memorial park's application for special use permit to operate crematory for humans and animals); Bell v. City Council, 224 Va. 490, 297 S.E.2d 810 (1982) (finding challenged amendments to city zoning regulations, which, among other things, allow special permits to modify setback and density requirements of zoning ordinance, valid); Maritime Union v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961) (hold-
ing that challenged provision of zoning ordinance, requiring use permit for union hiring hall, pro-
vided adequate standards to assure uniform application and was constitutional).

23Section 15.2-2298(A) (Michie Supp. 2001).

24Id.


26Id. at 440, 211 S.E.2d at 52.

27Fairfax County v. Williams, 216 Va. 49, 51, 216 S.E.2d 33, 36 (1975); see also Gregory v. 
Board of Supervisors, 257 Va. 530, 514 S.E.2d 350 (1999) (although county expected cash 
proffers, evidence supported decision of county board of supervisors to deny rezoning application 
based on health, safety and welfare concerns).

28See Lerner, 221 Va. at 30, 267 S.E.2d at 100.

29"The Comprehensive Plan established a number of standards 'as guidelines for new commercial 
development.' For a regional shopping center, the Plan provided a standard, among others, of a 
'minimum population to support' of 100,000 to 200,000 within a radius of 5 to 15 miles for a 
[shopping] center containing 400,000 to 1,000,000 square feet." ld. at 33, 267 S.E.2d at 102.

30Lerner appears primarily to be a timed development case.

31My conclusion is premised on the express assumption that such a standard for determining 
whether public facilities serving a particular proposed development are adequate is extensive and 
comprehensive.

OP. NO. 00-082

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Planning commission of Franklin County may not review for compliance with 
comprehensive plan existing locations of telecommunications towers in areas of 
county not subject to zoning. Such review may be undertaken only when application 
for telecommunications is made with county.

MR. B. JAMES JEFFERSON
COUNTY ATTORNEY FOR FRANKLIN COUNTY
JANUARY 3, 2002

You ask whether the provisions of § 15.2-2232(A) and (F) of the Code of Virginia 
permit review by the Franklin County planning commission for compliance with the 
comprehensive plan the existing location of telecommunications towers in parts of 
the county that are not subject to zoning.

You advise that, since 1988, four magisterial districts in Franklin County have been 
zoned; however, the 1990 census changed the county's magisterial district boundaries 
so that zoning now exists outside those four districts. You relate that your question 
arises from the presence of telecommunications towers owned by private wireless 
providers and located in areas of the county not subject to zoning. You note that the 
telecommunications towers do not constitute a public utility facility or a public service 
corporation facility subject to review by the local planning commission for compliance 
with the comprehensive plan under § 15.2-2232(A). You state, however, that 
§ 15.2-2232(F) requires review by the commission of a telecommunications facility, 
but that such review does not relate exclusively to the rezoning process. Therefore,
you conclude that § 15.2-2232(F) permits review by the local planning commission for compliance with the comprehensive plan the location of telecommunications towers in parts of the county that are not subject to the zoning application process.¹

Virginia’s land use and zoning enabling statutes are detailed in Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327. Chapter 22 presents a connected system for local government planning, subdivision of land, and zoning. Various provisions 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 local planning commissions. A local planning commission is required to prepare and recommend subdivision ordinances and amendments thereto to the governing body of the locality,² to prepare and recommend a comprehensive plan for development of the area, and to specify the procedures for putting the plan into effect.³ In addition, the planning commission may recommend amendments to zoning ordinances;⁴ may have made, for approval by the governing body, an official map showing existing and proposed public streets, waterways and public areas;⁵ and may prepare a five-year capital outlay program for the locality based on the comprehensive plan.⁶

A local planning commission is, therefore, an administrative entity that has specific powers and duties concerning the local comprehensive plan and the administration of the local subdivision and zoning ordinances.⁷ It has been stated repeatedly in court decisions and opinions of the Attorney General that a planning commission has no authority beyond that granted by statute, and that a governing body may not delegate its legislative power to a planning commission.⁸

Sections 15.2-2223 through 15.2-2228 provide for the development and adoption of a comprehensive plan. Section 15.2-2232 provides for the legal status of a comprehensive plan. A comprehensive plan, by itself, generally does not act as an instrument of land use control.⁹ Rather, the plan serves as a guideline for the development and implementation of a zoning ordinance.¹⁰ Section 15.2-2232(A) provides that no public area, public building, public structure, public utility facility, or public service corporation facility, whether publicly or privately owned, shall be established unless the general location and character of such building or facility is shown on the comprehensive plan or has been approved as substantially in accord with the plan.¹¹ Unless such a feature is actually shown on an adopted comprehensive plan, it shall not be constructed without approval of the governing body of the locality.¹²

Section 15.2-2232(F) provides:

On any application for a telecommunications facility, the commission’s decision shall comply with the requirements of the Federal Telecommunications Act of 1996.¹³ Failure of the commission to act on any such application for a telecommunications facility under subsection A [of § 15.2-2232] submitted on or after July 1, 1998, within ninety days of such submission shall be deemed approval of the application by the commission unless the governing body has
authorized an extension of time for consideration or the applicant has agreed to an extension of time. The governing body may extend the time required for action by the local commission by no more than sixty additional days. If the commission has not acted on the application by the end of the extension, or by the end of such longer period as may be agreed to by the applicant, the application is deemed approved by the commission. [Emphasis added.]

Section 15.2-2232(F) applies exclusively to “telecommunications” facilities. Section 15.2-2232(F) begins with the phrase “[o]n any application for a telecommunications facility.” This phrase reflects a legislative intent that an application for construction of such a facility actually be filed with the locality and referred to the planning commission. Furthermore, such application is made “under subsection A [of § 15.2-2232] on or after July 1, 1998.” Pursuant to § 15.2-2232(A), a local planning commission must decide whether “the general location or approximate location, character, and extent” of the facility is “substantially in accord with the adopted comprehensive plan or part thereof.” An additional requirement for decisions regarding applications to construct telecommunications facilities is that such decisions must be rendered in compliance with the Federal Telecommunications Act of 1996. The Telecommunications Act places restrictions on the ability of a locality to limit the provision of telecommunications service through application of land use regulations. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. The written decision of the planning commission must then be communicated to the governing body of the locality.

The Supreme Court has stated that “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.” I must, therefore, conclude that the provisions of § 15.2-2232(A) and (F) do not permit the planning commission of Franklin County to review for compliance with the comprehensive plan existing locations of telecommunications towers in parts of the county that are not subject to zoning. Any such review by the commission may be undertaken only when “application for a telecommunications facility” is made with the county. Until July 1, 1998, telecommunications facilities have been unrestricted by the statute as to their location in Franklin County. After July 1, 1998, any application for a telecommunications facility to be located in Franklin County must comply with § 15.2-2232(F).

1"Any opinion request to the Attorney General by an attorney for the ... county ... shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).
2VA. CODE ANN. §§ 15.2-2251 to 15.2-2253 (Michie Repl. Vol. 1997)
3Section 15.2-2223 (Michie Repl. Vol. 1997).
4Section 15.2-2286 (Michie Supp. 2001).
5Section 15.2-2233 (Michie Repl. Vol. 1997).
See, e.g., § 15.2-2204 (Michie Supp. 2001); §§ 15.2-2221, 15.2-2223, 15.2-2239, 15.2-2251, 15.2-2258 to 15.2-2261 (Michie Repl. Vol. 1997).

5See Laird v. City of Danville, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983) (because zoning and rezoning constitute legislative acts, such acts may be performed only by county’s governing body—board of supervisors—and then only by ordinance), construed in Krisnathevin v. Fairfax County, 243 Va. 251, 254, 414 S.E.2d 595, 596 (1992); Op. Va. Att’y Gen.: 1989 at 113, 114 (noting that planning commission has no authority beyond that expressly conferred by statute); 1981-1982 at 114, 115 (noting that any delegation of legislative authority to advisory body, such as planning commission, must be authorized by statute); 1978-1979 at 203, 204 (noting that planning commission’s role in amendment process is advisory only); see also Arkenberg v. City of Topeka, 197 Kan. 731, 735, 421 P.2d 213, 217 (1966) (until governing body makes final decision, application for rezoning remains in process of consideration; no finality in any action taken by planning commission).


8See Op. Va. Att’y Gen.: 1983-1984 at 80, 82 (concluding that property owned by public body and devoted to governmental purpose of operating sanitary landfill for local citizens is considered to be public area within meaning of predecessor statute to § 15.2-2232(A)); 1976-1977 at 237 (concluding that school site is subject to conformity review process under predecessor statute to § 15.2-2232(A)). But see 1964-1965 at 258, 259 (noting that businesses, such as apartments, hotels, filling stations and stores, are not public areas subject to review under predecessor statute to § 15.2-2232(A)).


11Section 15.2-2232(F).


15Section 15.2-2232(F).

16A statute ... in general and comprehensive terms and prospective in operation applies not only to situations existing at the time of its enactment, but to situations and subjects which may come into existence thereafter.” Great A. & P. T. Co. v. Richmond, 183 Va. 931, 950, 33 S.E.2d 795, 803 (1945).
Responsibility of police department of town issuing warrant for fugitive's arrest to retrieve and return to court fugitive held in another locality. Governor's discretionary selection of agent to retrieve and return to court fugitive located in another state is final and binding.

THE HONORABLE H.S. CAUDILL
SHERIFF FOR TAZEWELL COUNTY
DECEMBER 20, 2002

ISSUES PRESENTED
You pose two questions regarding the appropriate law enforcement agency responsible for the retrieval and return of a fugitive to court for trial. Specifically, you ask whether, pursuant to a warrant sworn out by a town police department within a county, the county sheriff's office or the town police department is responsible for returning to court a fugitive from another locality. You also ask which law enforcement agency is responsible for returning to court a fugitive located in another state.

RESPONSE
It is my opinion that the police department of the town issuing the warrant for a fugitive's arrest is responsible for the retrieval and return to court of a fugitive held in a locality other than the one issuing the warrant. It is further my opinion that under the Uniform Criminal Extradition Act, the Governor may appoint any agent he chooses to retrieve and return to court a fugitive located in another state.

FACTS
It is my understanding that the Tazewell County sheriff's office does not have the manpower to form a separate transportation unit to retrieve and return fugitives located outside the county. It is further my understanding that the sheriff's office is the chief criminal law enforcement agency for the county; however, there are town police departments within the county. You inquire whether it is the duty of the sheriff's department to retrieve and return a fugitive to court wanted on a warrant issued by one of the town police departments located within the county.

APPLICABLE LAW AND DISCUSSION
Section 15.2-1701 requires that, "[w]hen a locality provides for a police department, the chief of police shall be the chief law enforcement officer of that locality." Section 15.2-1704(A) provides:

The police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.

This Office previously has concluded that, when it is the duty of a police department to investigate crimes, it is that department's responsibility, as part of the investigatory process, to retrieve a fugitive located in another jurisdiction. This is also the case for
a person arrested by a police department and brought to court for his initial arraignment.\(^3\) Therefore, when a fugitive is held in another locality, it is the duty of the police department of the locality issuing the warrant to retrieve and return the fugitive to the court.

You further inquire concerning the agency responsible for returning to court a fugitive located in another state. The Uniform Criminal Extradition Act\(^4\) governs the retrieval of fugitives from other states. Section 19.2-108 of the Act provides:

> Whenever the Governor shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this Commonwealth, from the executive authority of any other state, ... he shall issue a warrant under the seal of this Commonwealth to some agent commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county or city in this Commonwealth in which the offense was committed.

Thus, the selection of the agent to retrieve a fugitive from another state is within the sole discretion of the Governor. The Governor’s decision is final and binding. Presumably, the Governor will appoint an agent from the locality demanding return of the fugitive. The Governor, however, could appoint an agent from the county sheriff’s office, even if a town within the county issues the warrant.

**CONCLUSION**

Accordingly, it is my opinion that the police department of the town issuing the warrant for a fugitive’s arrest is responsible for the retrieval and return to court of a fugitive held in a locality other than the one issuing the warrant. It is further my opinion that under the Uniform Criminal Extradition Act, the Governor may appoint any agent he chooses to retrieve and return to court a fugitive located in another state.

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to be rendered in service district, receive funds, or provide services; provides for tax levy to be set annually as part of budget process with other tax rates. Amended ordinance does not create long-term unconditional debt obligation, in violation of Constitution, and does not delegate legislative authority of city council.

THE HONORABLE MOLLY JOSEPH WARD  
TREASURER FOR THE CITY OF HAMPTON  
MR. A. PAUL BURTON  
CITY ATTORNEY FOR THE CITY OF HAMPTON  
OCTOBER 28, 2002

ISSUE PRESENTED

A prior opinion of this Office concludes that an ordinance adopted June 13, 2001, by the City of Hampton, establishing the Elizabeth Lake Estates Service District, creates an unconstitutional debt obligation and impermissibly delegates the legislative authority of the city to a private association. You ask whether the amendments to the ordinance, adopted by the Hampton city council on June 26, 2002, cure the unconstitutional infirmities noted in the prior opinion.

RESPONSE

Because the Hampton city council now has imposed an annual tax and appropriations mechanism, it is my opinion that the amended ordinance does not create a long-term unconditional debt obligation, in violation of the Constitution of Virginia, nor does it delegate to others the legislative function of the city council.

BACKGROUND AND APPLICABLE AUTHORITIES

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, Virginia Attorneys General traditionally have declined to render such opinions when the request involves a matter of purely local concern or procedure. Accordingly, I have limited my comments to the authority of a Virginia locality to adopt the June 26, 2002, ordinance described.

Article 1, Chapter 24 of Title 15.2, §§ 15.2-2400 through 15.2-2403, contains the laws governing service districts in the Commonwealth. Section 15.2-2400 authorizes localities to create service districts by ordinance “to provide additional, more complete or more timely services of government than are desired in the locality or localities as a whole.” The authorized governmental services are enumerated in § 15.2-2403(1)-(2). A service district may acquire real and personal property, hire employees, contract with any person, and impose taxes on real estate in the service district, if necessary, to provide the statutorily authorized governmental services.
Pursuant to the authority granted localities in Chapter 24 of Title 15.2, the City of Hampton created by ordinance the Elizabeth Lake Estates Service District. The ordinance sets forth a procedure by which interested entities may present an annual plan for services to be rendered in the service district. If the city council approves the proposed plan, it will appropriate funds annually to implement the plan and may enter into agreements with interested entities to effectuate the services within the service district. Unlike the ordinance reviewed in the prior opinion, the amended ordinance does not specify that the Elizabeth Lake Estates Civic Association shall be the entity to develop the plan, receive the funds, or provide the services. The amended ordinance provides for an annual tax levy that, after 2003, will be set annually as part of the budget process with other tax rates. The ordinance reviewed in the prior opinion imposed a tax for five years.

DISCUSSION

Article VII, § 10(b) of the Constitution of Virginia prohibits localities from contracting debt unless the proposed debt is authorized by general law and approved by referendum. A "debt" is described as establishing an unconditional long-term obligation to make payments in future years. A long-term contract for services is permissible only if payment is required as services are rendered.

The amended ordinance imposes an annual tax. Under this ordinance, the revenue from the tax will be appropriated annually, following approval of annual plans to provide services, and paid pursuant to agreements with entities whose plans have been approved by council. In view of the annual tax and appropriation process, the ordinance does not establish an unconditional long-term obligation to make payments in future years that would constitute a "debt" under Article VII, § 10(b). Therefore, it is my opinion that the amended ordinance is consistent with the mandates of Article VII, § 10(b).

Any determination as to the provision of services and the appropriation of funds to pay for them is a legislative function. "[T]he power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people." If allowed by statute, local governing bodies may delegate the exercise of these legislative functions to subordinate bodies, officers, or employees, but the subordinate body's exercise of these functions continues to be considered a legislative action. Section 15.2-2403(9) allows a local governing body to create a development board and to delegate to the board the authority to control and manage the funds appropriated to the service district.

Unlike the ordinance reviewed in the prior opinion, the amended ordinance provides that "interested entities" may present a plan to render services in the service district. If the city council approves the plan, it will appropriate funds annually to implement the plan and may enter into agreements with the entities that presented plans to effectuate the delivery of services.
While the Elizabeth Lake Estates Civic Association is obviously an interested entity that may present a plan to provide services in the district, the ordinance allows other entities to also present plans for consideration. The amended ordinance permits more than one entity to present a plan, more than one plan to be adopted for a year, and agreements to be entered into with more than one interested entity to deliver the services. In other words, the "interested entity" is the same as any vendor or contractor from which the city may obtain other goods and services.  

Under the amended ordinance, the city council may approve the annual plan describing the services to be rendered and the cost, and appropriate annually the funds to implement the plan, if it sees fit. The council clearly retains, and will exercise annually, its legislative function to determine the services to be provided in the service district and the amount expended in a given budget or fiscal year to provide those services. Therefore, it is my opinion that the amended ordinance does not delegate the city council's legislative authority.

Section 15.2-2403(1) expressly prohibits a service district from providing "services, events or activities ... undertaken for the sole or dominant benefit of any particular individual, business or other private entity." The amended ordinance states that "[t]he city believes that any benefit that may possibly inure to the Elizabeth Lake Estates Civic Association, itself as a result of the creation of this service district is merely incidental to the public benefits that are derived from the beautification, maintenance, improvement, etc. of the area." To the extent such services improve or maintain the real estate owned in common by the Association, a benefit is clearly conferred upon the Association, a private entity. Such a private benefit, however, is permissible if it is merely incidental to a public benefit. The questions regarding whether a particular transaction is executed in performance of a proper governmental function, and whether the resulting benefits inure primarily to the public and only incidentally to private interests, are to be determined from the factual circumstances in each case.

This Office refrains from issuing opinions on questions of fact rather than questions of law.  

CONCLUSION

Accordingly, because the Hampton city council now has imposed an annual tax and appropriations mechanism, it is my opinion that the amended ordinance does not create a long-term unconditional debt obligation, in violation of the Constitution of Virginia, nor does it delegate to others the legislative function of the city council.


Section 37-140(3) of the Hampton, Va., Code, provides:

“The plan for providing such facilities and services shall be for interested entities to present a plan for the services to be rendered in the service district to city council for approval annually. Said plan shall specifically describe the services to be rendered, the cost thereof and the relationship between the service and the benefit to the service district and the public generally. Council shall approve or disapprove the plan and costs thereof and, if approved, appropriate the funds for the services from any available Elizabeth Lake Estates Service District revenues, on an annual basis. The city may enter into agreements with these entities to effectuate the delivery of services in the service district and the transfer of appropriated funds. Entities receiving service district funds shall annually submit a report to city council detailing the use of service district funds which council shall review and evaluate. In addition, entities receiving service district funds shall submit to the City of Hampton, annual financial statements, audited by a licensed certified public accountant, (the auditor), including the auditor’s report on compliance with this ordinance as to use and purpose of revenues, expenditures, assets, liability and residual fund balance resulting from monies provided under this ordinance; and, the auditor’s report on internal controls over financial reporting and bookkeeping. The financial statements and related reports of the certified public accountants are to be provided to the city’s director of finance annually on or before September 30th of each year.

“Funds collected by the city as a result of this tax shall be used in accordance with the powers enumerated in Section 15.2-2403, of the Code of Virginia, 1950, as amended and as set forth in the plan approved by city council.”

See HAMPTON, VA., CODE § 37-140(5), supra note 8.


Fairfax County v. County Executive, 210 Va. 680, 683-84, 173 S.E.2d 869, 872 (1970); see also Herren, 230 Va. at 395, 337 S.E.2d at 744; (noting that continuing-services contracts impose no obligation to pay for future services; only meet accounts payable for services rendered that year).

See HAMPTON, VA., CODE § 37-140(5), supra note 8.

Id. § 37-140(3).

See cites supra note 12.

See Leonard v. Town of Waynesboro, 169 Va. 376, 385, 193 S.E. 503, 507 (1937) (reiterating holding in Stansbury v. Richmond, 116 Va. 205, 81 S.E. 26 (1914), that determination as to public improvements to be made by municipality is legislative function).


HAMPTON, VA., CODE § 37-140(3), supra note 8.

Id.

The city must comply with the Virginia Public Procurement Act, §§ 2.2-4300 to 2.2-4377, in connection with contracts to provide services within the district.
You ask whether a City of Hampton ordinance imposing a tax on real estate in the Elizabeth Lake Estates Service District is consistent with the Constitution and laws of Virginia.

RESPONSE

It is my opinion that the provisions of the ordinance relating to the expenditure of tax revenue by the Elizabeth Lake Estates Civic Association are not consistent with the debt limitations of the Virginia Constitution and are contrary to the state laws governing service districts. Therefore, the tax imposed by the ordinance is unenforceable.

BACKGROUND AND AUTHORITIES

Pursuant to the authority granted localities in § 15.2-2400 of the Code of Virginia, the City of Hampton has created by ordinance the Elizabeth Lake Estates Service District. The ordinance provides for a tax levy, and sets forth its plan for the city to enter into an agreement with Elizabeth Lake Estates Civic Association whereby the Association would receive the tax-generated funds. The agreement would require that the Association use the tax revenue to maintain the real estate owned in common by the Association and to provide other services within the district to enhance the area.

Article 1, Chapter 24 of Title 15.2, §§ 15.2-2400 through 15.2-2403, contains the laws governing service districts in the Commonwealth. Section 15.2-2400 authorizes localities to create service districts by ordinance “to provide additional, more complete or more timely services of government than are desired in the locality or localities as a
of the ordinance reveals no such manifested intention. Accordingly, it is my opinion that the tax imposed by the ordinance is unenforceable.

CONCLUSION

As noted above, the provisions of the ordinance relating to the expenditure of tax revenue by the Elizabeth Lake Estates Civic Association are inconsistent with the debt limitations of the Constitution and are contrary to the state laws governing service districts. Therefore, I am of the opinion that the tax imposed by the ordinance is unenforceable.

2 Id. § 37-140(2).
3 Section 37-140(3) of the Hampton Code provides:
"The plan for providing such facilities and services shall be for the city to enter into an agreement with Elizabeth Lake Estates Civic Association, a non-profit corporation in good standing formed under the laws of the Commonwealth of Virginia which shall receive the funds for operating the district, set the goals and budget, hire any needed staff, oversee the operations, apply for appropriate grants, coordinate programs with participating property owners and all federal, state, and local governmental entities as may be appropriate, and evaluate the effectiveness of the district programs. The Elizabeth Lake Estates Civic Association shall submit to the City of Hampton Annual Financial Statements, audited by a licensed certified public accountant, (the auditor), including the auditor's report on compliance with this division as to use and purpose of revenues, expenditures, assets, liability and residual fund balance resulting from monies provided under this division; and, the auditor's report on internal controls over financial reporting and bookkeeping. The financial statements and related reports of the certified public accountants are to be provided to the city's director of finance annually on or before September 30th of each year.
"Funds collected by the city as a result of this tax shall be used for maintenance and upkeep of the real estate owned in common by the Elizabeth Lake Estates Civic Association within the service district as well as the maintenance, repair and replacement of real property, installed equipment and such other services, events or activities which will enhance the use and enjoyment of and the safety, convenience and well being within the service district, provided that any such service, events or activities shall not be undertaken for the sole or dominant benefit of a particular individual, business or other private entity."
4 Id.
6 The ordinance provides that "Elizabeth Lake Estates Civic Association ... shall receive the funds for operating the district." HAMPTON, VA., CODE, supra § 37 140(3). "This tax ... shall continue through June 30, 2006." Id. § 37-140(5).
7 1990 Op. Va. Att'y Gen. 48, 49; see, e.g., Fairfax-Falls Church v. Herren, 230 Va. 390, 394, 337 S.E.2d 741, 743-44 (1985) (holding that, to extent employment contracts between church community services board and employees extended beyond years in which they took effect, such contracts constituted long-term obligations binding Fairfax County).
8 Herren, 230 Va. at 393, 337 S.E.2d at 743; Fairfax County v. County Executive, 210 Va. 680, 683-84, 173 S.E.2d 869, 872 (1970) (even though such contracts may extend over period of years, they are construed only as commitments to honor each year account payable incurred for services rendered that year); 1984-1985 Op. Va. Att'y Gen. 96, 98.
10 HAMPTON, VA., CODE, supra § 37-140(3).
I note that the ordinance requires the Association to provide audited financial statements annually to the city (see id.); however, financial reporting does not constitute program evaluation or control.


HAMPTON, VA., CODE, supra § 37-140(3).


A prior opinion of this Office concludes that the phrase “additional governmental services” includes those services of a type usually provided by local governments on a jurisdiction-wide basis. In the service district context, however, such services are provided on an exclusive or enhanced basis within the service district, rather than on a uniform basis throughout the jurisdiction. 1986-1987 Op. Va. Att’y Gen. 113, 114.


See supra note 3.

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. See Op. Va. Att’y Gen.: 1995 at 240, 241; id. at 260, 261; 1986-1987 at 347-48.

HAMPTON, VA., CODE, supra § 37-140(3).

Light v. City of Danville, 168 Va. 181, 206, 190 S.E. 276, 286 (1937) (noting that when private and public benefit are blended, judicial practice in such cases is to approve undertaking if it is capable of furthering public use, and disregard private benefit as mere incident); 1993 Op. Va. Att’y Gen. 84, 87.


Op. Va. Att’y Gen.: 1999 at 132, 133; 1997 at 1, 3; id. at 135, 137 n.15; id. at 195, 196; 1996 at 99, 100; id. at 102, 103; id. at 207, 208; 1991 at 122, 124.


Id. (quoting Hannabass v. Maryland Cas. Co., 169 Va. 559, 569, 194 S.E. 808, 812, (1938)).
ISSUE PRESENTED
You ask whether the Fairfax County School Board has the authority to amend its nondiscrimination policy to include sexual orientation.

RESPONSE
It is my opinion that, without enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy.

FACTS
You relate that the Fairfax County School Board is considering an amendment to its policy of nondiscrimination to include sexual orientation as a category for nondiscrimination. You inquire whether the school board has the authority to include this category in its policy. You further relate that the school board has not voted on this proposed change.

APPLICABLE AUTHORITIES AND DISCUSSION
The Fairfax County School Board policy provides:

No student, employee, or applicant for employment in the Fairfax County Public Schools shall, on the basis of age, race, color, sex, religion, national origin, marital status, or handicapping condition, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity, as required by law. It is the express intent of the School Board that every policy, practice, and procedure shall conform to all applicable requirements of federal and state law.^[1]

You advise that a proposed amendment to the policy inserts the phrase "sexual orientation" after the words "marital status" and deletes the words "as required by law."^[2]

Virginia adheres to the Dillon Rule of strict construction, which provides that "[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable."^[3] Any doubt as to the existence of a power must be resolved against the locality.^[4] The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth,^[5] which, in turn, rests on the foundation of Article I, § 14 of the Constitution of Virginia.^[6]

This Office previously has concluded that, without enabling legislation, Fairfax County has no authority to prohibit discrimination based on sexual orientation, and, further, that such authority cannot be either "fairly or necessarily implied" from discrimination based on sex.^[7] Fairfax County has authority to adopt an ordinance "prohibiting discrimination in ... employment ... and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status or disability."^[8]
As the Supreme Court of Virginia has noted, "[s]chool boards ... constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other." The Fairfax County School Board is subject to the Dillon Rule as is Fairfax County. As such, the school board may exercise no greater authority than that authorized by statute. Thus, without enabling legislation, the school board has no authority to add sexual orientation as a category in its nondiscrimination policy.

CONCLUSION

Accordingly, it is my opinion that, absent enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy.

2Draft Sch. Bd. Policy, supra note 1 (quoting proposed Policy 1450.3).
5"County government ... is ... one of the instruments or agencies through which the State performs its functions of government. It is an arm of the State." Board of Supervisors v. Cox, 155 Va. 687, 710, 156 S.E. 755, 762 (1931).
6Article I, § 14 guarantees "[t]hat the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This language is identical to Article I, § 14 of the 1902 Constitution and remains unchanged from § 14 of the Declaration of Rights, adopted June 12, 1776.
8VA. CODE ANN. § 15.2-853 (Michie Repl. Vol. 1997). Chapter 8 of Title 15.2, §§ 15.2-800 to 15.2-858, contains Virginia's laws governing the urban county executive form of government. Fairfax County has adopted this form of government. See VA. Ass'n COUNTIES, VIRGINIA COUNTY SUPERVISORS' MANUAL, at 3 - 10 (6th ed. 1998).
10Fairfax Zoning Board v. Cedar Knoll, 217 Va. 740, 743, 232 S.E.2d 767, 769-70 (1977); see also Commonwealth v. Arlington County Bd., 217 Va. 558, 578-79, 232 S.E.2d 30, 43, (1977) (holding that express statutory authority is necessary to confer collective bargaining power to local boards when General Assembly has not conferred such power by implication or otherwise).
General Assembly must enact legislation enabling Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation or Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation.

THE HONORABLE KENNETH R. PLUM
MEMBER, HOUSE OF DELEGATES
APRIL 30, 2002

ISSUES PRESENTED
You ask whether it is necessary for the General Assembly to enact enabling legislation to allow (1) Fairfax County to prohibit discrimination due to sexual orientation or (2) the Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation.

RESPONSE
My answer is that enabling legislation is required in both instances.

FACTS
You state that, during the 2002 Session of the General Assembly, you presented to the House Committee on Counties, Cities and Towns, House Bill No. 750, which would have amended §§ 15.2-853 and 15.2-854 of the Code of Virginia by adding "sexual orientation" as prohibited discrimination with regard to actions and investigations by a human rights commission in a county that has adopted the urban county executive form of government. At that time, a committee member advised that your bill was unnecessary because the Constitution of Virginia protects individual rights.

DISCUSSION
Section 15.2-853 authorizes counties with an urban county executive form of government to establish human rights commissions by ordinance. This enabling statute allows such an ordinance to prohibit "discrimination in housing, real estate transactions, employment, public accommodations, credit and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status or disability."

Virginia adheres to the Dillon Rule of strict construction, which provides that "[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable." Any doubt as to the existence of a power must be resolved against the locality. The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth, which, in turn, rests on the foundation of Article I, § 14 of the Constitution of Virginia.

The prohibition against discrimination based on sex in § 15.2-853 relates to one's gender. It is the biological condition of sex, whether one is male or female, rather than any particular sexual manifestation, that is the object of the prohibited discrimination. Therefore, authority to prohibit or investigate alleged discrimination based on sexual orientation may not be "fairly or necessarily implied" from discrimination based on sex.
CONCLUSION

Accordingly, it is my opinion that it is necessary for the General Assembly to enact enabling legislation to allow Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation or the Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation.

1"Sexual orientation" means "[a] person's predisposition or inclination toward a particular type of sexual activity or behavior: heterosexuality, homosexuality, or bisexuality." BLACK'S LAW DICTIONARY 1379 (7th ed. 1999).

2House Bill No. 750 was passed by indefinitely in the House Committee on Counties, Cities and Towns on February 1, 2002.

3You do not advise as to the substance of the committee member's argument beyond this truism. I am, therefore, unable to opine on the legal merits of the argument.

4Chapter 8 of Title 15.2, §§ 15.2-800 to 15.2-858, contains Virginia's laws governing the urban county executive form of government. Fairfax County is the only political subdivision of the Commonwealth so organized at present. See H.B. 750, available at http://legis.state.va.us.

5House Bill No. 750 would have inserted in the first sentence of § 15.2-853, "sexual orientation" after "marital status."


8"County government ... is ... one of the instruments or agencies through which the State performs its functions of government. It is an arm of the State." Board of Supervisors v. Cox, 155 Va. 687, 710, 156 S.E. 755, 762 (1931).

9Article I, § 14 guarantees "[t]hat the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This language is identical to Article I, § 14 of the 1902 Constitution and remains unchanged from § 14 of the Declaration of Rights, adopted June 12, 1776.

10"Sex" means "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism." BLACK'S LAW DICTIONARY, supra note 1, at 1379.


12White, 259 Va. at 712, 528 S.E.2d at 708.
provided contemplated use of funds furthers public purpose of Authority; may not make pledge, loan or grant to IDA to fund operating expenses of medical facility.

THE HONORABLE CLARENCE E. PHILLIPS
MEMBER, HOUSE OF DELEGATES
NOVEMBER 27, 2002

ISSUES PRESENTED

You ask whether the Virginia Coalfield Economic Development Authority may pledge collateral for a line of credit to be used by the Dickenson County Industrial Development Authority to purchase the hard assets and real estate of the Dickenson County Medical Center1 ("medical facility"). You next ask whether the economic development authority may utilize its funds in the form of a loan or grant to the industrial development authority for the purchase of the assets and real estate of the medical facility. You also ask whether the funds of the economic development authority may be pledged to the industrial development authority for operating expenses of the medical facility.

RESPONSE

It is my opinion that § 15.2-6011 authorizes the Virginia Coalfield Economic Development Authority to pledge its funds as collateral for a line of credit to the Dickenson County Industrial Development Authority for the purchase of machinery and tools or real estate of a medical facility, which qualifies as an "authority facility" as defined in § 15.2-4902. It is also my opinion that § 15.2-6011 authorizes the Authority to loan or grant funds to the industrial development authority for the purchase of machinery and tools or real estate of a medical facility, which qualifies as an "authority facility" as defined in § 15.2-4902. In both cases, the Virginia Coalfield Economic Development Authority may pledge its funds and make a loan or grant, for any of the purposes enumerated in § 15.2-6011, provided the Authority makes an independent legislative determination that the contemplated use of the funds furthers its public purposes. Finally, it is my opinion that § 15.2-6011 does not authorize the Authority to make a pledge, loan or grant to the Dickenson County Industrial Development Authority to fund the operating expenses of a medical facility.

APPLICABLE LAW AND DISCUSSION

Chapter 60 of Title 15.2, §§ 15.2-6000 through 15.2-6015, creates the Virginia Coalfield Economic Development Authority and details its powers. The Authority is created as a "body politic and corporate, a political subdivision of the Commonwealth,"2 to assist the Southwest Virginia coalfield region in economic development.3 "All powers, rights and duties conferred ... upon the Authority" are exercised by its sixteen-member Board.4 Dickenson County is one of the localities participating in the Authority, as specified in § 15.2-6002.

Chapter [60] is remedial in nature and is intended to address long-standing and intractable problems related to economic development and the absence of a diverse economic base in the coalfield region of Virginia. As a remedial statute, Chapter [60] should be liberally construed to accomplish this underlying legislative intent.5
Section 15.2-6011 authorizes the Virginia Coalfield Economic Development Authority to pledge its funds and to make loans and grants for the benefit of qualified private, for-profit enterprises; nonprofit industrial development corporations; or industrial development authorities. Section 15.2-6011 also specifies the eligible uses and projects for which the Authority may pledge funds to industrial development authorities. Specifically, § 15.2-6011 provides that the Virginia Coalfield Economic Development Authority is ... empowered to pledge its funds, and make loans and grants to ... industrial development authorities for financing the following:

1. Purchase of real estate;
2. Grading of site(s);
3. Construction of flood control dams;
4. Water, sewer, natural gas and electrical line replacement and extensions;
5. Construction or rehabilitation or expansion of buildings;
6. Construction of parking facilities;
7. Access roads construction and street improvements;
8. Purchase or lease of machinery and tools;
9. Construction of improvements outside the Commonwealth if in the Breaks Interstate Park; and
10. Such other improvements as the Authority deems necessary to accomplish its purpose. 

The Virginia Coalfield Economic Development Authority may pledge its funds for one of the eligible purposes specified in § 15.2-6011, including the purchase of real property and certain other property by the industrial development authority. The Authority may pledge its funds and make a loan or grant, as enumerated in § 15.2-6011, provided it makes an independent legislative determination that the contemplated use of the funds furthers the public purposes of the authority. Therefore, the Virginia Coalfield Economic Development Authority has the discretion to pledge its funds to the industrial development authority for the purchase of real estate and such things as machinery and tools, so long as it is satisfied, based on all the relevant facts, that the pledge is for one or more of the purposes set forth in § 15.2-6011.

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. Section 15.2-6011 may not be read to authorize the Authority to pledge funds to the industrial development authority to fund the operating expenses of a medical facility. Funding for “operating expenses” is not listed as a permitted financing by the Authority.
Accordingly, it is my opinion that § 15.2-6011 authorizes the Virginia Coalfield Economic Development Authority to pledge its funds as collateral for a line of credit to the Dickenson County Industrial Development Authority for the purchase of machinery and tools or real estate of a medical facility, which qualifies as an “authority facilit[y]” as defined in § 15.2-4902. It is also my opinion that § 15.2-6011 authorizes the Authority to loan or grant funds to the industrial development authority for the purchase of machinery and tools or real estate of a medical facility, which qualifies as an “authority facilit[y]” as defined in § 15.2-4902. In both cases, the Virginia Coalfield Economic Development Authority may pledge its funds and make a loan or grant, for any of the purposes enumerated in § 15.2-6011, provided the Authority makes an independent legislative determination that the contemplated use of the funds furthers its public purposes. Finally, it is my opinion that § 15.2-6011 does not authorize the Authority to make a pledge, loan or grant to the Dickenson County Industrial Development Authority to fund the operating expenses of a medical facility.

1For the purposes of this opinion, I assume that the Dickenson County Medical Center is a medical facility that qualifies as an “authority facilit[y]” as defined in § 15.2-4902.
51989 Op. Va. Att’y Gen. 132, 134 (citing Chapter 40, predecessor to Chapter 60); see also § 15.2-6013 (Michie Repl. Vol. 1997) (providing that Chapter 60 “shall be liberally construed to effect the purposes thereof”).
7Section 15.2-6011 (Michie Repl. Vol. 1997).
8Section 15.2-6011(1), (8).

OP. NO. 02-013
COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT.

Water authority may assess connection fee as proportionate part of costs of constructing water system; may review periodically and adjust amount of connection fee as necessary.
You ask whether a fee for connecting to a water system constructed by a water authority may be assessed as a proportionate part of the costs of installing the pertinent water facilities ("construction costs"). If so, you ask whether such connection fee complies with the requirement in § 15.2-5137(E) of the Code of Virginia for periodic review by the authority.

I answer your first question in the affirmative by stating that a water authority may assess, as a proportionate part of the construction costs, a fee for connecting to such water system. I answer your second question by stating that the facts are insufficient to determine whether the connection fee complies with the requirement in § 15.2-5137(E) for periodic review by the authority.

BACKGROUND

You advise that a county water authority functions as a local public service authority. You also advise that the authority's neighborhood line extension policy allows the construction of waterlines where a majority of the neighboring residents agree to contribute, in escrow, their share of the construction costs. You relate that, upon completion of the waterline construction, the nonconnecting residents are assessed their proportionate share of the construction costs.

You advise further that the water authority relies on §§ 15.2-5136 and 15.2-5137 to compel the owners, tenants or occupants of each parcel of land abutting a public or private street containing a water main or water system ("resident(s)") to pay a proportionate part of the construction costs. Furthermore, you relate that the water authority relies on § 15.2-5139 to place a lien on the real estate of any resident whose construction costs are delinquent at the time the line construction is complete.

You believe that the water authority has authority to establish and charge a fair and reasonable connection fee, a nonuser fee to nonconnecting residents, and to place liens on real estate to collect delinquent fees in accordance with the applicable statutory provisions. You do not believe, however, that the connection fees meet the "fair and reasonable" criteria established in § 15.2-5137(E), and state that the water authority's attempt to recover the construction costs as a connection fee appears to be a special tax assessment under § 15.2-2404 that is beyond the statutory powers of the county water authority.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2404 authorizes a locality to impose taxes or assessments upon abutting property owners "for the construction, replacement or enlargement of water lines" and other public improvements.1 Under § 15.2-2405, "[s]uch improvements may be ordered by the governing body" pursuant to (1) "an agreement between the governing body and the abutting landowners"; (2) "a petition from not less than three-fourths of the landowners" affected by the improvement; or (3) "a two-thirds vote of all the
members elected to the governing body.” “Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.”

It is clear from the facts that the county water authority is not a locality within the meaning of § 15.2-2404. Therefore, the water authority has no statutory authority to impose a special tax assessment.

Section 15.2-5136 authorizes an authority created pursuant to the Virginia Water and Waste Authorities Act to fix rates and charges for its services. Section 15.2-5136(A) specifically authorizes a water authority to “fix and revise rates, fees and other charges.” Section 15.2-5137(A) provides that, “with concurrence of the locality,” connection to the authority’s water system shall be mandatory. Additionally, § 15.2-5137(A) provides that “such connections shall be made in accordance with rules and regulations adopted by the authority, which may provide for a reasonable charge for making such a connection.” It appears from the nature, context, and purpose of these provisions that the General Assembly intended the term “shall,” as used in §§ 15.2-5136(A) and 15.2-5137(A), to be treated as mandatory.

Section 15.2-5137(B) provides an exception to the mandatory water connection in § 15.2-5137(A):

[T]hose persons having a domestic supply or source of potable water shall not be required to discontinue the use of such water. However, persons not served by a water supply system, as defined in § 15.2-2149, producing potable water meeting the standards established by the Virginia Department of Health may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge, ... or any combination of such fees and charges.

Therefore, unless the nonconnecting residents are served by a water supply system as defined in § 15.2-2149, the water authority may impose a connection fee, a front footage fee, and a monthly nonuser service charge or a combination of those charges.

Section 15.2-5136(A) authorizes an authority to “fix and revise rates ... and other charges ..., subject to the provisions of this section, for the use of ... any ... water ... system.” Section 15.2-5137(E) provides that “[w]ater ... fees established by any authority shall be fair and reasonable.” The General Assembly provides no definition of the term “fair and reasonable” as used in § 15.2-5137(E). A 1976 opinion of the Attorney General responds to a request regarding the standards governing the costs of water and sewer connections. The opinion notes that § 15.1-1261 “provides that the connection charge shall be ‘reasonable.’” Further, the opinion states:

Section 15.1-1260 provides that the aggregate sum of all fees and charges for the use of and for services furnished by any water or sewer system shall provide funds sufficient to defray operating costs, pay the principal of, and the interest on, the revenue bonds as the same shall become due, and provide a margin of safety for
making such payments. A reasonable inference, therefore, is that all charges assessed by a sewer and water authority are to be cost-based, although not necessarily limited precisely to actual costs because of the requirement that the funds collected provide a margin of safety for meeting the obligations of the authority.\[8\]

The General Assembly has taken no action to alter the conclusion of the 1976 opinion. The repeal of §§ 15.1-1260 and 15.1-1261 and enactment of §§ 15.2-5136 and 15.2-5137 by the 1997 Session of the General Assembly did not affect the pertinent language of these two statutory provisions.\[9\] 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.”\[10\]

The connection fees you describe represent a proportionate part of the construction costs. Specifically, you advise that such construction costs may include, but are not limited to, engineering, survey, design and construction of mains and appurtenances, and the requisite meter boxes and service lines, including an appropriate allocation of administrative costs. All of these costs appear to be associated with the construction of the pertinent water facilities. Furthermore, the connection fee charges appear to be cost-based. Therefore, based on the conclusion of the 1976 opinion, I must conclude that the water authority may include a fee for connecting to a water system constructed by the authority as a proportionate part of its construction costs.

You next ask whether such connection fee complies with the requirement in § 15.2-5137(E) for periodic review by the authority.

Section 15.2-5137(E) provides that water fees established by an authority “shall be reviewed by the authority periodically and shall be adjusted, if necessary, to assure that they continue to be fair and reasonable.”

In the case of Huffman v. Kite, the Supreme Court of Virginia considered the meaning of a state statute using the word “shall” in connection with circuit court appointments of school trustee electoral board members within thirty days after July 1.\[11\] Ruling that the time limit imposed on circuit courts by statute was not mandatory, the Court stated:

> If it appears from the nature, context, and purpose of the act that the legislature intended that “shall” be treated as advisory or directory, then it should be accorded that meaning.\[12\]

Therefore, “the use of ‘shall,’ in a statute requiring action by an official, is directory and not mandatory unless the statute manifests a contrary intent.”\[13\] I am of the opinion that the use of the term “shall” in § 15.2-5137(E) is not intended as a mandatory requirement that an authority review connection fees periodically. Rather, the term “shall” appears to be advisory or directory in nature, and permits periodic review and adjustment of the connection fee amount, as may be necessary, by a water authority.
Although you provide a copy of the authority’s neighborhood line extension policy, you offer no facts regarding review of connection fees by the county water authority in this matter. Consequently, I am unable to conclude whether such connection fees have been reviewed periodically by the authority.

CONCLUSION

Accordingly, it is my opinion that a water authority may include as a proportionate part of the construction costs a fee for connecting to a water system constructed by the authority. Moreover, the use of the term “shall” in § 15.2-5137(E) appears to be advisory or directory in nature, and permits an authority to review periodically and adjust the amount of connection fees, as necessary.

1Section 15.2-2404 also provides that the taxes or assessments imposed on abutting property owners “shall not be in excess of the peculiar benefits resulting from the improvements to such property owners.”


4The word “shall” in a statute ordinarily, but not always, implies that its provisions are mandatory. Compare Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (holding that statute using “shall” required court to summon nine disinterested freeholders in condemnation case), and Ladd v. Lamb, 195 Va. 1031, 1035-37, 81 S.E.2d 756, 759-60 (1954) (holding that statute providing that clerk of court “shall forward” copy of conviction to Department of Motor Vehicles Commissioner within fifteen days is not mandatory but merely directory).

5Section 15.2-2149 provides that “[a]ny person, including municipal corporations, that proposes to establish a water supply consisting of a well, springs, or other source and the necessary pipes, conduits, mains, pumping stations, and other facilities in connection therewith, to serve or to be capable of serving three or more connections shall notify the State Board of Health and shall notify in writing the governing body of the county in which such water system is to be located and shall appear at a regular meeting thereof and notify such governing body in person.”


7Id. at 424.

8Id.


11198 Va. 196, 93 S.E.2d 328 (1956).

12Id. at 202, 93 S.E.2d at 332.


14You include with your request a copy of the Policy of Bedford County Public Service Authority as to Implementation of Its Mandatory Hookup and Payment of Connection and Non-User Fees Requirements Instituted December 17, 1984, which was approved September 21, 1999, and a copy of the revised draft Neighborhood Line Extension Policy which, according to the handwriting on the first page, was adopted September 18, 2001.
OP. NO. 02-046
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Discretionary authority of juvenile court judge to appoint guardian ad litem or counsel is not applicable where court appointment of counsel is mandated for hearings involving allegedly abused or neglected child; child in need of services or supervision; or delinquent child; parent, guardian or adult. Judge may appoint counsel or guardian ad litem, but not both, to represent child(ren), parent or guardian in all other cases.

THE HONORABLE ROBERT N. BALDWIN
EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA
JULY 16, 2002

ISSUES PRESENTED
You seek clarification of a recent opinion of the Attorney General concerning § 16.1-266 of the Code of Virginia. First, you ask whether § 16.1-266(D), regarding the discretionary authority of the judge of a juvenile and domestic relations district court ("juvenile court") to appoint a guardian ad litem or counsel, is applicable in the same proceedings covered by §§ 16.1-266(A)-(C). Second, you ask whether § 16.1-266(D) permits the appointment of both a guardian ad litem and counsel for the same party.

RESPONSE
It is my opinion that § 16.1-266(D) is not applicable to proceedings within the purview of §§ 16.1-266(A)-(C), which makes such appointments mandatory in certain specific matters and proceedings. In all other matters covered by § 16.1-266(D), the judge may, in his discretion, appoint either a guardian ad litem or counsel, but not both.

BACKGROUND
You relate that there are instances in which it is advisable to appoint both a guardian ad litem and counsel, given the distinction in their roles. You express concern that the prior opinion has a sweeping impact on the current practice of the juvenile courts in utilizing guardians ad litem.

APPLICABLE LAW AND DISCUSSION
The issue in the prior opinion concerned whether § 16.1-266 authorizes a juvenile court to appoint a guardian ad litem for a juvenile defendant, in addition to the appointment of legal counsel to represent the juvenile defendant. Based on the plain language of §§ 16.1-266(B) and (D), the opinion determined 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.

Section 16.1-266(A) provides:

Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is otherwise before the court pursuant to
subdivision A 4 of § 16.1-241 or § 63.2-1230, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child pursuant to § 16.1-266.1.[7] [Emphasis added.]

Section 16.1-266(B) provides that, “prior to the detention review hearing or the adjudicatory or transfer hearing involving a child who is alleged to be in need of services, in need of supervision or delinquent,” the juvenile court shall advise of the child’s right to counsel of his own choosing. Section 16.1-266(C) provides that, prior to a hearing of alleged abuse or neglect, or the risk of abuse or neglect, of a child by a parent, guardian or other adult, and a hearing wherein “a parent could be subjected to the loss of residual parental rights,” such person shall be informed of his right to counsel. If counsel cannot be employed or the right to counsel is not waived in writing prior to the juvenile court hearings described in § 16.1-266(B) and (C), “the court shall appoint an attorney-at-law to represent” such child or person. (Emphasis added.) Section 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 or children or the parent or guardian, a discreet and competent attorney-at-law may be appointed by the court.” (Emphasis added.)

“The jurisdiction, practice, and procedure of the juvenile ... courts are entirely statutory, and are set forth in Chapter 11 of Title 16.1,” §§ 16.1-226 through 16.1-361. The juvenile courts have “exclusive original jurisdiction” over the several cases, matters and proceedings enumerated in § 16.1-241.

It is axiomatic that, “where the language of a statute is free from ambiguity, its plain meaning is to be accepted.” By its plain language, § 16.1-266(A)-(C) does not provide for appointment by the juvenile court of both a guardian ad litem and counsel in the hearings described in those subsections; each subsection specifically mentions one or the other. Generally, the “mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.” In the limited circumstances specified in § 16.1-266(A)-(C), the court is required to appoint a guardian ad litem or counsel, as delineated in each subsection.

The remaining jurisdictional areas of the juvenile court fall within the purview of § 16.1-266(D), and the appointment of a guardian ad litem or counsel in those cases is discretionary with the court. The ordinary meaning of the word “or” in § 16.1-266(D) is disjunctive and means that a court may appoint a guardian ad litem or counsel in those situations covered by that subsection. It is only when “necessary to effectuate the obvious intention of the legislature [that] disjunctive words may be construed as conjunctive, and vice versa.” There is nothing in the language of § 16.1-266(D), or the section itself, “which points to the conclusion that it was the obvious intention of the legislature’ that the word ‘or’ was intended to mean ‘and.’” As such, it may be assumed “that the draftsman intended the word ‘or’ to have its ordinary, literal and disjunctive meaning.”
CONCLUSION

Consequently, it is my opinion that § 16.1-266(D), which provides discretionary authority for a judge to appoint a guardian ad litem or counsel, is not applicable to proceedings within the purview of § 16.1-266(A)-(C), which makes such appointments mandatory in certain specific matters and proceedings. It is also my opinion that a judge may appoint a guardian ad litem or counsel pursuant to § 16.1-266(D), but not both.

2 You note that the guardian ad litem represents the person’s best interests, while the role of counsel is to represent the client’s wishes. Compare Stanley v. Dep’t of Social Services, 10 Va. App. 596, 601, 395 S.E.2d 199, 201 (1990), aff’d, 242 Va. 60, 63-64, 405 S.E.2d 621, 623 (1991), and VA. SUP. CT. R. 8:6.
4 See id. at 82.
5 Section 16.1-241(A)(4) addresses a child before the juvenile court “[w]ho is the subject of an entrustment agreement ... or whose parent or parents for good cause desire to be relieved of his care and custody.”
6 Section 63.2-1230 pertains to the placement of children by parents or guardians with adoptive parents, effective October 1, 2002.
7 Section 16.1-266.1 sets forth criteria to be included in the standards adopted by the Judicial Council of Virginia for attorneys appointed as guardians ad litem, and requires the Council to maintain and make available to the courts the names of attorneys who qualify, pursuant to the standards, to serve as such guardians.
9 Section 16.1-266(B)(2), (C)(2).
10 Section 16.1-266(B)(3), (C)(3).
11 Section 16.1-266(B)(2), (C)(2).
15 See, e.g., Wilson v. Commonwealth, 23 Va. App. 318, 325, 477 S.E.2d 7, 10 (1996) (determining that “§ 16.1-266(B), which mandates the appointment of counsel for juveniles appearing at delinquency hearings in courts not of record, states that juveniles enjoy only the right to counsel, not the right to guardians ad litem”).
18 Id.
OP. NO. 02-047

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile court laws do not allow juvenile court judge to temporarily detain juvenile, pending disposition hearing, who was not detained prior to adjudication hearing at which he was determined delinquent.

THE HONORABLE J. DEAN LEWIS
JUDGE, FIFTEENTH DISTRICT JUVENILE AND DOMESTIC RELATIONS COURT
AUGUST 7, 2002

ISSUE PRESENTED

You ask whether a juvenile and domestic relations district ("juvenile") court judge has the authority to detain a juvenile charged with delinquency, after an adjudication hearing but pending the disposition hearing, in the event the juvenile was not originally taken into custody and detained pursuant to § 16.1-248.1(A).

RESPONSE

It is my opinion that a juvenile court judge has no statutory authority to temporarily detain a juvenile, after an adjudication hearing where the juvenile is determined delinquent but pending the disposition hearing, when the juvenile was not originally taken into custody and detained pursuant to § 16.1-248.1(A).

FACTS

You relate a hypothetical situation where a juvenile is not detained prior to an adjudicatory hearing pursuant to § 16.1-248.1(A). Due to evidence presented at the adjudicatory hearing, however, the juvenile court finds that detention is necessary for up to thirty days pending a social history or substance abuse evaluation, or other report to aid the court in determining the proper disposition for the juvenile. Based on the evidence presented, the court finds that the child meets the criteria for detention under § 16.1-248.1 and remands the child to detention pending the dispositional hearing for a maximum of thirty days. You relate that there appears to be no specific authority to detain a juvenile based on the hypothetical scenario described.

APPLICABLE LAW AND DISCUSSION

The jurisdiction, practice, and procedure of the juvenile courts are wholly statutory and are set forth in the Juvenile and Domestic Relations District Court Law, Chapter 11 of Title 16.1, §§ 16.1-226 through 16.1-361 ("juvenile court laws"). "[T]he juvenile court is a creature of statute." As you indicate, no statute expressly grants judges the authority to detain temporarily a juvenile, after an adjudicatory hearing but prior to a dispositional hearing, who is not in the custody of the court.

Although the juvenile court laws are to be construed liberally, this statutorily mandated rule of construction may not be expanded to create law where there is none. In setting forth the purpose and intent of the juvenile court laws, § 16.1-227 provides that juvenile court judges "shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature," to promote the purposes of the juvenile court laws. The necessary and incidental powers of the court, however, must be in
relation to a specific grant of authority contained in the Virginia Code. There is no such specific grant of authority that allows a judge to detain a juvenile in the situation you present.

Section 16.1-248.1(A) and (B) sets forth the criteria to detain juveniles taken into custody, either in a secure facility or in shelter care. Section 16.1-248.1(C) provides the criteria for continuing the juvenile in detention or shelter care pending court disposition. Section 16.1-248.1(A)(1) is applicable in preadjudication circumstances. This section addresses the procedures for determining whether detention is appropriate for a juvenile when first taken into custody. Section 16.1-248.1(A)(1) requires the court, intake officer, or magistrate to make certain findings to determine whether the juvenile should be initially detained in a secure facility. Section 16.1-248.1(C) provides the criteria to determine whether a juvenile should continue in detention or shelter care after adjudication pending disposition.

Neither subdivision A(1) nor subsection C of § 16.1-248.1 grants a juvenile court the ability to temporarily detain a juvenile not already in custody, after an adjudicatory hearing, in order for certain evaluations concerning the juvenile to be made before the dispositional hearing. This, of course, does not prevent such evaluations from being made; nor does it prevent the court from revoking a personal recognizance or other bond required at the initial detention hearing for appropriate reasons, which, in turn, could subject the juvenile to confinement.

Section 16.1-278.8 sets forth the dispositional options available to a juvenile court or a circuit court. Section 16.1-278.8(A) enumerates nineteen orders that a judge may enter for the supervision, care and rehabilitation of a juvenile. Each of these orders is a final order of disposition that imposes a punishment or directs some action by the juvenile or others charged with his care. None of the options listed includes temporarily detaining a juvenile while social history reports or mental evaluations are being completed.

CONCLUSION

Accordingly, it is my opinion that there is no statutory authority for a juvenile court judge to temporarily detain a juvenile, after an adjudication hearing where the juvenile is determined delinquent but pending the disposition hearing, when the juvenile was not originally taken into custody and detained pursuant to § 16.1-248.1(A).


4See, e.g., Op. Va. Att'y Gen.: 2000 at 92, 93 (citing 1996 Op. Va. Att'y Gen. 84, 85, concluding that, absent language indicating legislative intent to expand access to public records to include access through Internet system, circuit court clerk had no such statutory authority); 1996 at 114, 116 (concluding that General Assembly did not intend to expand authorization provided under § 20-25 to foreign judges); 1991 at 91 (concluding that statutory powers granted to juvenile court
judges, intake officers and clerks may not be expanded by court order or policy; judges may order temporary detention of juveniles only in circumstances expressly provided by statute).

1The Supreme Court of Virginia has struck down decrees that are inconsistent with the juvenile court laws. See, e.g., Lowe v. Grasty, 203 Va. 168, 122 S.E.2d 867 (1961) (holding that juvenile court has no power to commit child permanently to local department of welfare with full adoption privileges); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946) (holding that juvenile court has no power to convict child of crime or commit him to penal institution).

OP. NO. 01-112
COURTS NOT OF RECORD: DISTRICT COURTS — JUVENILE AND DOMESTIC RELATIONS COURTS.

Substitute judge is not sitting judge without specific appointment by chief district judge and should not be called upon by hospital seeking judicial consent for medical treatment of minor.

THE HONORABLE CHARLES E. POSTON
JUDGE, FOURTH JUDICIAL CIRCUIT
FEBRUARY 28, 2002

You ask whether a substitute judge may grant consent for medical treatment of a minor pursuant to § 16.1-241(D) of the Code of Virginia on a day when such substitute has not been designated to sit in the juvenile and domestic relations district court.

You relate that it is customary in your judicial district to provide area hospitals with the names and telephone numbers of all full-time district court judges of the juvenile and domestic relations district court, as well as the names and telephone numbers of substitute judges. You further relate that when judicial consent for medical treatment of a minor is necessary, the hospitals call any of the persons on the list, whether they are full-time district court judges or substitute judges. Your inquiry concerns the propriety of this practice.

Section 16.1-241 provides for the jurisdiction and venue of juvenile and domestic relations district courts. Specifically, § 16.1-241(D) authorizes “judicial consent for emergency surgical or medical treatment” for a minor under certain enumerated circumstances.

“The jurisdiction, practice, and procedure of the juvenile and domestic relations district courts [of the Commonwealth] are entirely statutory.” Section 16.1-69.9:1(a) provides for the appointment of substitute judges by the chief justice of the appropriate circuit court. Section 16.1-69.9:1(c) provides that such judges “shall be appointed to serve every general district court and every juvenile and domestic relations district court within the judicial district for which the appointment is made.” Section 16.1-69.21 sets forth the powers and duties of a substitute judge. Specifically, § 16.1-69.21 provides:

In the event of the inability of the [district court] judge to perform the duties of his office or any of them by reason of sickness, absence,
vacation, interest in the proceeding or parties before the court, or otherwise, such judge or a person acting on his behalf shall promptly notify the appropriate chief district judge of such inability. If the chief district judge determines that the provisions of § 16.1-69.35 have been complied with or cannot reasonably be done within the time permitted and that no other full-time or retired judge is reasonably available to serve, the chief district judge may direct a substitute judge to serve as a judge of the court .... While acting as judge a substitute judge shall perform the same duties, exercise the same power and authority, and be subject to the same obligations as prescribed herein for the judge. While serving as judge of the court the judge or the substitute judge may perform all acts with respect to the proceedings, judgments and acts of any other judge in connection with any action or proceeding then pending or theretofore disposed of in the court except as otherwise provided in this chapter in the same manner and with the same force and effect as if they were his own. [Emphasis added.]

Notably, § 16.1-69.35(1) authorizes the chief judge, as part of his administrative duties, to designate other judges in the event one of the district judges in his district is unable to hold court in the following order: (1) a judge within the same district or a judge of another district court; (2) a retired district judge; (3) a retired circuit court judge; and (4) a substitute judge.

A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning. "The manifest intention of the legislature, clearly disclosed by its language, must be applied." Additionally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. It is clear from the plain language of § 16.1-69.21, as well as § 16.1-69.35(1), that a substitute judge may not be designated to serve as a district judge until the chief district judge has determined that another full-time district judge or retired judge is not reasonably available. It is equally clear from the plain language of § 16.1-69.21 that the powers and duties of a substitute judge are effected only upon being designated by the chief district judge to serve. Additionally, the Attorney General previously has noted that, in accordance with these statutes, a substitute judge may only sit when and if the general district court judge is absent and/or unable to serve.

Accordingly, it is my opinion that, without a specific appointment of a substitute judge pursuant to §§ 16.1-69.21 and 16.1-69.35, a substitute judge is not a sitting judge. Thus, with respect to the practice at issue, a substitute judge who is not so appointed should not be called upon by a hospital seeking judicial consent for medical treatment of a minor.
OP. NO. 02-102
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

ALCOHOLIC BEVERAGE CONTROL ACT: PROHIBITED PRACTICES; PENALTIES; PROCEDURAL MATTERS.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

Disposal by juvenile court of charges of unlawful possession of alcohol by juveniles.

THE HONORABLE J. DEAN LEWIS
JUDGE, FIFTEENTH DISTRICT JUVENILE AND DOMESTIC RELATIONS COURT
OCTOBER 29, 2002

ISSUE PRESENTED

You pose a question concerning a conflict between § 4.1-305, which prohibits underage possession of alcohol by any person, and § 16.1-278.9, which pertains to the adjudication of a child as delinquent for the unlawful possession of alcohol. In the case of a juvenile who enters a plea of guilty to the charge of underage possession of alcohol and the juvenile and domestic relations district ("juvenile") court has evidence to justify adjudication of the juvenile as delinquent, you ask whether the court should dispose of the case under § 16.1-278.9 or § 4.1-305, or whether the court has the discretion to choose which statute to apply.

RESPONSE

It is my opinion that a juvenile court should dispose of a charge of unlawful possession of alcohol by a juvenile pursuant to § 16.1-278.9.

APPLICABLE LAW AND DISCUSSION

Section 4.1-305(A) provides that "[n]o person" to whom the sale of alcoholic beverages is prohibited "shall purchase or possess, or attempt to purchase or possess, any alcoholic beverage." Section 4.1-305(C) further provides:

Any person found guilty of a violation of [§ 4.1-305] shall be guilty of a Class 1 misdemeanor; and upon conviction, (i) such person
shall be ordered to pay a fine of at least $500 or ordered to perform
a minimum of fifty hours of community service and (ii) such person’s
license to operate a motor vehicle in the Commonwealth may be
suspended for a period of not more than one year. [Emphasis
added.]

Where any person convicted of a violation of § 4.1-305 demonstrates hardship, the
court may issue such person a restricted permit under § 16.1-278.9(D) or § 18.2-271.1(E),
and may require monitoring of such person by an alcohol safety action program dur­ing
the suspension period.¹ Section 4.1-305(F) provides that, “[w]hen any person ... has not previously been convicted” in any state or federal court of underage posses­sion of alcohol, “the court may, ... without entering a judgment of guilt and with the
consent of the accused, defer further proceedings and place him on probation subject
to appropriate conditions. Such conditions may include the imposition of the license
suspension.” (Emphasis added.) In such deferred proceedings, however, “the court
shall require the accused to enter a treatment or education program or both.”² Section
4.1-305(F) stipulates that, if the accused successfully fulfills these conditions, “the
court shall discharge the person and dismiss the proceedings ... without an adjudica­tion of guilt.” (Emphasis added.)

Section 16.1-278.9(A) specifies that, if a court finds “a child at least thirteen years of
age” to be delinquent for having violated § 4.1-305, “the court shall order that the
child be denied a driver’s license” for six months. (Emphasis added.) Section
16.1-278.9(A) further provides that, if the child is under the age of sixteen years and
three months at the time of the offense, the court “shall” delay the child’s ability to
apply for a driver’s license for six months after the child reaches sixteen and three
months years of age. In addition, “the court shall impose the license suspension
without entering a judgment of guilt and shall defer disposition of the delinquent
charge until ... the court disposes of the case pursuant to [§ 16.1-278.9(F)].”³ Section
16.1-278.9(D) provides that “such child may be referred to appropriate rehabilitative
or educational services upon such terms and conditions as the court may set forth.”
(Emphasis added.) Section 16.1-278.9(F) provides that, “upon fulfillment of the terms
and conditions prescribed by the court and after the child’s driver’s license has been
restored, the court shall or, in the event the violation resulted in the injury or death of
any person, may discharge the child and dismiss the proceedings against him.” (Empha­sis added.)

Any conflict arising between §§ 4.1-305 and 16.1-278.9 is to be resolved by examining
the statutory framework governing the disposition of juveniles and the terms of the
statutes themselves. “The jurisdiction, practice, and procedure of the juvenile and
domestic relations district courts are entirely statutory,”⁴ and are set forth in the Juve­
nile and Domestic Relations District Court Law, §§ 16.1-226 through 16.1-361 (“Juvenile
Court Law”). Section 16.1-241 gives juvenile courts “exclusive original jurisdiction”
over “a child ... alleged to be ... delinquent.”⁵ Section 16.1-278.8 sets forth the types
of dispositions that are available for the “supervision, care and rehabilitation”⁶ of
delinquent juveniles.
This statutory scheme makes it is clear that, subject to certain exceptions not relevant here, juveniles are charged with "delinquent acts" rather than "crimes." 7 Juveniles, thus, are not subject to adult penalties; instead, they are subject only to the dispositions set forth in § 16.1-278.8. Consequently, a juvenile court must apply § 16.1-278.9 to a juvenile charged with the unlawful possession of alcohol in violation of § 4.1-305.

Moreover, an examination of the terms of the two statutes leads to the same conclusion. 8 Section 16.1-278.9 applies exclusively to "a child at least thirteen years of age at the time of the offense." Section 16.1-228 defines "child," as used in the Juvenile Court Law, as "a person less than eighteen years of age." By contrast, § 4.1-305 applies to "any person." Section 4.1-305, thus, is a statute of general application, whereas § 16.1-278.9 is a statute of specific application, expressly restricted by its terms to juveniles. "'[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, ... where they conflict, the latter prevails.'" 9 Consequently, the dispositional provisions of § 16.1-278.8 apply to juvenile violators of § 4.1-305. The sentencing provisions of § 4.1-305 apply to any offender who is over the age of eighteen at the time of the commission of the offense.

The policy considerations underlying the differences in the penalties between §§ 4.1-305 and 16.1-278.9 are readily apparent. The mandatory fine in § 4.1-305(C) is absent from § 16.1-278.9, indicating a clear recognition that juveniles, in general, are not self-supporting and lack the means to pay such a fine. The mandatory license suspension, or license application delay, in § 16.1-278.9(A), which is discretionary in § 4.1-305(C), emphasizes to the juvenile the conditional nature of the driving privilege and the responsibilities that accompany it. 10 The mandatory deferral of judgment in § 16.1-278.9(A), which is only discretionary in § 4.1-305(F), evinces an intent to be lenient with a younger offender whose judgment is still developing.

CONCLUSION

Accordingly, it is my opinion that, despite the appearance of any conflict between portions of §§ 4.1-305 and 16.1-278.9, the latter is the only statute applicable to juveniles. Therefore, a juvenile court must dispose of charges of unlawful possession of alcohol by juveniles pursuant to § 16.1-278.9.

1 VA. CODE ANN. § 4.1-305(C) (LexisNexis Supp. 2002).
2 Section 4.1-305(F) (LexisNexis Supp. 2002) (emphasis added).
6 Section 16.1-278.8(A) (LexisNexis Supp. 2002).
8 "Under basic rules of statutory construction, we examine the language of [a statute] in its entirety and determine the intent of the General Assembly from the words contained in the stat-


10 See, e.g., Deaner v. Commonwealth, 210 Va. 285, 289, 170 S.E.2d 199, 202 (1969) (noting that operation of motor vehicle on public highway is conditional privilege, which may be suspended or revoked).

OP. NO. 01-108
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – APPEAL.
Court rulings in Commonwealth ex rel. May v. Walker and Mahoney v. Mahoney overrule Avery v. Commonwealth, Department of Social Services, which allows bifurcated appeal in case of father found guilty of civil contempt for failure to pay court-ordered child support. Requirement that, within 30 days of juvenile court civil contempt ruling, party post appeal bond based on amount of support arrearage to perfect appeal to circuit court for trial de novo.

THE HONORABLE J. DEAN LEWIS
JUDGE, FIFTEENTH DISTRICT JUVENILE AND DOMESTIC RELATIONS COURT
APRIL 11, 2002

You inquire regarding appeal of a civil contempt matter in which arrearage for child support is established, or an arrearage amount is set, and a sentence is imposed on a defendant for violation of a child support order.

You first ask whether the decisions of the Court of Appeals of Virginia in Commonwealth ex rel. May v. Walker and Mahoney v. Mahoney overrule the decision in Avery v. Commonwealth, Department of Social Services, which allows a bifurcated appeal in the case of a father found guilty of civil contempt for failure to pay court-ordered child support. You also inquire whether § 16.1-296(H) requires the posting of an appeal bond to perfect an appeal of a civil contempt finding within thirty days of the court order, if arrearages are set forth in the order finding the payor in contempt.

It is my opinion that the decisions in Commonwealth ex rel. May v. Walker and Mahoney v. Mahoney effectively overrule the decision in Avery v. Commonwealth, Department of Social Services. My answer to your second question is that § 16.1-296(H) requires the posting of an appeal bond on court-ordered support arrearages to perfect an appeal on a civil contempt finding within thirty days of the court order.

APPLICABLE AUTHORITIES
All three cases interpret the portion of § 16.1-296(H) of the Code of Virginia requiring an appeal bond for the appeal to circuit court of a juvenile court order involving support arrearage. Section 16.1-296(H) provides, in part:
No appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal. In cases involving support, no appeal shall be allowed until the party applying for the same or someone for him gives bond, in an amount and with sufficient surety approved by the judge or by his clerk if there is one, to abide by such judgment as may be rendered on appeal if the appeal is perfected or, if not perfected, then to satisfy the judgment of the court in which it was rendered. Upon appeal from a conviction for failure to support or from a finding of civil or criminal contempt involving a failure to support, the juvenile and domestic relations district court may require the party applying for the appeal or someone for him to give bond .... An appeal will not be perfected unless such appeal bond as may be required is filed within thirty days from the entry of the final judgment or order.

The cases involve civil contempt actions for nonpayment of child support. "Civil contempt" arises from "[t]he failure to obey a court order that was issued for another party's benefit," as contrasted with "criminal contempt," which consists generally of "[a]n act that obstructs justice or attacks the integrity of the court." In the Commonwealth, courts may find civil contempt for the violation of child support, custody, or visitation orders, and may impose as punishment a jail sentence not to exceed twelve months. Civil contempt actions are remedial and not punitive in nature. Specifically, every noncriminal jail sentence exceeding ten days, or criminal jail sentence without a jury exceeding six months, must carry with it the key to release—e.g., in instances of child support enforcement, the reasonable payment, in whole or in part, of arrears. A jail sentence of up to twelve months with a "purge clause" is coercive and not criminal in nature.

DISCUSSION

The Court of Appeals decided the case of Avery v. Commonwealth, Department of Social Services, in July 1996. In 1990, the juvenile court ordered the father to pay monthly child support in the amount of $100 for his three children. When he failed to pay the court-ordered support, the Division of Child Support Enforcement filed a show cause motion against him. The juvenile court established the father's support arrearage at $9,200, adjudged him in civil contempt for violating the court order, sentenced the father to 365 days in jail unless he paid the arrearage or reached an agreement with Child Support Enforcement, and set the appeal bond at $9,200, the amount of the support arrearage. The father appealed the matter to the circuit court, where the appeal was dismissed for lack of jurisdiction due to the father's failure to post an appeal bond.

On appeal, the Court of Appeals focused on the language in the statute governing appeals from the juvenile court, which states that "[n]o appeal bond shall be required
of a party appealing from an order of a juvenile and domestic relations district court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal.” The Court of Appeals held that the specific language did not require the father to post an appeal bond where he appealed only the jail time and not the amount of child support arrearage established when the juvenile court found him in civil contempt. The Court found that the statute “recognizes that an order that sets arrearages may have a component that does not establish a support arrearage.” Therefore, the Court of Appeals concluded that, in a civil contempt proceeding, the appellant could bifurcate the appeal by appealing only the jail sentence, but not the child support arrears. The *Avery* Court held that the disposition was independent of the arrearage and, consequently, no appeal bond was required.

In April 1996, the Court of Appeals ruled in *Commonwealth ex rel. May v. Walker* that the circuit court had jurisdiction to hear a contempt action on appeal, despite the fact that the father had not posted an appeal bond. The father had been ordered in 1986 to pay weekly child support in the amount of $100 for his two children. When he failed to fully pay the support, the Division of Child Support Enforcement filed a motion requesting the father to show cause why he should not be held in contempt of court. The juvenile court established that the father owed $2,496.06 in past-due child support and adjudged him in contempt for violating the support order. The court suspended the father’s jail sentence on the condition that he make payments toward the arrearage. The father appealed the matter to circuit court but posted no appeal bond. The circuit court heard the case over the objection of Child Support Enforcement and ruled that the father owed no arrears. The Court of Appeals upheld the circuit court’s ruling that the circuit court obtained jurisdiction even without the posting of an appeal bond by the father, because the juvenile court failed to require an appeal bond.

The Supreme Court of Virginia, however, overturned the decision of the Court of Appeals when it considered whether the failure to post an appeal bond deprived the circuit court of jurisdiction over an appeal from juvenile court. Reversing the Court of Appeals, the Supreme Court held that the language in § 16.1-296(H), stating that “‘no appeal shall be allowed’ unless and until a bond is given by the party applying for the appeal,” “could not be more clear.” The Supreme Court repeatedly has held that “[t]he failure to substantially comply with the statutory requirements applicable to appeal bonds constitutes a jurisdictional defect which cannot be corrected after the expiration of the time within which an appeal may be taken.”

The Court of Appeals, sitting *en banc*, addressed the appeal bond issue recently in *Mahoney v. Mahoney*. The father was ordered in 1995 to pay child support for his children. When he failed to fully pay the support, the mother filed a show cause motion against him. The juvenile court established that the father owed $151,902.52 as arrears in child and spousal support, medical payments and attorney’s fees, and adjudged him in civil contempt for violating the support order. The father attempted to appeal the subject matter jurisdiction of the court to enter any support orders. The
juvenile court set an appeal bond in the amount of $165,888.52. The circuit court dismissed the appeal when the father failed to post the appeal bond.\textsuperscript{24} Relying on the decision in \textit{Avery v. Commonwealth, Department of Social Services}, the panel of the Court of Appeals initially reversed the circuit court, indicating that “Mahoney’s appeal of the ‘jurisdiction of the Court [to] enter any order’ is not an appeal of a ‘portion of any order or judgment establishing a support arrearage.’”\textsuperscript{25}

Upon a rehearing \textit{en banc}, the full Court of Appeals upheld the dismissal by the circuit court of the appeal from juvenile court based upon nonpayment of the required appeal bond.\textsuperscript{26} The Court of Appeals concluded that the father’s challenge to the validity of all support orders and the court’s authority to enter them “necessarily and logically implicates a challenge to the subject of the orders entered by the juvenile court” establishing “a support arrearage.”\textsuperscript{27} “[T]he substantive issue of support arrearages [is] logically related to, and inherent in, Mahoney’s challenge to the jurisdiction of the court.”\textsuperscript{28} The Court of Appeals further ruled that, because appeals from a court not of record are \textit{de novo},\textsuperscript{29} the circuit court “acts as the tribunal of original jurisdiction [and] must address and dispose of all issues raised by the petitioner in the lower court.”\textsuperscript{30}

Therefore, in answer to your first question, the decisions in \textit{Commonwealth ex rel. May v. Walker} and \textit{Mahoney v. Mahoney} effectively overrule the decision in \textit{Avery v. Commonwealth, Department of Social Services}. The \textit{Walker} decision makes it clear that posting an appeal bond is a jurisdictional requirement; the \textit{Mahoney} decision makes it clear that bifurcating a support appeal is not possible because a trial \textit{de novo} on appeal vacates the juvenile court’s order. The circuit court must consider and dispose of all issues raised in the initial motion for show cause. \textit{Mahoney} further elaborates on the trial \textit{de novo} concept by indicating that, “if jurisdiction is found to exist on appeal, the circuit court must determine arrearages.”\textsuperscript{31} \textit{Mahoney} specifically limits the possibility of bifurcating an appeal to cases where an order “addresses multiple, independent issues unrelated to the issue of support.”\textsuperscript{32} This is more restrictive than the \textit{Avery} decision, which allows bifurcating an appeal in cases where an order addresses an issue other than support arrearage.\textsuperscript{33}

You also inquire whether § 16.1-296(H) requires the posting of an appeal bond based on court-ordered arrearages for perfection of an appeal on a civil contempt finding within thirty days of the court’s order, if arrearages are set in the court order finding the payor in civil contempt. Having answered your first question in the affirmative, the answer to your second question must also be in the affirmative. The amount of support arrears, having been alleged in a motion to show cause, will always be a relevant, necessary element of any civil contempt case for failure to pay support. Upon a trial \textit{de novo}, on appeal the entire juvenile court order is vacated. The circuit court must consider all matters that were before the juvenile court, not merely selected elements. The support arrearage is the major issue and is intrinsic to the issue of contempt on appeal. Support arrears must always exist in order for civil contempt actions to be appropriate. Even if a party has fallen behind at some point in the past, if there currently are no arrears, there is no possibility of a remedial or coercive jail sentence.
CONCLUSION

In summary, I am of the opinion that both § 16.1-296(H) and the relevant cases interpreting this provision require that a party in a civil contempt proceeding initiated in juvenile court post an appeal bond within thirty days, in the amount of the support arrearage, in order to perfect an appeal to the circuit court for a trial de novo.

5BLACK'S LAW DICTIONARY 313 (7th ed. 1999).
9"Purge" means "[t]o exonerate (oneself or another) of guilt <purged the defendant of contempt>." BLACK'S LAW DICTIONARY, supra note 5, at 1249.
10Similar civil contempt provisions, with coercive incarceration, appear in § 38.2-1916.1(J) (insurance rate violations) and § 59.1-9.10(K) (antitrust violations), where the purge is the testimony or production sought, just as the purge in support is the support money sought.
1122 Va. App. at 698, 472 S.E.2d at 675.
12Id. at 699, 700, 472 S.E.2d at 675-76.
14Id. at 700, 472 S.E.2d at 676.
15A "bifurcated trial" is "[a] trial that is divided into two stages, such as for guilt and punishment, or for liability and damages." BLACK'S LAW DICTIONARY, supra note 5, at 1510.
1622 Va. App. at 702, 472 S.E.2d at 677. But see Gravely v. Deeds, 185 Va. 662, 664, 40 S.E.2d 175, 176 (1946) (holding that it is reversible error for circuit court to receive into evidence judgment of lower court); Cox v. Cox, 16 Va. App. 146, 428 S.E.2d 515 (1993) (holding that trial de novo in circuit court annuls judgment of lower court as if there had been no previous trial).
1722 Va. App. at 230, 231, 468 S.E.2d at 695.
18Id. at 232, 468 S.E.2d at 696.
19Id. at 235, 468 S.E.2d at 697.
20Walker, 253 Va. at 319, 485 S.E.2d at 134.
21Id. at 322, 484 S.E.2d at 136.
22Id. (quoting Parker v. Prince William County, 198 Va. 231, 235, 93 S.E.2d 136, 139 (1956)).
2334 Va. App. at 63, 537 S.E.2d at 626.
2432 Va. App. at 140-41, 526 S.E.2d at 781.
25Id. at 142, 526 S.E.2d at 781-82.
2634 Va. App. at 68, 537 S.E.2d at 628.
132 2002 REPORT OF THE ATTORNEY GENERAL

27 Id. at 66, 537 S.E.2d at 627.
28 Id. at 66, 537 S.E.2d at 628.
29 A “trial de novo” is “[a] trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance.” BLACK’S LAW DICTIONARY, supra note 5, at 1512.
30 Id. at 67, 537 S.E.2d at 628.
31 Id. at 67 n.1, 537 S.E.2d at 628 n.1.
32 Id. at 68 n.2, 537 S.E.2d at 628 n.2 (emphasis added).
33 The Court of Appeals recently has reaffirmed the Walker and Mahoney principles. See Bostwick v. Woods, Nos. 2203-01-4, 2204-01-4, 2205-01-4 (Jan. 29, 2002) (per curiam) (noting that juvenile court denied noncustodial parent’s motion to decrease support and set appeal bond of $10,000 (slip op. at 2), and stating that failure to post bond, which also stemmed from custodial parent’s show cause order, was fatal to noncustodial parent’s appeal to circuit court (slip op. at 3, 4)); Howell v. Commonwealth, No. 0123-01-2, slip op. at 5 (Nov. 6, 2001) (stating that “appellant may not bifurcate a contempt determination from the related arrearage determination for purposes of appeal”).

OP. NO. 02-041
COURTS OF RECORD: CLERKS, CLERKS’ OFFICES AND RECORDS – FEES – RECORDS, RECORDATION AND INDEXING GENERALLY.
TAXATION: STATE RECORDATION TAX.
Circuit court clerk should base recordation taxes for Security Instrument on original acquisition balance as defined in instrument and assess separate fees for recording Assignment Agreement containing two instruments of equal dignity that serve independent purposes at law.

THE HONORABLE JOHN T. FREY
CLERK OF THE FAIRFAX COUNTY CIRCUIT COURT
JUNE 24, 2002

This is in response to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

ISSUES PRESENTED
You pose two questions concerning the assessment of a state recordation tax for recording documents that are intended to allow individuals of the Islamic faith to acquire real estate without violating a tenet of their religion. First, you inquire concerning the method for determining the proper amount of recordation tax on a document entitled “Security Instrument Deed of Trust” (“Security Instrument”), which allows for the payment of profits as opposed to a traditional deed of trust that is secured by a note requiring the payment of interest. Second, you ask whether a document entitled “Assignment of Agreements and Amendment of Security Instrument” (“Assignment Agreement”) should be treated as one instrument or as multiple transactions of equal dignity in a single instrument requiring the assessment of two clerk’s fees.
RESPONSE

It is my opinion that the circuit court clerk should base the recordation taxes for the Security Instrument on the original acquisition balance as defined in the instrument, and assess separate fees for recording the Assignment Agreement, since the document contains two instruments of equal dignity that serve independent purposes at law.

FACTS

A local attorney has presented draft real estate transaction documents for your review to determine the proper recordation taxes and clerk’s fees applicable to the transaction. You relate that this attorney represents a lender that works with individuals who wish to obtain financing for the purchase of residences, but whose religion prohibits them from paying interest on this kind of transaction. Their religion, however, allows the payment of profits to a co-owner for the use of property. A typical transaction in this situation would have a home purchased by an individual consumer and an institutional co-owner. The consumer puts in a certain amount of money, the traditional down payment, and the co-owner advances the balance of the funds by purchasing an interest in the property. The co-owner will be repaid this amount of money, the original acquisition balance, in regular monthly installments. In addition, the consumer will pay the co-owner a monthly amount as a “profit payment.” This profit payment represents the amount that the consumer is paying the co-owner for the use of the home.

The attorney for the lender has presented you with two separate documents, which you have provided to me. Under the Security Instrument, the consumer transfers a trust interest in the real property to a trustee to secure payment of the original acquisition balance plus profit payments. The Assignment Agreement appears to serve two separate purposes: (1) assignment of the co-owner’s interest in the real estate under a document entitled “Co-Ownership Agreement”; and (2) transfer of the co-owner’s rights under the Security Instrument to a third party engaged in the business of purchasing security instruments in residences.

APPLICABLE LAW AND DISCUSSION

The Security Instrument secures payment of the original acquisition balance, plus profit payments, to the co-owner. Incorporated into the Security Instrument is a document entitled “Definitions of Key Terms.” The latter document defines “original acquisition balance” as the total acquisition payments due over the term of the transaction, from the consumer to the co-owner, as determined at closing. The term “acquisition payment” in the document means the portion of the consumer’s monthly payment that is applied according to the schedule incorporated into the Co-Ownership Agreement. Each acquisition payment increases the consumer’s ownership interest in the property. The Definitions document also defines the term “profit payment” as the portion of the consumer’s monthly payment paid to the co-owner for enjoyment of home ownership. Thus, the profit payment is an ongoing monthly charge, akin to rent, that the consumer in the transaction pays to live in the home; it is not part of the principal amount secured by the deed of trust.
Section 58.1-803(A) imposes "[a] recordation tax on deeds of trust or mortgages ... at a rate of 15¢ on every $100 or portion thereof of the amount of bonds or other obligations secured thereby." (Emphasis added.) In a traditional transaction, the recordation tax is paid on the principal amount of the loan secured by the deed of trust. The amount of interest, or profit, to be paid by the borrower is not a factor in calculating the recordation tax. In this transaction, the original acquisition balance is the obligation secured by the Security Instrument. Accordingly, a circuit court clerk should assess the recordation tax based on the amount of the original acquisition balance as shown on the Security Instrument.

Section 17.1-275(A)(2) requires the clerk of a circuit court to assess a fee "[f]or recording and indexing in the proper book any writing and all matters therewith." The word "writing" in § 17.1-275(A)(2) is singular and means the particular document or instrument which is entered in the deed book, while the phrase "all matters therewith" pertains to related papers that are supportive or probative of the document which the clerk is required to admit to record. As a result, certain documents are deemed of such primary importance that separate recordation is required, while other papers are merely auxiliary writings which are to be annexed to the primary documents.

If a single document offered for recordation contains multiple transactions which are determined to be of equal dignity, that document is, in essence, a number of documents within a document, and each function must be recorded and indexed separately, with the appropriate multiple fees charged. If it is determined that a particular function within the single document is auxiliary to another function, then separate fee should not be charged for that auxiliary function. Please note that a determination that the recordation tax applies to a particular function within a single document may be an indication of the separate nature of the transaction, but it is not conclusive of whether multiple recording fees may be charged. Recordation taxes are not imposed on all instruments which may be admitted to record.

In determining whether multiple transactions within a single document should be recorded individually or annexed within a document, it must be ascertained whether there is a specific statutory provision for recordation of each document, the formalities required to render the document valid, and the separate or joint nature of the documents. The Assignment Agreement assigns to the assignee, as determined at closing, such rights of the co-owner regarding the property as are specified in the Assignment Agreement and the Co-Ownership Agreement. Section 17.1-227 provides that "all contracts in reference to real estate ... shall ... be recorded in a ... deed book," just as other instruments such as deeds, deeds of trust, certificates of satisfaction, and the like. Since it is a "contract[[] in reference to real estate," the assignment by itself may be recorded as provided in § 17.1-227.

The portion of the Assignment Agreement that purports to amend the Security Instrument provides that the Agreement's grant to the assignee of the co-owner's interest in the real estate under the Security Instrument shall constitute an amendment to the
Security Instrument recorded in the clerk's office prior to recordation of the Agreement, and that the assignee would not fund the transaction without such grant. If the amendment were a separate document, § 17.1-227 provides for its recordation as a "contract[] in reference to real estate." The assignment and amendment portions of the Assignment Agreement serve two different functions and relate to two different documents: The assignment portion assigns the co-owner’s interest in the Co-Ownership Agreement; and the amendment portion amends the Security Instrument. As such, the documents are not interdependent, but, instead, are independent of one another. Since the assignment of agreements and amendment of security interest are separate and distinct, each requiring separate recordation, they are of equal dignity and should be treated accordingly. Therefore, each function must be recorded and indexed separately, with the appropriate multiple clerk’s fees charged.  

CONCLUSION

Accordingly, it is my opinion that the circuit court clerk should base the recordation taxes for the Security Instrument on the original acquisition balance as defined in the instrument, and assess separate fees for recording the Assignment Agreement, since the document contains two instruments of equal dignity that serve independent purposes at law.

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4. Id.
5. Id.
6. Id.

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OP. NO. 02-082
CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE ADMINISTRATION OF JUSTICE.
Law-enforcement officer conducting lawful stop to investigate alleged criminal activity may not arrest for obstruction of justice suspect who refuses to identify himself to officer. Depending on circumstances, suspect may be detained for purpose of determining his identity.

THE HONORABLE MARSHA L. GARST
COMMONWEALTH’S ATTORNEY FOR THE CITY OF HARRISONBURG
OCTOBER 10, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.
ISSUES PRESENTED
You ask whether a law-enforcement officer, who is engaged in a valid investigative stop of the kind permitted by Terry v. Ohio, may arrest a person for obstruction of justice under § 18.2-460(A), when such person refuses to provide information concerning his identity to the officer.

RESPONSE
It is my opinion, under the specific facts you have presented, that a law-enforcement officer conducting a lawful investigative stop may not arrest a suspect for obstruction of justice under § 18.2-460(A), when the suspect refuses to identify himself to the officer. Depending on the circumstances, however, there may be justification to detain a suspect for the purpose of determining his identity.

BACKGROUND
You relate a situation where a law-enforcement officer in your jurisdiction lawfully stops an unidentified individual whom the officer reasonably suspects has committed a criminal offense. The individual refuses to provide identifying information, thereby frustrating the progress of the investigation.

APPLICABLE LAW AND DISCUSSION
Section 18.2-460(A) provides:

If any person without just cause knowingly obstructs a ... law-enforcement officer in the performance of his duties as such or fails or refuses without just cause to cease such obstruction when requested to do so by such ... law-enforcement officer, he shall be guilty of a Class 1 misdemeanor.

In interpreting a former statute involving the obstruction of an officer performing his duty, the Supreme Court of Virginia has distinguished that which constitutes “obstruction”:

[T]here is a broad distinction between avoidance and resistance or obstruction.... “To constitute obstruction of an officer in the performance of his duty, it is not necessary that there be an actual or technical assault upon the officer, but there must be acts clearly indicating an intention on the part of the accused to prevent the officer from performing his duty, as to ‘obstruct’ ordinarily implies opposition or resistance by direct action.... It means to obstruct the officer himself not merely to oppose or impede the process with which the officer is armed.”

Additionally, the Supreme Court held that an attempt to escape the custody of an officer by running away does not provide a basis for a conviction for obstruction under the former statute.
The Court of Appeals of Virginia has held that "obstruction of justice does not occur when a person fails to cooperate fully with an officer or when the person's conduct merely renders the officer's task more difficult but does not impede or prevent the officer from performing that task."\(^4\) In applying § 18.2-460(A), the Court has also determined that providing inconsistent information, even if the information has the effect of frustrating the investigation, is not sufficient to warrant a conviction for obstructing justice.\(^5\) Similarly, the Court has held that providing false information is not grounds for a conviction for obstruction of justice.\(^6\)

If providing inconsistent information that, in effect, frustrates an investigation is not sufficient for a conviction for obstruction of justice, then it would also appear that failing to provide any information would not provide a basis for an arrest for obstructing justice.\(^7\) Such a failure to respond does not constitute the requisite "opposition or resistance by direct action."\(^8\)

Virginia courts have set a high threshold for a conviction under § 18.2-460(A). Given this precedent, I am compelled to conclude that a law-enforcement officer, even when armed with reasonable suspicion that criminal activity may be occurring, may not arrest a suspect for obstruction of justice on the basis that the suspect refuses to identify himself. The officer may, of course, pursue any other lawful avenues of investigation to determine the individual's identity. Those avenues, however, depend on the facts of each individual case.\(^9\) A suspect's refusal or inability to provide his identification in some circumstances may prolong the justified period of detention. Reasonable suspicion about a suspect permits that he "be stopped in order to identify him, to question him briefly, ... while attempting to obtain additional information."\(^10\) If the suspect's identity is material to confirming or dispelling the suspicion that led to the detention, depending upon the circumstances, the detention may be continued for a reasonable period to establish his identity.\(^11\) Additionally, an officer may, pursuant to § 46.2-104, demand identification of a motorist he stops for a traffic violation.

CONCLUSION

Accordingly, it is my opinion, under the specific facts you have presented, that a law-enforcement officer conducting a lawful investigative stop may not arrest a suspect for obstruction of justice under § 18.2-460(A), when the suspect refuses to identify himself to the officer. Depending on the circumstances, however, there may be justification to detain a suspect for the purpose of determining his identity.

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1 392 U.S. 1 (1968). A *Terry* stop allows an officer to approach and briefly detain an individual that the officer has reason to suspect is engaging in criminal activity. *Id.* at 27-31.

2 *Jones v. Commonwealth*, 141 Va. 471, 478-79, 126 S.E. 74, 77 (1925) (citation omitted). In *Jones*, the accused was charged with violating § 55-c, which provided that "(a)nny person who shall hinder or obstruct any officer of this State charged with the duty of inspecting baggage for ardent spirits ... shall be deemed guilty of a misdemeanor." 1918 Va. Acts ch. 388, at 578, 611.

3 *Jones*, 141 Va. at 478, 126 S.E. at 76. The accused in *Jones* was transporting barley, sugar, hops and yeast, and fled when stopped by the police officer, because he believed he had violated former § 55-c, which made it unlawful to "'hinder or obstruct any officer'" charged with inspecting any
vehicle transporting ardent spirits. *Id.* at 477-78, 126 S.E. at 76 (quoting 1918 Va. Acts, *supra*, at 611).


5*Id.* at 431, 505 S.E.2d at 390.


7A concurring opinion in *Terry v. Ohio* notes that a person detained in a *Terry* stop “[*i*s not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.]” 392 U.S. at 34 (White, J., concurring) (emphasis added). Relying on this concurrence, several courts have held that to arrest someone for failure to identify himself during a *Terry* stop violates the Fourth Amendment. Accord Martinelli v. City of Beaumont, 820 F.2d 1491 (9th Cir. 1987); see, e.g., Timmons v. City of Montgomery, Ala., 658 F. Supp. 1086, 1092, 1093 (M.D. Ala. 1987) (vagrancy offense).

8*Jones*, 141 Va. at 479, 126 S.E. at 77.

9For example, the officer could approach others who are present and inquire about the suspect’s identity, provided those individuals consent to such questioning. Additionally, if appropriate, the officer could follow the suspect home and determine who lives at that address. The options available to a police officer depend on the circumstances of each case. Accordingly, these examples are offered only to demonstrate other ways in which an officer may obtain this information if a suspect refuses to provide his identity, upon request, during a *Terry* stop.


11See *Washington v. Com.*, 29 Va. App. 5, 13-15, 509 S.E.2d 512, 516-17 (1999) (noting that officer could further detain person he reasonably suspected to be person named in capias, to establish his identity); see also *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985) (holding that officers’ further detention of burglary suspect who refused to identify himself did not convert investigatory stop into arrest); State v. Flynn; 285 N.W.2d 710, 717-18 (Wis. 1979) (holding that police officer with reasonable suspicion could remove and search wallet of verbally abusive robbery suspect who refused to identify himself).

**OP. NO. 02-006**

**CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD.**

**TAXATION: CIGARETTE TAX.**

Cigarette manufacturer’s sweepstakes promotion at retail establishment is prohibited.

THE HONORABLE THOMAS C. WRIGHT, JR.
MEMBER, HOUSE OF DELEGATES
MARCH 7, 2002

You ask whether § 18.2-242 of the *Code of Virginia* prohibits a cigarette manufacturer’s sweepstakes promotion.

You relate that a cigarette manufacturer seeks to offer a sweepstakes marketing promotion. You also relate that no consumer purchase is necessary to participate in the promotion and that the promotion will be open only to smokers who are at least twenty-one years old. You further relate that the sweepstakes material will be available only in the cigarette package or on the counter of the retail establishment selling such cigarettes.
Section 18.2-242 provides:

(a) No retail establishment in this Commonwealth shall use any game, contest, lottery or other scheme or device, whereby a person or persons may receive gifts, prizes or gratuities as determined by chance for the purpose of promoting, furthering or advertising the sale of any product or products having both a federal and state excise tax placed upon it, and the fact that no purchase is required in order to participate in such game, contest, lottery or scheme shall not exclude such game, contest, lottery or scheme from the provisions of this section.

(b) Any person violating the provision of this section shall be guilty of a Class 3 misdemeanor. \[1\]

"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." \[2\] Another rule of statutory construction requires that words in a statute be given their usual, commonly understood meaning. \[3\] In addition, although § 18.2-242 is a penal statute, and penal statutes generally are strictly construed, this Office has noted that such "'rule of construction 'does not abrogate the well recognized canon that a statute ... should be read and applied so as to accord with the purpose intended.'" \[4\]

Section 18.2-242 clearly prohibits the use of sweepstakes promotions by a retail establishment to further the sale of products upon which federal and state excise taxes are placed. Thus, although sweepstakes promotions generally may be conducted in retail establishments, \[5\] this statute specifically provides that such promotions may not be conducted with regard to the sale of products falling within its purview. Cigarettes have both federal and state excise taxes imposed upon them. \[6\] Accordingly, cigarettes are products within the statute's parameters.

With respect to the fact that the sweepstakes promotion is offered by the manufacturer, as opposed to the retail establishment itself, I note that the usual and commonly understood meaning of the verb "use" is "to avail oneself of something," to "utilize" or to "employ." In this instance, the retailer is availing itself or using the manufacturer's promotion in order to further the sale of cigarettes; thus, § 18.2-242 is applicable to such promotion regardless of who is offering the promotion.

Accordingly, it is my opinion that § 18.2-242 prohibits a cigarette manufacturer's sweepstakes promotion at a retail establishment.

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\[1\] Punishment for conviction of a Class 3 misdemeanor is "a fine of not more than $500." VA. CODE ANN. § 18.2-11 (Michie Supp. 2001).


140 2002 REPORT OF THE ATTORNEY GENERAL


See 1972-1973 Op. Va. Att'y Gen. 258, 258 (concluding that promotion of sweepstakes by national manufacturers, for which no purchase is necessary to enter sweepstakes, does not violate state lottery laws).


OP. NO. 01-065

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS.

Sheriff is chief law-enforcement officer of office of sheriff for purposes of issuing concealed weapons permits to retired deputies.

THE HONORABLE JOHN R. NEWHART
SHERIFF FOR THE CITY OF CHESAPEAKE
MARCH 26, 2002

You inquire regarding the definition of the term "chief law enforcement officer," as used in § 18.2-308(B)(8) of the Code of Virginia, and the discretion provided to a sheriff, rather than the chief of police, to issue concealed weapons permits to retired deputies.

It is my opinion that the sheriff is the chief law-enforcement officer of the office of the sheriff for the purposes of § 18.2-308(B)(8).

BACKGROUND

Section 18.2-308(A) generally makes the carrying of a concealed weapon a Class 1 misdemeanor. § 18.2-308(B) excludes from the prohibition those persons or situations fitting within one of eight enumerated categories. Section 18.2-308(B)(8) covers "any local law-enforcement officer retired from a police department or sheriff's office within the Commonwealth," if such officer meets the specified requirements. The first requirement is that the officer must have retired "(i) with a service-related disability or (ii) following at least fifteen years of service." The second requirement is that the officer must carry with him "written proof of consultation with and favorable review of the need to carry a concealed handgun issued by the chief law-enforcement officer of the last such agency from which the officer retired."

DISCUSSION

A rule of statutory construction requires that, where there is no ambiguity in a statute, the statute is not to be construed but is to be given effect in accordance with its plain meaning and intent. § 18.2-308(B)(8) clearly and unambiguously provides the requirements that must be satisfied for a retired law-enforcement officer to be exempt from the prohibitions contained in § 18.2-308. In addition to a service requirement, the officer must carry "written proof of consultation with and favorable review of the
need to carry a concealed handgun issued by the chief law-enforcement officer of the last such agency from which the officer retired."\(^6\) The term "chief law-enforcement officer," referred to in § 18.2-308(B)(8), clearly is identified to be such officer of "the last such agency from which the officer retired."

A 1990 opinion of the Attorney General responds to a sheriff's question regarding whether the phrase "principal law-enforcement officer" means the same thing as the phrase "chief law-enforcement officer," and concludes that there is no distinction between the "chief" and "principal" law-enforcement officer.\(^7\) The opinion notes that the words "chief" and "principal" are mere adjectives describing the status of the law-enforcement officer. It is, therefore, clear that, in the Commonwealth of Virginia, the "chief law-enforcement officer" of a sheriff's office is the sheriff.

**CONCLUSION**

Therefore, it is my opinion that a retired deputy sheriff's identification card, which is issued by the sheriff and identifies the holder as a retired deputy sheriff, satisfies the statutory requirement of § 18.2-308(B)(8). I am of the opinion that the sheriff is the chief law-enforcement officer of the office of the sheriff for the purposes of § 18.2-308(B)(8).

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1A second violation of § 18.2-308 constitutes a Class 6 felony, and a third violation constitutes a Class 5 felony. VA. CODE ANN. § 18.2-308(A) (Michie Supp. 2001).
2Section 18.2-308(B)(8) provides that § 18.2-308 shall not apply to:
"Any State Police officer retired from the Department of State Police, any local law-enforcement officer retired from a police department or sheriff's office within the Commonwealth and any special agent retired from the Alcoholic Beverage Control Board (i) with a service-related disability or (ii) following at least fifteen years of service with any such law-enforcement agency, board or any combination thereof, other than a person terminated for cause, provided such officer carries with him written proof of consultation with and favorable review of the need to carry a concealed handgun issued by the chief law-enforcement officer of the last such agency from which the officer retired or, in the case of special agents, issued by the Alcoholic Beverage Control Board. A copy of the proof of consultation and favorable review shall be forwarded by the chief or the Board to the Department of State Police for entry into the Virginia Criminal Information Network. The chief law-enforcement officer shall not without cause withhold such written proof if the retired law-enforcement officer otherwise meets the requirements of this section.
"For purposes of applying the reciprocity provisions of subsection P, any person granted the privilege to carry a concealed handgun pursuant to this subdivision, while carrying the proof of consultation and favorable review required, shall be deemed to have been issued a concealed handgun permit."

3Section 18.2-308(B)(8) (Michie Supp. 2001). The officer also must not have been terminated from service for cause. Id.
4Id.
5See Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 1996 Op. Va. Att'y Gen. 152, 153; see also Schluderberg-Kurdle Co. v. Trice, 198 Va. 85, 88, 92 S.E.2d 374, 377 (1956) (holding that words of any instrument should be given their commonly accepted meaning, and if no ambiguity exists, there is no need to do more than accept plain meaning of instrument and give effect to instrument accordingly).
6Section 18.2-308(B)(8) (emphasis added).
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - UNIFORM MACHINE GUN ACT.

Act does not prevent discharge or firing of machine gun by nonexempt person. Such person may transport machine gun away from registered bona fide permanent residence or business address. Determination whether definition of ‘immediate vicinity’ includes storage of ammunition in same vehicle, room, house or building as machine gun is question of fact rather than one of law, and is not appropriate issue on which to render an opinion.

COLONEL W. GERALD MASSENGILL
SUPERINTENDENT, DEPARTMENT OF STATE POLICE
JULY 30, 2002

ISSUE PRESENTED

You ask three questions regarding the application of the Uniform Machine Gun Act. You inquire in your first two questions whether a person who is not exempt from the Act (“nonexempt person(s)”) (1) may discharge or fire a machine gun in the Commonwealth, or (2) may transport a machine gun away from his registered bona fide permanent residence or business address. Third, you ask whether the Act’s definition of “immediate vicinity” includes the storage of ammunition in the same vehicle, room, house or building as the machine gun.

RESPONSE

It is my opinion that the Uniform Machine Gun Act does not prevent the discharge or firing of a machine gun by nonexempt persons. It is also my opinion that a nonexempt person may transport a machine gun away from his registered bona fide permanent residence or business address. Finally, because your third question requires a determination of fact rather than one of law, it is not an appropriate issue on which to render an opinion.

APPLICABLE LAW AND DISCUSSION

The Uniform Machine Gun Act\(^1\) sets out definitions as used in the Act,\(^2\) establishes offenses and presumptions,\(^3\) and creates a mechanism for the registration of a specified class of firearms.\(^4\) No person shall lawfully possess a machine gun unless it is registered pursuant to the Act\(^5\) and federal law.\(^6\) The Act makes the “[p]ossession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence ... a Class 2 felony.”\(^7\) It also makes the “[u]nlawful possession or use of a machine gun for an offensive or aggressive purpose ... a Class 4 felony.”\(^8\)

A primary principle of statutory construction dictates that statutes are to be read in accordance with their plain meaning and intent.\(^9\) Resort to the rules of statutory construction is necessary only when there is ambiguity; otherwise, the clear and unambig-
uous words of the statute must be accorded their plain meaning.\textsuperscript{10} When a statute is
penal in nature, it “must be strictly construed against the Commonwealth and in favor
of an accused.”\textsuperscript{11}

You first ask whether a nonexempt person\textsuperscript{12} may discharge or fire a machine gun in the
Commonwealth. Although the Uniform Machine Gun Act creates several rebuttable
presumptions that possession of a machine gun under certain conditions is aggressive
in nature,\textsuperscript{13} there are no provisions that criminalize the discharge or firing of a machine
gun in the Commonwealth for nonaggressive or nonoffensive purposes. The mere
presence of “empty or loaded shells ... in the immediate vicinity” of a machine gun,
however, creates the presumption of an offensive or aggressive purpose.\textsuperscript{14} A person
that elects to discharge or fire a machine gun must rebut the presumption contained
in § 18.2-291(4) of the Act, or face conviction should he be charged with a violation of
the Act.

Next, you ask whether a nonexempt person may transport a machine gun away from
his registered bona fide permanent residence or business address. The Act does not
prevent the transportation of a machine gun away from a person’s registered bona
fide permanent residence or business address. The transportation of the machine gun
could, however, create a presumption that the possession of the machine gun in cer­
tain circumstances is for an aggressive purpose. For instance, if the person transporting
the machine gun is “on premises not owned or rented” by him for his residence or
business,\textsuperscript{15} has been “convicted of a crime of violence,”\textsuperscript{16} has not registered the
weapon,\textsuperscript{17} or has “empty or loaded shells which have been or are susceptible of use
in the machine gun ... in the immediate vicinity thereof,”\textsuperscript{18} then such person creates
a presumption that transportation of the machine gun is for an aggressive purpose.
Finally, you ask for an interpretation of the phrase “in the immediate
vicinity” as used
in § 18.2-291(4) of the Act. Section 18.2-291(4) creates a presumption that the possession
or use of a machine gun is for an offensive or aggressive purpose “[w]hen empty or
loaded shells which have been or are susceptible of use in the machine gun are found
in the immediate vicinity thereof.” Whether empty or loaded shells are “in the immediate
vicinity” of a weapon is a determination of fact based on the unique situation raised
in a specific case and is not an appropriate issue on which to render an opinion.\textsuperscript{19}

For the purposes of law enforcement, guidance as to the meaning of “in the immediate
vicinity” may be found by examining cases dealing with concealed weapons. As gen­
eral guidance to enforcement personnel, when the ammunition and machine gun are
“readily accessible for use or surprise if desired,” and could pose an immediate dan­
ger to the general public,\textsuperscript{20} that circumstance could be considered “in the immediate
vicinity” of the machine gun.

\textbf{CONCLUSION}

Accordingly, it is my opinion that the Uniform Machine Gun Act does not prevent the
discharge or firing of a machine gun by a nonexempt person. It is also my opinion that
a nonexempt person may transport a machine gun away from his registered bona fide
permanent residence or business address. Finally, because your third question requires a determination of fact rather than one of law, I must respectfully decline to respond as it is not an appropriate issue on which to render an opinion.

2 Section 18.2-288 (defining "machine gun," "crime of violence," "person").
3 Sections 18.2-289 to 18.2-291.
4 Sections 18.2-294, 18.2-295.
5 Section 18.2-295. Failure to produce a certificate of registration or notification of the transfer of a machine gun constitutes a Class 3 misdemeanor. Id.
7 Section 18.2-289.
8 Section 18.2-290.
12 Section 18.2-288(3) provides that the term "person," as used in the Uniform Machine Gun Act, "applies to and includes firm, partnership, association or corporation." Section 18.2-293.1 exempts the possession of a machine gun that is used for scientific purposes or for a manifestly nonaggressive or nonoffensive purpose, and that is not usable as a weapon and is possessed as a curiosity, ornament, or keepsake.
13 Section 18.2-291.
14 Section 18.2-291(4).
15 Section 18.2-291(1).
16 Section 18.2-291(2).
17 Section 18.2-291(3).
18 Section 18.2-291(4).

OP. NO. 02-031
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY — GAMBLING.
Attorney General declines to render opinion regarding whether operation of Free Spin machines constitutes illegal gambling.

THE HONORABLE GORDON F. SAUNDERS
COMMONWEALTH’S ATTORNEY FOR ROCKBRIDGE COUNTY & CITY OF LEXINGTON
MAY 29, 2002
ISSUE PRESENTED
You pose a question regarding the use of a combination video game of chance and collector's trading card dispensing machine in connection with the sale of the trading cards. You ask whether the operation of these machines, known as Free Spin machines, would constitute illegal gambling.¹

RESPONSE
Consistent with prior opinions of the Attorney General, I decline to render an opinion regarding whether the specific conduct outlined in your request constitutes illegal gambling.

BACKGROUND
You relate that Free Spin is a trading card dispensing machine that includes an opportunity for the purchaser to play a video game as a promotion. The trading cards are sold for $1. When a card is dispensed, the machine's video screen shows twenty "free points," which have no cash value but may be risked in the video game for an opportunity to win additional points that instantly may be redeemed for cash. The machine itself appears identical to a Las Vegas slot machine, and persons must be at least eighteen years of age to play. When the player "spins," the video screen begins to spin three columns of symbols such as cherries, bells and lemons. When the spinning stops, the player wins if the symbols line up in certain combinations. Chances of winning may be predetermined by the business operator. When the customer stops playing, the machine issues a receipt of his point balance, which may be redeemed for cash. Although the trading cards are sold for $1, you indicate that they are worth approximately five cents. Any adult may play the games once per day without purchasing a trading card or other product dispensed by the machine. The machines will be placed in truck stops in your jurisdiction.

APPLICABLE AUTHORITIES AND DISCUSSION
Section 18.2-325(1)² of the Code of Virginia defines "illegal gambling" as

the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth.

Section 18.2-326 provides that "[e]xcept as otherwise provided in [Article 1, Chapter 8 of Title 18.2],² any person who illegally gambles ... shall be guilty of a Class 3 misdemeanor."

It is well settled in Virginia that an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together.⁴ The elements of prize and chance clearly are present in the described promotional scheme. Accordingly,
whether the operation of the Free Spin machine under the circumstances you describe would constitute illegal gambling depends on whether the element of "consideration" is present.

The Supreme Court of Virginia has not considered the type of promotional schemes you describe. The Court of Appeals of Indiana, however, recently held that a "Free Spin" machine, which appears to be identical to the machine you describe, is an illegal gambling device. The court specifically found that the element of consideration was present, because "the play of the machine did not end once the player had played his initial 'free' game. Rather, the player is enticed to continue to play" and is required to "risk the prize points that could be redeemed for cash. In other words, he stakes his points on a chance of winning more." The court concluded that the player thus "gives something of value, or consideration."

The Supreme Court of Virginia and prior opinions of the Attorney General have construed the term "consideration" liberally for the purpose of determining whether a particular scheme or game constitutes illegal gambling. Despite a liberal construction of the term "consideration," however, prior opinions of the Attorney General consistently conclude that the element of consideration is missing when no purchase is required to enter into a drawing or other game of chance, but that it is present when eligibility to receive a prize is limited to those who make a purchase.

You relate that you believe the primary purpose of a Free Spin machine is to allow the consumer to play a game of chance, as opposed to purchasing the associated product. Even though the Supreme Court of Virginia has not considered promotional schemes that are "incidental" to a legitimate commercial transaction, other states have applied various tests to games other than Free Spin. Some conclude that no consideration is present where participants can obtain game pieces without purchasing the product promoted. Some have applied the "primary purpose" test, e.g., whether the consumer is buying a chance to win rather than the associated product or service. Others have ruled that, when consumers obtain tickets or game cards solely from the place where the promotional scheme is held, although no purchase is required, the element of consideration is present, because traffic is increased resulting in increased sales.

You also relate that any adult may play the Free Spin game once a day without purchasing a trading card, and that the trading cards are worth only five cents despite the $1 purchase charge. If a Virginia court reviewing this matter were to adopt the "primary purpose test," factual determinations regarding the value of the trading cards referenced in your inquiry would need to be made to resolve whether the consumer is buying a chance to win the game rather than the trading cards. If, on the other hand, a court were to place more emphasis on the requirement that the points won on the "free" spin, which have a cash value, must be risked in order for the player to proceed, a factual determination regarding the value of the cards alone would not be dispositive of whether consideration is present. Additionally, you relate that the odds of winning a prize may be determined by the operator of the business; however, there is no indication whether the odds of winning a prize vary according to whether the game card
is provided without cost. The value of the trading cards without the games attached and the extent to which other factors such as those listed above result in the element of consideration being present requires factual determinations to be made.

The Attorney General consistently has declined to render official opinions when the request involves determinations of questions of fact rather than questions of law. Furthermore, prior opinions of the Attorney General also conclude that the application of various elements of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth’s attorney, the grand jury, and the trier of fact, and is not an appropriate issue on which to render an opinion.

CONCLUSION

Consequently, I must decline to render an opinion regarding whether the specific conduct outlined in your request constitutes illegal gambling.

1 You do not ask and I offer no opinion regarding whether the Prizes and Gifts Act, §§ 59.1-415 to 59.1-523 of the Code of Virginia, is violated under the facts you provide; however, I note that compliance with the Prizes and Gifts Act does not determine whether a particular scheme or game constitutes illegal gambling.

2 You seek an advisory opinion regarding the application of § 18.2-365. From the context of your request, it is clear that you intended to reference § 18.2-325, which defines “illegal gambling,” and I respond accordingly.

3 Article 1, Chapter 8 of Title 18.2 comprises Virginia’s gambling statutes.


5 Jack Eiser Sales Company v. Wilson, 752 N.E.2d 225 (Ind. Ct. App. 2001). Indiana law defines “gambling” as “risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device.” Id. at 228 (quoting Ind. Code § 35-45-5-1). “Gambling device” under Indiana law includes either “[a] mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;” or “[a] mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation.” Id. (quoting Ind. Code § 35-45-5-1).

6 Id. at 228.

7 Id. at 229.

8 Id.


10 See Op. Va. Att’y Gen.: 1981-1982 at 175-76 (concluding that element of consideration is absent from cable television company’s offer of entry blank to customers and no purchase or subscription to cable service is required); 1977-1978 at 238, 239 (concluding that element of consideration is present where eligibility to receive prize is limited to those who purchase clothing memberships); 1972-1973 at 258 (concluding that element of consideration is absent when no purchase is required to enter sweepspeaks); 1969-1970 at 167 (concluding that element of consideration is absent when no purchase is required for participating in give-away promotion); see also § 18.2-332 (Michie Repl. Vol. 1996) (“In any prosecution under [Article 1], no consideration shall be deemed to have passed or been given because of any person’s attendance upon the
premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith.

11 See, e.g., Mobil Oil Corporation v. Attorney General, 361 Mass. 401, 280 N.E.2d 406 (1972) (holding that promotional games operated by Mobil service stations were not lottery where participants who purchased products at stations gained no advantage over those who received game pieces without making any purchases); Mississippi Gaming v. Treasured Arts, 699 So.2d 936 (Miss. 1997) (holding that "scratch-and-win" promotional game attached to phone cards was not lottery because consideration paid by purchasers was for card itself and not for opportunity to win cash prize).

12 Animal Protection Soc. v. State, 95 N.C. App. 258, 267, 382 S.E.2d 801, 807 (1989) (fact that patrons obtained bingo cards without purchasing combs or candies did not transform bingo games into games without consideration, since nonpurchasing persons received fewer game cards than patrons who bought items and paid for their chances); G.A. Carney, Ltd. v. Brzeczek, 117 Ill. App. 3d 478, 453 N.E.2d 756 (1983) (controlling fact in determining whether scheme or business is lottery is nature of appeal business makes to secure customer patronage; if controlling inducement is lure of uncertain prize, business is lottery; court rejected claim that consideration was missing because free entry forms were available, noting that, because obstacles to obtaining free entry blanks were so formidable, offer of free entry blank "must be regarded as chimerical" (453 N.E.2d at 760-61)).


14 See, e.g., Op. Va. Att'y Gen.: 1996, supra note 4, at 100 (considering whether retail establishments in Commonwealth may sell consumer items accompanied by lottery-like scratch-off tickets); 1991 at 122, 124 (considering whether Duck Race is form of illegal gambling).


OP. NO. 02-040
CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.
CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY.
COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE, CIVIL MATTERS.

Order of remittance of bond forfeiture entered upon timely appearance of defendant does not serve as satisfaction of judgment in general district court; operates as satisfaction of judgment docketed in circuit court.

THE HONORABLE JOEL C. CUNNINGHAM
JUDGE, GENERAL DISTRICT COURT OF HALIFAX COUNTY
MAY 29, 2002

ISSUE PRESENTED

You ask whether, after the forfeiture of a bond in a general district court criminal matter has led to a docketed judgment, the order of remittance of the forfeiture serves as satisfaction of the judgment pursuant to § 16.1-94.01 of the Code of Virginia.
RESPONSE

It is my opinion that the order of remittance does not serve as a satisfaction of the judgment pursuant to § 16.1-94.01; however, it does act as a satisfaction of the judgment under the applicable statutes pertaining to judgments filed in circuit courts.

FACTS

You present a situation where a defendant released on bail in general district court fails to appear in court, resulting in forfeiture of the bond and a judgment docketed against him for the amount of the bond. The defendant appears before the general district court within twelve months of the forfeiture, however, and the court remits the amount of the forfeiture to the defendant.

APPLICABLE LAW AND DISCUSSION

Prior to admitting a person to bail, the judicial officer shall obtain such person’s criminal history.1 "If the person is admitted to bail, the terms [of bail] will be reasonably fixed to assure the appearance of the accused."2 The appropriate judicial officer may order the person or his surety to post bond “as a condition of bail to assure performance of the terms and conditions contained in the recognizance.”3 Section 19.2-135 provides that a person under recognizance in a case must appear before the court to answer for the offense charged at the time stated in the recognizance. Section 19.2-143 authorizes forfeiture of a bail bond posted in a criminal proceeding when the defendant fails to appear. Section 19.2-143 then states that, if the defendant fails to appear before the district court within sixty days, judgment shall be entered by the court, and

his default shall be entered by the judge of such court, on the page of his docket whereon the case is docketed .... [S]uch judge ... shall promptly transmit to the clerk of the circuit court of his county or city wherein deeds are recorded an abstract of such judgment as he may render thereon, which shall be forthwith docketed by the clerk of such court.

If the defendant ... appears before or is delivered to the court within twelve months of the findings of default, the court shall remit any bond previously ordered forfeited by the courts, less such costs as the court may direct.

Chapter 17 of Title 8.01, §§ 8.01-426 through 8.01-465, governs judgments generally in the circuit courts. Section 8.01-446 states that each circuit court clerk

shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket, without delay, any judgment for a specific amount of money rendered in his court, and shall likewise docket without delay any judgment for a specific amount of money rendered in this Commonwealth by any other court of this Commonwealth or federal court, when he shall be required so to do ..., and any ... judgment rendered by a district court judge ... of which a legible
abstract is delivered to him certified by the district court judge who rendered it ....

Section 8.01-449 provides that, "[w]here a well-bound book is used for the judgment docket," there shall be a separate column for satisfaction or discharge of the judgment. Section 8.01-450 requires all judgments to be indexed in the name of the defendant. Under § 8.01-457, it is the duty of circuit court clerks, "upon the release of any recognizance by court order, to mark the same satisfied upon the judgment lien docket at every place such judgment or recognizance ... shall have been recorded upon such lien docket." Significantly, §§ 8.01-426 through 8.01-465, "so far as they relate to the docketing of judgments, the entering of satisfaction thereof, and the liens of judgments and enforcement of such liens, shall be construed as embracing recognizances, and bonds having the force of a judgment."

Section 16.1-94.01 provides the methods for satisfying judgments in general district courts. It does not appear to provide for the satisfaction of a judgment entered on a previously forfeited bond under § 19.2-143.

Section 19.2-143 makes clear that an abstract of the judgment entered in the general district court shall be docketed with the clerk of the circuit court and that the bond previously forfeited shall be remitted by the court to the defendant if he appears within the prescribed time period. It thus seems clear that the district court must embody that remittance in an order. That order, like any other order vacating or modifying a judgment, would be filed without requiring an additional document, such as a certificate of satisfaction.

It seems implicit that, if the original judgment of forfeiture must be sent to the circuit court clerk, the order of remittance must also be sent to the circuit court clerk. The circuit court clerk then would be required to record and index satisfaction of the judgment, so that anyone searching the records and discovering the abstract of judgment would also find the order of remittance satisfying that judgment.

CONCLUSION

Accordingly, it is my opinion that the order of remittance entered upon the appearance of the defendant would not serve as a satisfaction of the judgment pursuant to § 16.1-94.01; however, the order would operate as a satisfaction of the judgment docketed in the circuit court.

3 Section 19.2-119 (Michie Repl. Vol. 2000) (defining "bond"). The term "recognizance" "means a signed commitment by a person to appear in court as directed and to adhere to any other terms ordered by an appropriate judicial officer as a condition of bail." Id.
CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE.

E-911 personnel may access criminal justice information generated by VCIN/NCIC terminals per statutorily authorized agreement with local sheriff's office, subject to requirements of State Police. Absent specific statutory authorization, sheriff may not enter into agreement binding his successors in office.

THE HONORABLE CLARENCE E. PHILLIPS
MEMBER, HOUSE OF DELEGATES
AUGUST 20, 2002

ISSUES PRESENTED

You pose two questions as they relate to a proposed management control agreement between a county sheriff's office and the local E-911 office. First, you ask whether nonlaw-enforcement personnel, such as E-911 dispatchers, may lawfully access criminal justice information generated from Virginia Criminal Information Network ("VCIN") or National Crime Information Center ("NCIC") terminals. Second, you ask whether a sheriff, as a constitutional officer, may enter into an agreement that binds future sheriffs.

RESPONSE

It is my opinion that nonlaw-enforcement personnel, such as E-911 dispatchers, are permitted access to criminal justice information generated from VCIN/NCIC terminals, provided the local E-911 office and the proposed agreement between the county sheriff's office, the county board of supervisors, and the local E-911 office satisfy the requirements of § 19.2-389, and, further, that such access is authorized by the State Police. It is also my opinion that, absent specific statutory authorization, a sheriff may not enter into an agreement binding his successors in office.

BACKGROUND

You relate that a county sheriff's office is considering entering into a management control agreement with the county board of supervisors and local E-911 office for the provision of continuous emergency communications services for law-enforcement purposes. Under the agreement, the E-911 office would receive incoming calls and perform dispatching duties on behalf of the sheriff's office. The agreement contains a provision allowing only the board of supervisors to terminate the agreement.

APPLICABLE STATUTORY PROVISIONS

Chapter 2 of Title 521 provides for the establishment within the Department of State Police of "a basic coordinating police communication system"2 "under the control of the Superintendent of State Police,"3 referred to as the Virginia Criminal Information Network (VCIN). Certain other departments or divisions of state government or localities are allowed access to the basic system.4 The Superintendent of State Police "may make and issue such orders, rules or regulations for the use of the system as in his discretion are necessary for efficient operation."5

Section 19.2-389(A) authorizes certain designated agencies or individuals to receive criminal history record information. Specifically, § 19.2-389(A) provides:
Criminal history record information shall be disseminated, whether directly or through an intermediary, only to:

1. Authorized officers or employees of criminal justice agencies, as defined by § 9.1-101, for purposes of the administration of criminal justice and the screening of an employment application or review of employment by a criminal justice agency with respect to its own employees or applicants ...;

3. Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement which shall specifically authorize access to data, limit the use of data to purposes for which given, and ensure the security and confidentiality of the data;

6. Individuals and agencies where authorized by court order or court rule.[.]

Section 9.1-101 defines “criminal justice agency” as “a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice and any other agency or subunit thereof which performs criminal justice activities, but only to the extent that it does so.” Section 9.1-101 further defines “criminal history record information” as “records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges, and any disposition arising therefrom.”

DISCUSSION

Through computer terminals connected to the VCIN system, law-enforcement agencies and other authorized users may gain access to Virginia’s criminal history record information and information stored in the NCIC and various other data banks. The NCIC is a nationwide computerized criminal justice information system, maintained by the Federal Bureau of Investigation. Access to the NCIC system is controlled by federal law, and access to VCIN acts as a gateway to the information stored in the NCIC databanks.

Nonlaw-enforcement personnel, such as E-911 dispatchers, may access criminal history record information through VCIN terminals only if such personnel are employees of a “criminal justice agency,” as defined in § 9.1-101, or the E-911 office enters into an appropriate agreement with a criminal justice agency. The E-911 office also may gain access to information contained in the VCIN if it is an agency “authorized by court order or court rule” under § 19.2-389(A)(6).

Under the facts presented, E-911 personnel do not qualify as employees of a criminal justice agency. The E-911 office clearly is neither “a court or any other governmental
agency or subunit thereof” nor “any other agency or subunit thereof which performs criminal justice activities.” The E-911 office does not perform criminal justice activities as its primary function. Since the E-911 dispatchers are nonlaw-enforcement personnel and the E-911 office does not meet the definition of “criminal justice agency” in § 9.1-101, the office and its personnel, by themselves, do not qualify for access to any criminal history record information in the VCIN system.

The E-911 personnel may access information in the VCIN system if the E-911 office has an agreement with a criminal justice agency. Since the county sheriff’s office satisfies the statutory definition of “criminal justice agency,” it may enter into a specific agreement with the local E-911 office governing access to information contained in the VCIN system. Section 19.2-389(A)(3) requires that such an agreement “shall specifically authorize access to data, limit the use of data to purposes for which given, and ensure the security and confidentiality of the data” and otherwise fulfill the requirements of the statute.

Any such agreement between the sheriff’s and the E-911 offices must meet the requirements imposed by the Superintendent of State Police for access to information in the VCIN system. Under § 52-15, the Superintendent, or such member of the State Police as he shall designate, is charged with the maintenance and supervision of VCIN. Section 52-14 permits, but does not require, the Superintendent to make VCIN available for use by nonlaw-enforcement personnel. As such, the Superintendent may impose such restrictions on the access to, and supervision and monitoring of, VCIN terminals as deemed necessary to ensure the efficient operation of the system. Therefore, any agreement between the sheriff’s and the E-911 offices for access to the VCIN system would be subject to the State Police allowing such access by nonlaw-enforcement personnel. Accordingly, the State Police should be consulted in advance with regard to any such agreement between the sheriff’s and the E-911 offices.

You also ask whether a sheriff may enter into a contract, which extends beyond his term in office, thereby binding future sheriffs, and which may be terminated only by the local board of supervisors.

The office of sheriff is a constitutional office created pursuant to Article VII, § 4 of the Constitution of Virginia. The duties of a sheriff “shall be prescribed by general law or special act” of the General Assembly. While the powers and duties of a constitutional officer are those prescribed by statute, except as limited by law, the constitutional officer is free to discharge his prescribed powers and duties in a manner he deems appropriate. The Dillon Rule of strict construction, under which “local public bodies may exercise only those powers conferred expressly or by necessary implication,” is, however, applicable to constitutional officers. Prior opinions of this Office consistently have concluded that a local governing body does not have the power or authority to take actions that irrevocably bind its successors in office, unless such binding action is expressly authorized by statute. Similarly, absent specific statutory authorization, the sheriff, as a public officer, may not bind his successors in office by entering into such an agreement. Accordingly, while the county board of supervisors,
the county sheriff and the county E-911 office may enter into an agreement outlining a relationship between them, such an agreement would not be binding on future sheriffs.\footnote{CONCLUSION

It is my opinion that nonlaw-enforcement personnel, such as E-911 dispatchers, may access criminal justice information generated from VCIN/NCIC terminals, provided the county E-911 office and the proposed agreement between the county sheriff's office, the county board of supervisors, and the local E-911 office satisfy the requirements of \S\ 19.2-389, and, further, that such access is authorized by the State Police. It is also my opinion that, absent specific statutory authorization, a sheriff may not enter into an agreement that binds his successors in office.

\footnote{1VA. Code Ann. \S\S\ 52-12 to 52-15 (LexisNexis Repl. Vol. 2002).}

\footnote{2Section 52-12.}

\footnote{3Section 52-15.}

\footnote{4"The basic system ... may be made available for use by any department or division of the State government and by any county, city, town, railroad or other special police department lawfully maintained by any corporation in this Commonwealth as well as agencies of the federal government, subject to the ... terms and conditions [listed in \S\ 52 14(1) (4)]." Section 52-14.}

\footnote{5Section 52-15.}


\footnote{7E.g., 28 U.S.C.A. \S\ 534 (West 1993), which provides for the acquisition, preservation and exchange of information from the NCIC as follows: "The Attorney General [of the United States] shall— "(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; .... 

"(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions."}

\footnote{8See VA. Code Ann. \S\ 19.2-389(A)(1), (3) (LexisNexis Supp. 2002).}


\footnote{10See, e.g., op. no. 00-011 to Hon. Thomas D. Horne, 20th Jud. Cir. J. (Apr. 8, 2002), available at \url{http://www.vaag.com/media%20center/Opinions/00-011.htm} (concluding that commissioner of accounts is not criminal justice agency permitted access to criminal history records through VCIN, but circuit court is criminal justice agency); Op. Va. Att'y Gen.: 1996 at 105, 106-07 (concluding that general district court is criminal justice agency, but public defender's office is not); 1991 at 130, 133-34 (concluding that private police department is not court or criminal justice agency permitted access to VCIN system).}

\footnote{11Section 52-15 authorizes the Superintendent of State Police to "make ... regulations for the use of the [VCIN] system as in his discretion are necessary for efficient operation."}

\footnote{121991 Op. Va. Att'y Gen., supra note 10, at 134; see also 6 VA. Admin. Code 20-120-150 (Law. Co-op. 1996) ("The Department of State Police shall further approve of any access to the Virginia Criminal Information Network (VCIN), in accordance with State Police regulations governing the network.").}
You ask whether § 19.2-390(B) of the Code of Virginia requires law-enforcement agencies to enter into the Virginia Criminal Information Network information contained in indictments and capiases ordered sealed by court prior to arrest of individual named in such indictments and capiases.

I am of the opinion that the requirement in § 19.2-390(B) is not intended to circumvent the authority of the circuit court to order indictments and capiases to remain sealed under the facts you present.

BACKGROUND

You relate that many cases involving sealed indictments and capiases from a multijurisdictional grand jury are continuing investigations. You state that entry on the Virginia Criminal Information Network of information contained in such indictments and capiases jeopardizes the secrecy of ongoing criminal investigations, risks the safety of law-enforcement officers involved in the investigations, and allows for the arrest of a target without the knowledge of the detective assigned to the case. Such reporting does not allow for the coordinated execution of search warrants or arrest of codefendants. Finally, you advise that such a process inhibits the cultivation of potential confidential informants.
APPLICABLE LAW

Section 19.2-390(B) provides for the reporting to the Department of State Police of information contained in a capias or warrant received by a law-enforcement agency:

Within seventy-two hours following the receipt of (i) a warrant or capias for the arrest of any person on a charge of a felony ..., the law-enforcement agency which received the warrant shall enter the person's name and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network .... [Emphasis added.]

DISCUSSION

"[T]he use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent."¹ Unlike certain procedural criminal statutes that ensure the protection of an individual's constitutional rights, § 19.2-390(B) assists law-enforcement officers in the efficient administration of the criminal justice system. Where there is no deprivation of an individual's constitutional rights, lawful restraint in compliance with a procedural statute that is purely directory in nature is permissible.²

CONCLUSION

I am of the opinion that § 19.2-390(B) clearly is not intended to circumvent the authority of the circuit court to order indictments and capiases to remain sealed under the facts you present. I am also of the opinion that the particular requirement in § 19.2-390(B) that a law-enforcement agency enter into the Virginia Criminal Information Network certain information contained on a warrant or capias received by the agency is clearly directory in nature, and does not otherwise violate an affected individual's constitutional rights. Therefore, it is my view that § 19.2-390(B) contains no prohibitory or limiting language that is clearly mandatory to law-enforcement officers.

Accordingly, I am of the opinion that § 19.2-390(B) does not require the reporting of information contained in indictments and capiases ordered sealed by the court prior to the arrest of the individual named in such indictments and capiases.

Court trying felony cases has discretion to establish procedures for choosing and contracting for private court reporting services. Court reporting services associated with criminal litigation proceedings are exempt from Act's competitive process requirements.

THE HONORABLE CLIFFORD R. WECKSTEIN
JUDGE, TWENTY-THIRD JUDICIAL CIRCUIT
APRIL 12, 2002

ISSUE PRESENTED

You pose two questions regarding the use of private court reporters to produce verbatim recordings of evidence and incidents of trial in all felony cases pursuant to § 19.2-165 of the Code of Virginia. You indicate a need to seek private court reporting services to assist the clerk’s office, and ask (1) what procedures the court must follow in choosing and contracting for such private services, and (2) what discretion the court may exercise in choosing trustworthy private court reporters.

RESPONSE

It is my opinion that (1) it is within the discretion of the court to establish procedures for choosing and contracting for private court reporting services; and (2) the court may exercise its discretion in choosing those people it determines to be trustworthy for the task.

FACTS

You relate that circuit court deputy clerks in the City of Roanoke record felony court proceedings on equipment that is owned by the clerk and approved by the court. You note that the clerk has arranged for the typing of most criminal transcripts by a private court reporter. The court reporter is beset with transcript requests from several courts. Therefore, you state that the clerk would like to arrange for the preparation of transcripts by other individuals.

APPLICABLE LAW AND DISCUSSION

Section 19.2-165 provides that, “[i]n all felony cases, the court or judge trying the case shall by order entered of record provide for the recording verbatim of the evidence and incidents of trial either by a court reporter or by mechanical or electronic devices approved by the court.” Section 19.2-166 further dictates that “[e]ach judge of a court of record having jurisdiction over criminal proceedings shall be authorized, in all felony cases, to appoint a court reporter.” Title 19.2 provides no statutory guidance as to the means by which court reporters are to be procured.

It is necessary, then, to ascertain whether the Virginia Public Procurement Act, §§ 2.2-4300 through 2.2-4377, governs your query. The Act generally imposes certain competitive process requirements whenever public bodies enter into contracts with nongovernmental contractors for the purchase of services. There are several exceptions to this requirement, however, both in the Act itself and in other parts of the Virginia Code.
One such exception is contained in § 2.2-4344(A)(2), which authorizes a public body to enter into noncompetitive contracts for "[t]he purchase of legal services, ... or expert witnesses or other services associated with litigation or regulatory proceedings." (Emphasis added.) Because the court reporter services in question are associated with criminal litigation proceedings, public bodies are permitted to enter into contracts for the purchase of such services without competition.\(^2\)

In addition to the Procurement Act, I draw your attention to the last sentence of § 19.2-165, which provides that "[t]he administration of this section shall be under the direction of the Supreme Court of Virginia." Expenditures for court reporting services are paid out of a fund administered by the Executive Secretary of the Virginia Supreme Court. Therefore, the Supreme Court may have additional guidance to be followed when procuring the services required by § 19.2-165.

Public officials, particularly those associated with the judicial branch of government, must exercise appropriate care in the expenditure of public funds, even in the absence of competition. While competition is not required by statute, the court, nevertheless, may choose to follow the competitive procedures of the Virginia Public Procurement Act when obtaining court reporter services. The court should continue to follow any other documentation or requirements that apply generally to court purchases.

### CONCLUSION

Accordingly, it is my opinion that court reporting services associated with criminal litigation proceedings are exempt from the competitive process requirements of the Virginia Public Procurement Act. The provision of these services lies within the sound discretion of the court, recognizing that the people should be at all times "effectually secured against the danger of maladministration."\(^3\)

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\(^1\) See, e.g., VA. CODE ANN. § 2.2-4303(A) (LexisNexis Repl. Vol. 2001) (providing that "[a]ll public contracts with nongovernmental contractors for the purchase ... of services ... shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law").

\(^2\) I note, with reference to your question, the defeat of 1999 House Bill No. 2123, which would have brought court reporting services under the competitive process requirements of the Virginia Public Procurement Act.

\(^3\) VA. CONST. art. I, § 3.

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OP. NO. 02-128

CRIMINAL PROCEDURE: PRELIMINARY HEARING.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Statute governing admissibility into evidence at trial of written results of hospital-taken blood alcohol tests is procedural. Commonwealth may introduce such test results into evidence at trial conducted after effective date of statute, even though motor vehicle accident giving rise to charge of involuntary manslaughter as result of driving while intoxicated occurred before effective date of statute.
THE HONORABLE MICHAEL J. BUSH  
COMMONWEALTH'S ATTORNEY FOR RUSSELL COUNTY  
DECEMBER 18, 2002  

ISSUE PRESENTED  
You ask whether the blood alcohol test results of a defendant may be introduced into evidence at trial pursuant to § 19.2-187.02, when the motor vehicle accident giving rise to the charge of involuntary manslaughter as a result of driving under the influence occurred before the effective date of the statute and the trial is scheduled after the effective date of the statute.  

RESPONSE  
It is my opinion that § 19.2-187.02 is procedural in nature. Therefore, the Commonwealth may introduce into evidence at such trial the written results of a blood alcohol test conducted in accordance with § 19.2-187.02, even though the motor vehicle accident giving rise to the charge of involuntary manslaughter as a result of driving while intoxicated occurred before the effective date of the statute.  

APPLICABLE LAW AND DISCUSSION  
The 2002 Session of the General Assembly enacted § 19.2-187.02, relating to the admissibility of hospital-taken blood alcohol tests in the trial of a defendant charged with, among other offenses, involuntary manslaughter as a result of driving while intoxicated:  

A. Notwithstanding any other provision of law, the written results of blood alcohol tests conducted upon persons receiving medical treatment in a hospital emergency room are admissible in evidence as a business records exception to the hearsay rule in prosecutions for any violation of § 18.2-266 (driving while intoxicated) or a substantially similar local ordinance, § 18.2-36.1 (involuntary manslaughter resulting from driving while intoxicated), § 18.2-51.4 (maiming resulting from driving while intoxicated), or § 46.2-341.24 (driving a commercial vehicle while intoxicated).  

B. The provisions of law pertaining to confidentiality of medical records and medical treatment shall not be applicable to blood alcohol tests performed under the provisions of this section in prosecutions as specified in subsection A. No person who is involved in taking blood or conducting blood alcohol tests shall be liable for civil damages for breach of confidentiality or unauthorized release of medical records because of the evidentiary use of blood alcohol test results under this section, or as a result of that person's testimony given pursuant to this section.  

You ask whether a blood alcohol test conducted in accordance with § 19.2-187.02 is admissible as evidence in a trial scheduled for hearing after § 19.2-187.02 became effective, when the test results were acquired before the effective date of the statute.
"The general rule is that statutes are to be applied prospectively absent an express legislative provision to the contrary."\(^2\) This rule has been codified in § 1-16:

No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings .... [Emphasis added.]

In construing § 1-16, the Supreme Court of Virginia has held that the "procedural provisions of the statute in effect on the date of trial control the conduct of trial insofar as practicable."\(^3\)

By its terms, § 19.2-187.02 pertains to the admissibility of evidence. "[R]ules of evidence are procedural, rather than substantive rights or claims ...."\(^4\) Consequently, the rules of evidence in effect on the date of trial control the conduct of the trial. Since § 19.2-187.02 is a rule of evidence, it applies to any criminal trial that occurs after the statute takes effect, whether the offense occurred before or after the July 1, 2002, effective date.

**CONCLUSION**

Accordingly, it is my opinion that § 19.2-187.02 is procedural in nature. Therefore, the Commonwealth may introduce into evidence at such trial the written results of a blood alcohol test conducted in accordance with § 19.2-187.02, even though the motor vehicle accident giving rise to the charge of involuntary manslaughter as a result of driving while intoxicated occurred before the effective date of the statute.


\(^4\)Wyatt, 11 Va. App. at 229, 397 S.E.2d at 414 (citing Virginia & West Virginia Coal Co. v. Charles, 254 F. 379, 383 (4th Cir. 1918) (noting that "there is no vested right in rules of evidence"); see also Crawford v. Halstead & Putnam, 61 Va. (20 Gratt) 211, 224, (1871) (citing Robbins v. Holman, 65 Mass. (11 Cush.) 26, 27, 1853 Mass. LEXIS 8, *2 (1853) (stating that it is erroneous to consider "the mode of conducting a suit, or the rules of practice regulating it, to be subjects of vested rights in any sense")).
ISSUE Presented

You ask what effect the 2002 amendment to § 19.2-306 has on the jurisdiction of the circuit court to conduct a probation revocation hearing, and whether the amendment violates a defendant’s right to due process.

RESPONSE

It my opinion that the timely issuance of process invokes the jurisdiction of the circuit court under § 19.2-306 to conduct a probation revocation hearing. Although § 19.2-306 does not specify when a probation revocation hearing must be conducted, the lack of a specific time period in the statute does not violate the due process rights of a defendant.

APPLICABLE LAW AND DISCUSSION

The 2002 Session of the General Assembly amended and reenacted § 19.2-306, relating to revocation of a suspended sentence and probation. Prior to the 2002 amendment to § 19.2-306, the Court of Appeals of Virginia held that a probation revocation hearing must be commenced within the period of suspension plus one year, or the circuit court lost jurisdiction to revoke the alleged violator’s probation.

Section 19.2-306 provides, in part:

A. In any case in which the court has suspended the execution or imposition of sentence, the court may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court. If neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned.

B. The court may not conduct a hearing to revoke the suspension of sentence unless the court, within one year after the expiration of the period of probation or the period of suspension, issues process to notify the accused or to compel his appearance before the court. If neither a probation period nor a period of suspension was fixed
by the court, then the court shall issue process within one year after the expiration of the maximum period for which the defendant might originally have been sentenced to be incarcerated. Such notice and service of process may be waived by the defendant, in which case the court may proceed to determine whether the defendant has violated the conditions of suspension. [Emphasis added.]

Jurisdiction to conduct a revocation proceeding is based on the timely issuance of process, which, typically, is the issuance of a show cause order and a capias. Under § 19.2-306, a circuit court’s jurisdiction no longer expires if it fails to commence the probation revocation proceeding within the time limits of the statute. As long as the circuit court issues the process within the time periods specified in § 19.2-306(B), it may conduct the revocation hearing at a later time.

Courts in the Commonwealth have “only such jurisdiction as is granted ... by statute or by the Constitution.” When a court’s jurisdiction is founded upon a statute, the legislature may change the statute to modify the jurisdiction of that court. The General Assembly controls the judicial exercise of the statutory jurisdiction it bestows. In this instance, the General Assembly amended § 19.2-306 to provide that a circuit court obtains jurisdiction over an alleged violation of probation if it issues process to bring the defendant before the court within the time limits prescribed by the statute. Thus, the amendment eliminates the prospect of a court losing jurisdiction to hear a case simply because it could not commence the probation violation hearing within the prescribed time. Significantly, the General Assembly has enacted a similar provision regarding the conduct of criminal trials.

The failure of § 19.2-306 to specify a time limit for a revocation hearing does not violate the due process rights of a defendant. Federal courts have considered scenarios in which warrants were issued, but not immediately served on the alleged violator, and have held that any such delay in service does not violate their constitutional rights. While the Fourth Circuit has held that “fundamental fairness” requires that a warrant be executed with reasonable dispatch and that the revocation hearing be held within a reasonable time, there is no fixed rule determining what is reasonable. The gravamen of any due process claim is whether the defendant is prejudiced by any delay in executing the warrant. Accordingly, whether a defendant’s right to due process has been violated will turn on the facts of a specific case. It is conceivable that a prosecutor could be so dilatory in bringing an individual before the court for a probation violation hearing that the delay would violate a defendant’s right to due process. Such violation, however, would be case-specific and would not implicate the statute itself.

The Supreme Court of Virginia noted in a 1984 case that former § 19.2-306 contained an exception to the time limitation period. The Court held that, where a defendant, by his own conduct, places himself beyond the control and supervision of the court that placed him on probation,
the legislature did not intend the statutory one-year limitation to restrict the power of the court to revoke probation under these circumstances. When, as here, the probationer commits another crime within the probation period and is arrested by another jurisdiction, thereby placing himself beyond the jurisdiction and control of the sentencing court, the one-year time constraint of § 19.2-306 is suspended. The time limit remains suspended, when the probation period expires during incarceration in the other jurisdiction, until the probationer is released by such other jurisdiction, provided the original court as soon as practicable has issued a warrant charging violation of probation and a detainer.\textsuperscript{[13]}

The court in \textit{Rease} makes clear that, under prior law, the time limits in former § 19.2-306 could be tolled in certain circumstances. The recent amendment to § 19.2-306 expands the holding in \textit{Rease} by establishing that it is the timely issuance of process that triggers the jurisdiction of the circuit court to adjudicate an allegation that a defendant has violated the terms of his probation.\textsuperscript{14} Section 19.2-306 does not prohibit a defendant from asserting that a particular delay in executing a warrant in his case is unreasonable\textsuperscript{15} or that he has been prejudiced by that delay, any more than a defendant who suffers no statutory speedy trial violation is precluded from raising a constitutional speedy trial claim.\textsuperscript{16} The defendant may assert, for consideration by the court, his claim of prejudice at a revocation hearing.

**CONCLUSION**

It my opinion that the timely issuance of process invokes the jurisdiction of the circuit court under § 19.2-306 to conduct a probation revocation hearing. Although § 19.2-306 does not specify when a probation revocation hearing must be conducted, the lack of a specific time period in the statute does not violate the due process rights of a defendant.

\textsuperscript{1}2002 Va. Acts ch. 628, at 894 (adding subsections A to E, and rewriting former language of § 19.2-306 included in subsections A and D).


\textsuperscript{3}Compare 2002 Va. Acts ch. 628, supra note 1, at 895 (deleting statutory time limits in § 19.2-306(A)).

\textsuperscript{4}Roach v. Director, Dept. of Corrections, 258 Va. 537, 546, 522 S.E.2d 869, 873 (1999).

\textsuperscript{5}See Va. Const. art. VI § 1 (vesting authority to determine jurisdiction of circuit courts in General Assembly); see also Pulliam v. Coastal Emergency Services, 257 Va. 1, 21 22, 509 S.E.2d 307, 319 (1999); Etheridge v. Medical Center Hospitals, 237 Va. 87, 100, 376 S.E.2d 525, 532 (1989).

If an indictment or presentment is found against the accused but he has not been arrested for the offense charged therein, the five and nine months periods, respectively, shall commence to run from the date of his arrest thereon.” Va. Code Ann. § 19.2-243 (LexisNexis Supp. 2002).

See Mauney v. Garrison, 558 F.2d 214, 215 (4th Cir. 1977) (holding that, where warrant is issued during probationary period, execution of warrant may be held in abeyance while defendant serves intervening sentence (citing Gaddy v. Michael, 519 F.2d 669, 674 (4th Cir. 1975))).

Gaddy, 519 F.2d at 672-73.

Id. at 673. In Gaddy, the Fourth Circuit noted that, in some cases, the delay in the issuance of a warrant actually benefits the defendant. If the initiation of the revocation proceedings is based on a new conviction, the delay provides the defendant an opportunity to demonstrate that he can conduct himself in an appropriate manner. Id. at 675.

Id.; see also Moody v. Daggett, 429 U.S. 78, 89 (1976) (holding that parole commission has no constitutional duty to provide parole violator with hearing until he is taken into custody as parole violator by execution of warrant).


The holding in Rease is consistent with a prior opinion of the Attorney General concluding that, if a capias is issued within one year after expiration of a probationary period, but cannot be served because the probationer has fled, the Commonwealth should not be prevented from proceeding with probation revocation hearings when probationer finally is located more than one year after expiration of his probationary period. 1978-1979 Op. Va. Att’y Gen. 198, 199.

The Court of Appeals of Virginia has also held that due process is satisfied if the revocation hearing is conducted within a reasonable amount of time after the defendant is taken into custody under the capias and show cause order. See Atkins v. Commonwealth, 2 Va. App. 329, 334, 334 S.E.2d 385, 388 (1986).

In Gaddy, the Fourth Circuit held that a delay of over thirteen months, while the defendant served an intervening sentence which was also the basis for the revocation, did not violate due process. 519 F.2d at 671-72. In its analysis, Gaddy noted that other federal circuits, under similar circumstances, have upheld delays between eighteen months and four years. 519 F.2d at 674-75. Gaddy further held that, even if the delay had been unreasonable, “the petitioner would still be entitled to relief only if he could establish prejudice.” Id. at 677.

OP. NO. 02-066
DOMESTIC RELATIONS: MARRIAGE GENERALLY.

Circuit court clerk’s issuance of order authorizing minister to perform marriages, upon production of proof of ordination or licensure, is discretionary. No requirement that minister appear personally before clerk, although clerk may compel such appearance as condition for issuing order.

THE HONORABLE EDWARD SEMONIAN
CLERK, CIRCUIT COURT OF THE CITY OF ALEXANDRIA
SEPTEMBER 10, 2002

ISSUE PRESENTED

You ask whether a minister or other clergy member may be authorized to perform the rites of matrimony under § 20-23 without personally appearing before the clerk of a circuit court.
RESPONSE

It is my opinion that a minister may be authorized to perform marriages pursuant to § 20-23, upon production of proof before the circuit court of his ordination or licensure, without personally appearing before the circuit court clerk. The issuance by the clerk of an order authorizing a qualifying minister to perform a marriage ceremony is discretionary. Accordingly, the clerk is not prohibited from requiring an appearance in person.

APPLICABLE LAW AND DISCUSSION

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 ... proof of his ordination ..., or proof that he holds a minister’s license ..., the clerk of such court ... may make an order authorizing such minister to celebrate the rites of matrimony in this Commonwealth.\(^{[1]}\)

You inquire whether the phrase “produce before the circuit court” in § 20-23 requires an appearance in person before the circuit court clerk. There is no statutory definition of the terms “produce” and “before” as used in § 20-23. “Generally, the words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest.”\(^{[2]}\) “[A] word in a statute is to be given its everyday, ordinary meaning unless the word is a [term] of art.”\(^{[3]}\) The verb “produce” means “to bring forward ... offer to view or notice”\(^{[4]}\) and “[t]o provide (a document, witness, etc.) in response to subpoena or discovery request.”\(^{[5]}\) The preposition “before” is defined as “in the presence of” or “in sight or notice of.”\(^{[6]}\)

“Appearance,” in the technical and legal sense of the term, generally “signifies an overt act by which a person ... submits himself to the jurisdiction of the court.”\(^{[7]}\) The filing of an appropriate pleading without a personal appearance may perfect a legal appearance. Where the physical presence of an individual is required, the General Assembly has employed the phrase, “appear in person.”\(^{[8]}\)

Section 20-23 does not specify the means by which a minister is to produce his proof of ordination or licensing before the court. In the absence of language requiring an appearance in person, such production includes any method that brings proof into view or notice of the court and clerk. Production may be accomplished by delivery in person or by any other usual and customary means of placing proof before the court.

While the production of proof of ordination or licensing is required under § 20-23, issuance of an order authorizing a qualifying minister to perform marriages is not mandatory and lies within the sound discretion of the clerk.\(^{[9]}\) A clerk may not compel the personal appearance of a minister, but may require such appearance as a condition for issuing an order authorizing a minister or other clergy to perform marriages.
CONCLUSION

It is my opinion that a minister may be authorized to perform marriages pursuant to § 20-23, upon production of proof before the circuit court of his ordination or licensure, without personally appearing before the circuit court clerk. The issuance by the clerk of an order authorizing a qualifying minister to perform a marriage ceremony is discretionary. Accordingly, the clerk is not prohibited from requiring an appearance in person.

1The requirement that a minister “shall first produce credentials ... to the court” originated in 1784. 11 Hen. Stat. ch. 37, ¶ 2, at 503, 503 (1784).
5Black’s Law Dictionary 1225 (7th ed. 1999).
6Webster’s Third New International Dictionary of the English Language Unabridged, supra note 4, at 197.

OP. NO. 02-099

EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATION & SALARIES.
COUNTRIES, CITIES AND TOWNS: GOVERNING BODIES OF LOCALITIES – SALARIES.

Authority for Chesapeake School Board, based on population count, to increase annual salary of its members to maximum paid to city council members, and annual salary of its chairman to maximum paid to city mayor, upon passage of motion in 2003 approving specific salaries of $25,000 and $27,000, respectively. July 1, 2004, is earliest date that such salary increases may be effective.

THE HONORABLE HARRY B. BLEVINS
MEMBER, SENATE OF VIRGINIA
NOVEMBER 15, 2002

ISSUE PRESENTED

You pose several questions regarding the salaries that may be paid pursuant to § 22.1-32 to the elected members of the City of Chesapeake School Board, and the procedures for effectuating such salaries. You inquire concerning the maximum annual salary that the Chesapeake School Board may pay its members and ask whether the school board may pay its members and its chairman the same annual salary as that paid to city council members and the mayor, respectively. You inquire also as to the
procedures the Chesapeake School Board must take and the time frame within which the board must act to adopt a salary increase. Finally, you inquire as to the earliest date a salary increase may occur.

RESPONSE

It is my opinion that § 22.1-32 authorizes the Chesapeake School Board, based on population count, to increase the annual salary of its members to the maximum paid to city council members, and the annual salary of its chairman to the maximum paid to the city mayor, upon passage of a motion in the year 2003 approving the specific salaries of $25,000 and $27,000, respectively. July 1, 2004, is the earliest date that such salary increases may be effective.

FACTS

You relate that members of the Chesapeake School Board are elected for four-year terms. Elections are staggered every two years. Five members were elected in May 2002, and the remaining four members will be elected or reelected in May 2004. Prior to December 31, 2001, the Chesapeake School Board adopted a resolution to petition the General Assembly to increase the limit on salaries of school board members. I note that the 2002 Session of the General Assembly passed, and the Governor signed, three bills amending § 22.1-32, which governs elected school board members’ salaries. The first increases the annual salary limits for Chesapeake School Board members from $5,000 to $10,000. The second deletes the authorized salary limits for various named localities, including Chesapeake, and permits elected school boards to pay members the same salary as that paid their local governments. The third increases the annual salary level for specific school boards; however, the Chesapeake School Board is not one of the affected school boards. At the direction of the Virginia Code Commission, the provision set forth in the Code deletes the authorized salary limits for various named localities, including Chesapeake, and permits elected school boards to “pay each of its members an annual salary that is consistent with the salary procedures and no more than the salary limits provided for local governments in Article 1.1 … of Chapter 14 of Title 15.2 or as provided by charter.”

You further relate that the Chesapeake School Board has not voted to increase member salaries in any amount. You also relate that the population of the City of Chesapeake is between 175,000 and 259,999.

APPLICABLE LAW AND DISCUSSION

Section 22.1-32 provides:

A. Any elected school board may pay each of its members an annual salary that is consistent with the salary procedures and no more than the salary limits provided for local governments in Article 1.1 (§ 15.2 1414.1 et seq.) of Chapter 14 of Title 15.2 or as provided by charter.

....
D. Any school board may, in its discretion, pay the chairman of the school board an additional salary not exceeding $2,000 per year upon passage of an appropriate resolution by (i) the school board whose membership is elected in whole or in part ....

F. No ... elected school board shall be awarded a salary increase, unless, upon an affirmative vote by such school board, a specific salary increase shall be approved. Local school boards shall adopt such increases according to the following procedures:

2. A local school board representing a city or town may establish a salary increase prior to December 31 in any year preceding a year in which members are to be elected or appointed. Such increase shall become effective on July 1 of the year in which the election or appointment occurs.

No salary increase may become effective during an incumbent member's term of office; however, this restriction shall not apply if the school board members are elected or appointed for staggered terms.

Section 22.1-32(A) authorizes elected school boards to refer to §§ 15.2-1414.1 through 15.2-1414.7 for guidance in setting the salaries for their members. Section 15.2-1414.6 provides, in part, that cities with a population between 175,000 and 259,999 “shall be allowed to set [annual] salaries for mayors, which include presidents of council, and council members not to exceed” $27,000 and $25,000, respectively. Section 15.2-1414.6 further provides that “[n]o increase in the salary of a member of council shall take effect until July 1 after the next regularly scheduled general election of council members.”

According to the reported population for the City of Chesapeake, the city fits within the bracket that would allow school board members and the school board chairman to be paid an annual salary not to exceed $25,000 and $27,000, respectively. These amounts are authorized salary limits and are not required salaries. Nothing in either § 22.1-32 or § 15.2-1414.6 requires that the indicated salaries must be paid. Further, nothing in either statute establishes a minimum salary level.

You next inquire concerning the procedures the Chesapeake School Board must take to adopt a salary increase for its members. Section 22.1-32(F)(2) provides that a city school board “may establish a salary increase prior to December 31 in any year preceding a year in which members are to be elected or appointed,” and that “[s]uch increase shall become effective on July 1 of the year in which the election ... occurs.” For an elected school board, this means that § 22.1-32(F) still requires the school board to approve, upon an affirmative vote, a specific salary increase. Procedurally, the Chesapeake School Board must pass a motion to increase its annual salary to a particular salary figure. The 2002 amendments to § 22.1-32 do not delete or alter the statutory
language governing the timing for an elected school board to increase its annual salary. Further, the provisions of § 22.1-32 governing the timing for elected school board member salary increases are consistent with the provisions in § 15.2-1414.6, governing the effective date for increases in city council member salaries. As such, § 22.1-32 continues to govern the timing for elected school board members' salary increases.

Finally, you inquire concerning the earliest time that a salary increase may occur. The motion to increase the salary may occur no sooner than January 1, 2003. The year 2003 is the next year preceding the year in which members are to be elected or appointed. The earliest possible effective date for a salary increase would be July 1, 2004, because that is the July 1 date within the year in which the election occurs.

CONCLUSION

It is my opinion that § 22.1-32 authorizes the Chesapeake School Board, based on population count, to increase the annual salary of its members to the maximum paid to city council members, and the annual salary of its chairman to the maximum paid to the city mayor, upon passage of a motion in the year 2003 approving the specific salaries of $25,000 and $27,000, respectively. July 1, 2004, is the earliest date that such salary increases may be effective.

1 See 2002 Va. Acts ch. 669, at 963, 964-65 (amending § 22.1-32(B) to increase salary limits for Chesapeake School Board from $5,000 to $10,000, and salaries for school boards in Fredericksburg and Newport News in varying amounts).

2 See 2002 Va. Acts ch. 733, at 1088, 1088-91 (adding subsection A to § 22.1-32, providing that elected school boards may pay each member annual salary consistent with salary procedures and limits set for local governments in §§ 15.2-1414.1 to 15.2-1414.7, or as provided by charter, redesignating subsections A to D as B to E; increasing, in subsection D, salary limit appointed or elected school board may pay its chairman from $1,100 to $2,000; and adding, in subsection F, that salary increase must be approved by affirmative vote of elected school board). The 2002 legislation eliminated the specific salary limits previously provided for most elected school boards; however, for appointed school boards the specific salary limits were retained. Compare id. (§ 22.1-32(B)-(C)), with § 22.1-32(A)-(B) (Michie Repl. Vol. 2000).

3 See 2002 Va. Acts ch. 739, at 1097, 1099 (amending § 22.1-32(B), in which salary limit for school board members was increased only for Newport News).

4 Va. Code Ann. § 22.1-32(A) (Michie Supp. 2002); see also ch. 733, supra note 2, at 1088.

OP. NO. 02-050

ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION – LOCAL ELECTORAL BOARDS – REGISTRARS.

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF PLANNING AND BUDGET — GOVERNOR.

Governor has power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts.
THE HONORABLE HARRY J. PARRISH
MEMBER, HOUSE OF DELEGATES
JUNE 21, 2002

ISSUE PRESENTED

You ask by what authority the State Board of Elections may reduce the amount it reimburses localities for the annual compensation and expenses of electoral board members and general registrars.

RESPONSE

It is my opinion that the Governor has the power to direct the State Board of Elections to reduce the amounts it reimburses localities for the salaries of electoral board members and general registrars in order to achieve legislatively mandated budget savings.

FACTS

You advise that the State Board of Elections has announced its intention to reimburse localities for ninety-five percent of the salaries paid to electoral board members and general registrars in fiscal year 2002 and ninety percent in fiscal year 2003. You state that you are unable to find authority for the State Board to make such reductions.

APPLICABLE LAW

Section 24.2-108 of the Code of Virginia requires the General Assembly to “establish a compensation and expense plan in the general appropriation act for … members of the electoral boards.” In particular, § 24.2-108 provides that “[t]he governing body for the county or city of each electoral board shall pay compensation, expenses, and mileage in accordance with the plan and be reimbursed annually as authorized by the act.” Section 24.2-111 sets forth the same requirements for the compensation and expenses of general registrars.

Section 2.2-1509(A) requires the Governor to submit a proposed budget bill by “December 20 of the year immediately prior to the beginning of each regular session of the General Assembly.” Section 2.2-1509(A) further requires that the budget bill shall be organized by function, primary agency and proposed appropriation item and shall include an identification of, and authorization for, common programs and the appropriation of funds according to programs. Except as expressly provided in an appropriation act, whenever the amounts in a schedule for a single appropriation item are shown in two or more lines, the portions of the total amount shown on separate lines are for information purposes only and are not limiting. [Emphasis added.]

The 2002 Session of the General Assembly has adopted budget amendments for fiscal year 2002 and a biennium budget for fiscal years 2003-2004. The compensation and expense plans required by §§ 24.2-108 and 24.2-111 are set forth in each of the acts. The 2002 Amendments to the 2000 Appropriation Act state that, “[t]o accomplish savings estimated at $87,297,805, … the Department of Planning and Budget is
hereby authorized to reduce the general fund appropriation for operating expenses of each agency in the Executive Department, ... by a maximum of three percent (3%) the second year.” The Department of Planning and Budget has calculated the State Board of Election’s reduction as $305,607 for fiscal year 2002. In fiscal year 2003, the Board is to cut $711,242.

Section 4 1.04(a) of the 2002 Amendments and the 2002 Appropriation Act comments regarding appropriation reductions due to reduced revenues:

2. All appropriations are hereby declared to be maximum and conditional appropriations. The general fund appropriations shall be payable in full in the amounts named only in the event the general fund revenues are estimated by the Governor to be sufficient to pay in full all appropriations payable from the general fund revenues....

6. Except as enumerated in subdivision 5 of this subsection, in effecting the reduction of expenditures the Governor is authorized to withhold specific allotments of appropriations by a uniform percentage, a graduated reduction or on an individual basis, or apply a combination of these actions.

DISCUSSION

The Governor, as the chief planning and budget officer of the Commonwealth, has broad power to control spending and sustain his constitutional mandate to maintain a balanced budget. To determine the extent of that power under the facts you present requires an examination of the statutes and acts set out above. The Supreme Court of Virginia has stated that “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.” “[T]ake the words as written” and give them their plain meaning.” “When an enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply.” Sections 24.2-108 and 24.2-111 require localities to pay the salaries of electoral board members and general registrars as authorized in the general appropriation act. The localities are to “be reimbursed annually as authorized by the act.” I can find no specific statement, however, in either the 2002 Amendments to the 2000 Appropriation Act or the 2002 Appropriation Act requiring that a certain percentage of reimbursement be made by the State Board to localities. The acts set out the minimum amount of salary to be paid by localities to local electoral board members and general registrars. One would presume that the amount of reimbursement would be the same as the amount of stated salary, except to the extent the Governor chooses to exercise the power granted him by the General Assembly to reduce above-the-line “allotments of appropriation by a uniform percentage.”

The Governor, should he decide to reduce allotments of appropriation budgeted to reimburse localities by five percent for 2002 and ten percent in 2003, has the authority to require the State Board of Elections to reflect such reductions in its reimbursement
payments to localities. To accomplish the executive management savings, the Governor has the authority to require a reduction in appropriations allotted for the salaries of electoral board members and general registrars.

CONCLUSION

It is my opinion that the Governor has the power to direct the State Board of Elections to reduce the amounts it reimburses localities for the salaries of electoral board members and general registrars in order to achieve legislatively mandated budget cuts.


3"The Director of the Department [of Planning and Budget] shall, under the direction and control of the Governor, exercise the powers and perform the duties conferred or imposed upon him by law and perform such other duties as may be required by the Governor." VA. CODE ANN. § 2.2-1500(B) (LexisNexis Repl. Vol. 2001).

42002 Va. Acts ch. 814, supra note 1, at 1813 (quoting Item 543.07(A)).

5Memorandum of Department of Planning and Budget, Summary of 3% - 7% - 8% Reductions Proposed by Secretarial Area and Agency, at 2 (Feb. 11, 2002) (on file with Department of Planning and Budget).


7The term "allotment" means "[a] share or portion of something." BLACK'S LAW DICTIONARY 76 (7th ed. 1999).

82002 Va. Acts ch. 899, supra note 1, at 2699-2700 (emphasis added); see id. ch. 814, supra note 1, at 1923-24.


10"Other than as may be provided for in the debt provisions of this Constitution, the Governor, subject to such criteria as may be established by the General Assembly, shall ensure that no expenses of the Commonwealth be incurred which exceed total revenues on hand and anticipated during a period not to exceed the two years and six months period" "after the end of the session of the General Assembly at which the law is enacted authorizing the same." VA. CONST. art. X, § 7.


15See 2002 Va. Acts chs. 814, 899, supra note 1, at 1435-39, 2286-90 (citing Items 88 and 92, respectively).

16"Above-the-line" in this use means "portions of the total amount shown on separate lines [which] are for information purposes only and are not limiting." Section 2.2-1509(A) (LexisNexis Repl. Vol. 2001).

172002 Va. Acts chs. 814, 899, supra note 1, at 1924, 2700 (quoting § 4-1.04(a)(6)).
OP. NO. 00-011

FIDUCIARIES GENERALLY: INVENTORIES AND ACCOUNTS.
COMMISSIONS, BOARDS AND INSTITUTIONS: DEPARTMENT OF CRIMINAL JUSTICE SERVICES.
CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE.
POLICE (STATE): BASIC STATE POLICE COMMUNICATION SYSTEM.
MOTOR VEHICLES: DEPARTMENT OF MOTOR VEHICLES.

Commissioner of accounts is not a 'criminal justice agency' entitled to access criminal history records of delinquent fiduciaries through Virginia Criminal Information Network. Circuit court may release such records to commissioner pursuant to court order or rule.

THE HONORABLE THOMAS D. HORNE
JUDGE, TWENTIETH JUDICIAL CIRCUIT
APRIL 8, 2002

You ask whether a commissioner of accounts may use certain investigative procedures that are used by a sheriff's office in the investigation of criminal cases and in the service of criminal process to locate and serve delinquent fiduciaries who are proceeded against under Title 26, §§ 26-1 through 26-71 of the Code of Virginia. Specifically, you ask whether, on behalf of a commissioner of accounts, the sheriff may access Department of Motor Vehicle records and other records through the Virginia Criminal Information Network to aid in such proceedings.

It is my opinion that a commissioner of accounts is not permitted access to the criminal history records in issue. The circuit court, however, is authorized to release criminal records to the commissioner of accounts pursuant to a court order or rule.

APPLICABLE LAW

Title 26 governs the actions of fiduciaries, including requiring such to file periodic accountings of inventory with a commissioner of accounts.\(^1\) Should a fiduciary fail to do so, § 26-13 requires that

the commissioner shall issue, through the sheriff or other proper officer, a summons to such fiduciary, requiring him to make such return; and if such return be not made within thirty days after the date of service of the summons, the commissioner shall report the fact to his court. The court shall immediately thereupon order a summons to the fiduciary, requiring him to appear; and upon his appearing unless excused for sufficient reason, he shall be fined by the court in a sum not to exceed $500. If the fiduciary still fail[s] to make the return within such time as the court may prescribe, he shall be deemed guilty of contempt of court, and be dealt with accordingly.
Additionally, for a fiduciary's failure to make proper settlement of his accounts, § 26-18 provides for a procedure similar to that set forth in § 26-13. I note that § 26-8.1 instructs that, although commissioners of accounts have the power to issue subpoenas to require any person to appear before them and to issue subpoenas duces tecum to require the production of any documents or papers before them, they do not have the power to punish any person for contempt for failure to appear or to produce documents or papers, but may certify the fact of such nonappearance or failure to produce to the circuit court.

Section 26-8.1 further provides that the circuit court then “may impose penalties for civil contempt.”

The Virginia Criminal Information Network is a computerized criminal justice information system maintained by the Department of State Police pursuant to Chapter 2 of Title 52. The Network is not an independent repository of information, but is an electronic “gateway” to various electronic databases maintained by the federal government, the Commonwealth, and other states. Access to criminal history record information through a Network terminal is allowed pursuant to § 19.2-389. This statute provides for such access by a “criminal justice agency,” as that term is defined in § 9-169. Section 9-169(3) defines “criminal justice agency” as “a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice and any other agency or subunit thereof which performs criminal justice activities, but only to the extent that it does so.” The Network also may be used to access records compiled by the Department of Motor Vehicles. Access to the Department’s records, however, is similarly restricted by statute.

DISCUSSION

In accordance with §§ 9-169(3) and 19.2-389(A)(1), a circuit court is a “criminal justice agency,” and is therefore entitled to obtain information available from a Network terminal. A commissioner of accounts must likewise qualify under these statutes to obtain such information since the commissioner, and not the sheriff, has the statutory obligation of ensuring compliance with Title 26 by fiduciaries.

1. Commissioner of Accounts Is Not a “Criminal Justice Agency”

Section 26-8 authorizes circuit court judges to appoint commissioners of accounts as supervisory officers of the circuit courts. Such commissioners have general supervisory authority over fiduciaries who have qualified before the court and their accounts. A commissioner acting under § 26-8 is implementing a special statutory jurisdiction for the efficient administration of fiduciary accounts without resorting, in ordinary cases, to a full-scale suit for direction in the administration of estates. A commissioner of accounts is a public officer exercising statutory jurisdiction and an officer of the circuit court in a capacity different from the ordinary attorney. Nevertheless, it is my opinion that he is an appointee of the court whose function is to reduce court involvement in fiduciary matters. A commissioner of accounts, therefore, is
not a "court," and thus is not a "criminal justice agency," as defined in § 9-169(3), to whom criminal record information may be disseminated pursuant to § 19.2-389(A)(1).

II. Commissioner of Accounts Is Not a Governmental Agency Engaged in Criminal Justice Activities

I am also of the opinion that a commissioner of accounts is not a governmental agency, other agency, or a subunit of such agencies which principally performs criminal justice activities.13 Criminal justice activities are encompassed in the definition of "administration of criminal justice" in § 9-169(1) as the "performance of any activity directly involving the detection, apprehension, detention, pretrial release, posttrial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders."14

CONCLUSION

It is settled that, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."15 It is unnecessary to resort to any rules of statutory construction where the language of a statute is unambiguous.16 In such situations, the statute's plain meaning and intent govern.17 The clear language of Title 26 and § 9-169(3) does not construe a commissioner of accounts to be a "criminal justice agency" or his principal function to be the "administration of criminal justice."18 Therefore, it is my opinion that the commissioner of accounts is not permitted access to the criminal history records in issue.

Additionally, however, I note that § 19.2-389(A)(6) authorizes the dissemination of criminal records to "[i]ndividuals and agencies where authorized by court order or court rule." Accordingly, the circuit court is authorized to release criminal records to the commissioner of accounts pursuant to a court order or rule.19

4See VA. CODE ANN. § 46.2-208(B) (Michie Repl. Vol. 1998).
5Section 46.2-208(B)(9) specifically allows for the dissemination of the information outlined in § 46.2-208(A) to "any federal, state or local governmental entity, law-enforcement officer, attorney for the Commonwealth, court, or the authorized agent of any of the foregoing," and only when the information presented by the foregoing "is different from that contained in the Department's records."
6Compare 1996 Op. Va. Att'y Gen. 105, 107 (concluding that general district court is criminal justice agency under § 9-169(3)).
7But cf. 1991 Op. Va. Att'y Gen., supra note 2, at 133-34 (concluding that private police department is not court or other criminal justice agency and thus is not permitted access to Virginia Criminal Information Network).
You inquire regarding the authority of a municipality to enforce the Statewide Fire Prevention Code at a state university. You first ask whether a municipality has authority to enforce the Fire Prevention Code on state property, including buildings, structures and premises, if an agreement has not been entered into with the State Fire Marshall pursuant to § 27-99, or the Director of the Department of Housing and Community Development pursuant to § 36-139.4, for the enforcement of the Code. You also ask whether a municipality has authority to enforce the Uniform Statewide Building Code on state property if such authority has not been delegated by the state building official pursuant to § 36-98.1.

I respond by stating it is my opinion that, absent agreements with appropriate agencies, a municipality has no authority to enforce the Statewide Fire Prevention Code on state property, and localities have no authority to enforce the Uniform Statewide Building Code against the Commonwealth through their building inspectors.
FACTS
You advise that a municipality has sought to apply various provisions, including permitting requirements of the Statewide Fire Prevention Code, to open burning in the form of bonfires taking place on the campus of a state university located within the municipality. In addition, you advise that the municipality has required the state university to obtain a permit before proceeding with a tar pot for a roofing project. For the purposes of this opinion, I assume that the permit is a building permit required by local ordinance of the municipality.

APPLICABLE AUTHORITIES
Section 27-99 provides:

The Fire Prevention Code shall be applicable to all state-owned buildings and structures. Every agency, commission or institution, including all institutions of higher education, of the Commonwealth shall permit, at all reasonable hours, a local fire official reasonable access to existing structures or a structure under construction or renovation, for the purposes of performing an informational and advisory fire safety inspection. The local fire official may submit, subsequent to performing such inspection, his findings and recommendations including a list of corrective actions necessary to ensure that such structure is reasonably safe from the hazards of fire to the appropriate official of such agency, commission, or institution and the State Fire Marshal. Such agency, commission or institution shall notify, within sixty days of receipt of such findings and recommendations, the State Fire Marshal and the local fire official of the corrective measures taken to eliminate the hazards reported by the local fire official. The State Fire Marshal shall have the same power in the enforcement of this section as is provided for in § 27-98.

The State Fire Marshal may enter into an agreement as is provided for in § 36-139.4 with any local enforcement agency that enforces the Fire Prevention Code to enforce this section and to take immediate enforcement action upon verification of a complaint of an imminent hazard such as a chained or blocked exit door, improper storage of flammable liquids, use of decorative materials and overcrowding.

Section 36-139.4 provides:

The Department [of Housing and Community Development] is hereby authorized to enter into agreements with federal agencies, other state agencies and political subdivisions for services directly related to enforcement and administration of laws, rules, or regulations, or ordinances of such agencies affecting fire safety in public buildings.
Section 36-98.1 provides, in part:

The Building Code shall be applicable to all state-owned buildings and structures, with the exception that §§ [2.2-1159] through [2.2-1161] shall provide the standards for ready access to and use of state-owned buildings by the physically handicapped.

Acting through the Division of Engineering and Buildings, the Department of General Services shall function as the building official for state-owned buildings. The Department ... shall provide for the inspection of state-owned buildings and enforcement of the Building Code and standards for access by the physically handicapped by delegating inspection and Building Code enforcement duties to the State Fire Marshal’s Office, to other appropriate state agencies having needed expertise; and to local building departments, all of which shall provide such assistance within a reasonable time and in the manner requested.

DISCUSSION

The long-followed Dillon Rule requires a narrow construction of all powers conferred upon and exercised by local government in Virginia, because such powers are delegated powers. Thus, "municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."2

A basic rule of statutory construction requires that, where there is no ambiguity in a statute, the statute is not to be construed but is to be given effect in accordance with its plain meaning and intent.3 Sections 27-99 and 36-139.4 clearly and unambiguously provide that, unless the State Fire Marshall, or the Director of the Department of Housing and Community Development, has entered into an agreement with the municipality to enforce the Fire Prevention Code, the municipality is limited to performing informational, advisory and safety inspections of state buildings at reasonable hours. No language in either statute authorizes a municipality to enforce the Code on state premises.

CONCLUSION

Therefore, it is my opinion that a municipality has no authority to enforce the Statewide Fire Prevention Code on state property, including buildings, structures and premises, if an agreement has not been entered into with the State Fire Marshal pursuant to § 27-99, or the Director of the Department of Housing and Community Development pursuant to § 36-139.4, for the enforcement of the Code.

A 1975 opinion of the Attorney General responds to the inquiry whether a municipality has authority to enforce the Uniform Statewide Building Code on state property if the building official has not delegated such authority pursuant to § 36-98.1. The opinion
concludes that localities have no authority to enforce the Building Code against the Commonwealth through their building inspectors.\(^5\) I concur with the conclusion of the 1975 opinion.

\(^5\)Id. at 402.

**OP. NO. 02-025**

**GENERAL ASSEMBLY: GENERAL ASSEMBLY CONFLICTS OF INTERESTS ACT.**

**CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS TO HOLD ELECTIVE OFFICE) – LEGISLATURE (QUALIFICATIONS OF SENATORS AND DELEGATES) – LOCAL GOVERNMENT (MULTIPLE OFFICES) – BILL OF RIGHTS.**

**EDUCATIONAL INSTITUTIONS: VIRGINIA MILITARY INSTITUTE.**

Legislator’s employment by VMI Foundation, Inc., as major gifts officer, does not constitute impermissible conflict of interest. Legislator is not restricted in his ability to participate in transactions of the General Assembly affecting Virginia Military Institute as part of group of educational institutions.

THE HONORABLE WILLIAM R. JANIS
MEMBER, HOUSE OF DELEGATES
APRIL 5, 2002

This responds to your request for an opinion of the Attorney General regarding whether you may be employed by the VMI Foundation, Inc., while serving as a member of the House of Delegates. You ask whether your employment by the VMI Foundation, Inc., as a major gifts officer, constitutes an impermissible conflict of interest.

An impermissible conflict of interest does not exist under the facts presented below.

**FACTS**

You relate that you are a member of the House of Delegates. Previously, you have been, and may in the future be, employed by the VMI Foundation, Inc., as a major gifts officer. You advise that the Foundation is a private corporation organized in accordance with federal law as a nonprofit organization.\(^1\) The duties of a major gifts officer entail the solicitation of donations from private persons, especially alumni, in support of the educational purposes and objectives of Virginia Military Institute; however, such duties would not entail the solicitation of donations or gifts from corporate donors.
APPLICABLE AUTHORITIES AND DISCUSSION

The qualifications to hold office as a member of the General Assembly are set out in Article II, § 5 of the Constitution of Virginia:

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 officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision.

Specific constitutional provisions contain the required qualifications for General Assembly members and the prohibition against multiple officeholding. The General Assembly has not enacted any statute of which I am aware that specifically prohibits a paid employee of a foundation, such as the VMI Foundation, Inc., from holding office as a member of the General Assembly. Because the position as employee of the Foundation is not a public office, the doctrine of incompatible offices is not applicable.

A legislator is, however, prohibited from accepting any position that would "reasonably tend[] to influence him in the performance of his official duties" or where "there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties." The legislator bears the initial burden of determining whether a business opportunity is being offered to influence him in his official capacity, and if so, the legislator must decline such opportunity to avoid an impermissible conflict of interest.

I note that, although the VMI Foundation, Inc., is affiliated with Virginia Military Institute, a "governmental agency" created under Chapter 10 of Title 23, the Foundation is independent of the Institute.

The other potential issue that arises from such employment is your participation in debates and votes before the General Assembly that affect Virginia Military Institute as a state governmental agency. One of the purposes of the Act is to assure the citizens of the Commonwealth "that the judgment of the members of the General Assembly will not be compromised or affected by inappropriate conflicts." In furtherance of this policy, the Act defines a "personal interest in a transaction" as one where the member "may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction."

The Act further provides:
A "personal interest in a transaction" exists only if the legislator ... is affected in a way that is substantially different from the general public or from persons comprising a profession, occupation, trade, business or other comparable and generally recognizable class or group of which he or the individual or business he represents is a member.\[10\]

This exception recognizes that the interests of citizen-legislators are a conflict only if substantially different from other members of a recognizable group or class affected by the transaction, even if it is reasonably foreseeable that those interests may be affected by action of the General Assembly.\[11\] Furthermore, the rules of the House of Delegates must be consulted to determine whether limited participation in such transaction is permitted.\[12\] Disqualification is required whenever the transaction is specifically applicable to the employer rather than applicable to the public in general.\[13\]

CONCLUSION

Because Virginia Military Institute is one of the educational institutions in Title 23, comprising a "generally recognizable class or group,"\[14\] your participation as a citizen-legislator is no different from other members whose professions are likewise part of such classes or groups. Accordingly, you are not restricted in your ability to participate in debates or cast votes on matters affecting Virginia Military Institute as part of the group of educational institutions.

Our system of government is dependent in large part on its citizens' maintaining the highest degree of trust in public officials. The conduct and character of public officials is of particular concern because it is that conduct and character that defines the reputation of the Commonwealth. The purpose of the Act is to assure citizens that the judgment of legislators will not be compromised or affected by inappropriate conflicts. The law cannot, and should not, protect against all appearances of conflict, as members of the General Assembly have a continuing responsibility to examine their individual conduct.

The language of the Declaration of Rights, adopted on June 12, 1776, remains part of our Constitution to this day. The government of "the good people of Virginia"\[15\] at all times should be "most effectually secured against the danger of maladministration."\[16\] This is our great honor and our sworn duty.

\[1\]See 1.R.C. § 501(c)(3).
\[2\]See VA. CONST. art. IV, § 4.
\[3\]See id. art. VII, § 6.
\[5\]Section 30-103(6).
The definition of "governmental agency" under the Act includes "each institution ... created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties." Section 30-101 (Michie Repl. Vol. 2001).

Section 30-100 (Michie Repl. Vol. 2001).

Section 30-101.

Id.


Id. See, e.g., Op. Va. Att'y Gen.: 1982-1983 at 100 (General Assembly member may not patron legislation in which he has specific interest); id. at 678, 679 (state regulatory board member must disqualify himself in matters concerning professional association he represents); id. at 684 (school principal may not vote on school board appointments); 1973-1974 at 432 (city council members must disqualify themselves from voting on sale of city property to employer); see also West v. Jones, 228 Va. 409, 323 S.E.2d 96 (1984); 1984-1985 Op. Va. Att'y Gen. 51, 52-53 (following reasoning in West that member of board of supervisors, who is also teacher in school system, may not participate in selection or appointment of school board members).

Section 30-101 (defining "personal interest in a transaction").

VA. CONST. art. I (Declaration of Rights).

Id. art I, § 3.

OP. NO. 01-077

HEALTH: VITAL RECORDS – MARRIAGE RECORDS AND DIVORCE AND ANNULMENT REPORTS.

CONSTITUTION OF VIRGINIA: LEGISLATURE (EFFECTIVE DATE OF LAWS) — BILL OF RIGHTS (DUE PROCESS).

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Statutory requirement preventing disclosure of social security or other control numbers appearing on marriage licenses applies retroactively to licenses filed on and after July 1, 1997. Attorney General declines to comment on practicability of devising method by which marriage licenses processed and imaged since 1997 may be changed to comply with nondisclosure requirements.

THE HONORABLE CAROL W. BLACK
CLERK, CIRCUIT COURT OF BEDFORD COUNTY
MARCH 25, 2002

You inquire concerning the retroactive effect of legislation enacted by the 2001 Session of the General Assembly requiring circuit court clerks to block social security or other control numbers that have been included on applications for marriage licenses since 1997. You also inquire concerning the practicability of devising a method by which marriage licenses processed and imaged since 1997 may be changed to prevent disclosure of such numbers.

I answer your first inquiry by stating that the General Assembly intends that social security numbers required for a person to obtain a marriage license not be disclosed to the general public, and that this applies retroactively to all marriage licenses filed
on and after July 1, 1997. I answer your second inquiry by stating that I am unable to comment on the practicability of devising a method by which marriage licenses processed and imaged since 1997 may be changed to comply with the nondisclosure requirements.

FACTS AND APPLICABLE LAW

Section 32.1-267(B) of the Code of Virginia requires that “[t]he officer issuing a marriage license shall prepare the record based on the information obtained under oath or by affidavit from the parties to be married.” The 1997 Session of the General Assembly added the following language to § 32.1-267(B):

The parties [to be married] shall also include their social security numbers or other control numbers issued by the Department of Motor Vehicles pursuant to § 46.2-342 and affix their signatures to the application for [a marriage] license.

You relate that your office initiated an imaging system in 1995 whereby all documents, including marriage licenses, are scanned into the system and made available for public viewing.

The 2001 Session of the General Assembly added subsection F to § 32.1-267 to provide, in part:

Applications for marriage licenses filed on and after July 1, 1997, which have not been configured to prevent disclosure of the social security number or control number required pursuant to the provisions of subsection B of this section shall not be available for general public inspection in the offices of clerks of the circuit courts.

You advise that it is unclear whether the 2001 enactment may be made applicable to a method used by clerks to comply with the 1997 legislation. Specifically, you express concern regarding the practicability of changing marriage licenses that have been processed and imaged since 1997 to comply with § 32.1-267(F).

DISCUSSION

Article IV, § 13 of the Constitution of Virginia and § 1-12(A) contain the general rule in Virginia concerning the effective date of new legislation: All “regular” legislation, as opposed to appropriation bills, emergency acts and other special legislation, takes effect on July 1 following adjournment of the regular session of the General Assembly at which it was enacted, unless a subsequent date is specified in the legislation. “[A] statute speaks as of the time when it takes effect and not of the time it was passed.” Consequently, § 32.1-267(F) became effective July 1, 2001. Accordingly, § 32.1-267(F) applies retroactively to “[a]pplications for marriage licenses filed on and after July 1, 1997.”

Section 1-16 codifies the generally accepted principle that “statutes should be given a prospective rather than a retrospective construction,” unless their language clearly
indicates the contrary. It is a basic rule of statutory construction that a new law, except as to matters of remedy, will be presumed to be prospective rather than retroactive in its application. The Supreme Court of Virginia has applied § 1-16 to mean that new statutes may not be applied retroactively to modify existing substantive rights.

The Supreme Court also has held that Article I, § 11 of the Constitution protects "substantive property interests which may ripen into vested rights." The Court first discussed the prohibition against retroactive application of statutes affecting substantive rights in the case of Shiflet v. Eller. In Shiflet, the Court defined "substantive rights" to include "that part of the law dealing with creation of duties, rights, and obligations." The generally accepted definition of a "substantive right" is "[a] right that can be protected or enforced by law; a right of substance rather than form." In the case of Potomac Hospital Corporation v. Dillon, the Supreme Court stated that "the retroactive application of a statute impairing a 'substantive' right violates due process and is therefore unconstitutional." These general legal principles are codified, to an extent, in § 1-16.

In contrast, remedial or procedural laws prescribe "methods of obtaining redress or enforcement of [substantive] rights." Thus, remedial or procedural laws do not create rights but merely operate in furtherance of already existing rights. The generally accepted definition of a "remedial right" is "[t]he secondary right to have a remedy that arises when a primary right is broken." It is clear that the subject matter addressed by § 32.1-267(F) is entirely procedural in nature, furthering an already existing right. The specific "substantive" right addressed in § 32.1-267(F) is that of protecting against the dissemination of social security numbers to the general public from the inspection of certain public records maintained in the offices of circuit court clerks. The result is the prohibited dissemination of such numbers. Thus, it is my opinion that § 32.1-267(F) clearly and unambiguously does not modify existing substantive rights.

There are several additional rules of statutory construction applicable to your request. The General Assembly, in passing a new law or amending an old one, is presumed to act with full knowledge of the law as it stands. In addition, when new provisions are added to existing legislation by amendment, a presumption arises that, "in making the amendment the legislature 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." Finally, it is presumed that the legislature acted purposefully with the intent to change existing law.

CONCLUSION

I am required to apply all applicable rules of statutory construction in arriving at my conclusions. Consequently, it is clear from § 32.1-267(F) that "marriage licenses filed on and after July 1, 1997," which disclose a social security number or control number, "shall not be available for general public inspection in the offices of clerks of the circuit courts." Undoubtedly, the General Assembly intends that social security numbers
required for a person to obtain a marriage license not be disclosed to the general public.

Turning to your second inquiry, it generally is acknowledged that official opinions of the Attorney General must be confined to matters of law.\textsuperscript{18} Historically, Attorney General has limited responses to requests for official opinions to matters that concern an interpretation of federal or state law, rule or regulation.\textsuperscript{19} Accordingly, consistent with the historical practice of prior Attorneys General, I am unable to comment on your inquiry concerning the practicability of devising a method by which marriage licenses processed and imaged since 1997 may be changed to comply with the non-disclosure requirements of § 32.1-267(F).

\textsuperscript{1}1997 Va. Acts ch. 898, at 2429, 2431; id. ch. 794, at 1942, 1943.
\textsuperscript{2}2001 Va. Acts ch. 836, at 1173, 1177.
\textsuperscript{3}School Board v. Town of Herndon, 194 Va. 810, 814, 75 S.E.2d 474, 477 (1953).
\textsuperscript{6}See City of Norfolk v. Kohler, 234 Va. 341, 345, 362 S.E.2d 894, 896 (1987) (holding that city charter provision guaranteeing that deputy director of city library could not be dismissed without cause created substantive right unaffected by amendment adopted after deputy was hired); cf. Phipps, Admin’r v. Sutherland, 201 Va. 448, 453, 111 S.E.2d 422, 426 (1959) (noting that § 1-16 prohibits retroactive application of statute affecting vested interest or contractual rights, but not of one affecting merely procedural matters).
\textsuperscript{8}228 Va. 115, 319 S.E.2d 750 (1984).
\textsuperscript{9}Id. at 120, 319 S.E.2d at 754.
\textsuperscript{10}BLACK’S LAW DICTIONARY 1324 (7th ed. 1999).
\textsuperscript{11}229 Va. 355, 360, 329 S.E.2d 41, 45 (1985).
\textsuperscript{14}BLACK’S LAW DICTIONARY, supra note 10, at 1324.
\textsuperscript{16}Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).
\textsuperscript{18}2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 668 (1974).
OP. NO. 02-100
HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC.
— FERRIES, BRIDGES AND TURNPIKES — STATE REVENUE BOND ACT.

Attorney General defers to determination by Commonwealth Transportation Board that funds set aside in Virginia Transportation Act for Southeast Bypass project are to be spent solely on planning, engineering and construction of bypass and not on improving roads along bypass corridor and alternatives to bypass.

THE HONORABLE CHRISTOPHER B. SAXMAN
MEMBER, HOUSE OF DELEGATES
DECEMBER 11, 2002

ISSUE PRESENTED

Your request focuses on legislation passed during the 2000 Session of the General Assembly, pertaining to construction of the Southeast Bypass around the City of Harrisonburg. You ask whether the $20 million allocated by the Virginia Transportation Act for the Southeast Bypass may be used only for that project, or to pay the costs of improving existing roads along the bypass corridor and alternatives to the bypass.

RESPONSE

The interpretation given the term “Southeast Bypass” by the Commonwealth Transportation Board is entitled to deference unless it clearly is wrong. Accordingly, I defer to the Board’s interpretation that the $20 million in the Virginia Transportation Act allocated for the Southeast Bypass project is to be expended solely for that project, and may not be expended to improve roads along the bypass corridor and alternatives to the bypass. Any change in such interpretation must be made by the Commonwealth Transportation Board.

FACTS

The 2000 Session of the General Assembly passed the Commonwealth of Virginia Federal Highway Reimbursement Anticipation Notes Act of 20001 (“Virginia Transportation Act” or “Act”), relating to funding of transportation projects.

The Virginia Transportation Act authorizes the Commonwealth Transportation Board to fund specific projects from the proceeds of Commonwealth of Virginia Federal Highway Reimbursement Anticipation Notes, the Priority Transportation Fund and other available funds.2 The General Assembly has established the Priority Transportation Fund to finance priority transportation projects identified in the Virginia Transportation Act.3 The Act identifies for funding seven specific projects in the Staunton District and denotes one additional project as a statewide project.4 One of the seven projects is identified as “Harrisonburg - Southeast Bypass,” with $20 million in funding set aside for that specific project.5

The Virginia Transportation Act provides no definition for the project described as “Southeast Bypass.” In the absence of a statutory definition or a definition contained in the Act, it is assumed that the legislature intended a common, ordinary meaning of the phrase to apply.6 The word “bypass” means “[a] road or highway that passes
around or to one side of an obstructed or congested area." It is my understanding that the Commonwealth Transportation Board interprets the "Southeast Bypass" to be a four lane road. The Virginia Transportation Six-Year Development Program describes the "Southeast Bypass" as "I-81/Route 257 Intrchg. (Exit 240) - Just North of Route 33 (Exact tiedown location to be determined)." This description pertains only to a road known as the "Southeast Bypass." It does not include alternatives to the bypass.

Great deference should be given to the administrative interpretation of statutes by the agency charged with the responsibility for carrying out legislation. The Commonwealth Transportation Board and the Department of Transportation are charged with implementing the provisions of the Virginia Transportation Act. The Board has determined that the Act requires the allocated funds to be spent on the planning, engineering and construction of a road known as the "Southeast Bypass." This determination does not appear to include alternatives to the bypass. Prior opinions of the Attorney General defer to the interpretations of the law by an agency charged with administering the law, unless the agency interpretation clearly is wrong. Given the lack of specificity in the Virginia Transportation Act concerning what constitutes the "Southeast Bypass," I cannot say the interpretation of the Commonwealth Transportation Board clearly is wrong.

CONCLUSION

The interpretation given the term "Southeast Bypass" by the Commonwealth Transportation Board is entitled to deference unless it clearly is wrong. Accordingly, I defer to the Board's interpretation that the $20 million in the Virginia Transportation Act allocated for the Southeast Bypass project is to be expended solely for that project, and may not be expended to improve roads along the bypass corridor and alternatives to the bypass. Any change in such interpretation must be made by the Commonwealth Transportation Board.

2 Chapters 1019, 1044, supra note 1, at 2403, 2521 (enacting cl. 2, § 2); id. at 2405-08, 2523-26 (enacting cl. 3), amended by 2002 Va. Acts ch. 899, Item 49(H)(2), at 2222, 2615. The 2002 amendment does not affect the conclusion in this opinion regarding the $20 million allocated for the "Harrisonburg - Southeast Bypass." id. at 2407, 2525.
4 Chapters 1019, 1044, supra note 1, at 2407-08, 2524-26.
5 Id. at 2407, 2525.
OP. NO. 02-104

HOUSING: UNIFORM STATEWIDE BUILDING CODE — HOUSING AUTHORITIES LAW.

Hampton housing ordinance is unauthorized to extent it applies in areas other than conservation and rehabilitation districts designated by city's local governing body or in nonblighted areas.

THE HONORABLE THOMAS D. GEAR
MEMBER, HOUSE OF DELEGATES
DECEMBER 18, 2002

ISSUE PRESENTED

You ask whether the City of Hampton is authorized to enact a proposed ordinance entitled “The Hampton Housing Quality Assurance Ordinance” (“Hampton Housing Ordinance”).

RESPONSE

It is my opinion that the Hampton Housing Ordinance is unauthorized to the extent that the ordinance applies in areas other than conservation and rehabilitation districts designated by the city’s local governing body, or it applies in areas other than those designated as blighted under § 36-49.1:1.

FACTS

You relate that the City of Hampton desires to implement the Hampton Housing Ordinance in order to improve and preserve residential housing in the city through a program of inspections that comply with Part III of the Virginia Uniform Statewide Building Code regulations. You state that the city has selected two “venture” areas to test the ordinance, and ask whether the city may enact the proposed ordinance.

The Hampton Housing Ordinance makes it unlawful for any person to reoccupy a rental unit or for any owner or agency to permit reoccupancy of any unit that is vacant on or after the effective date of the ordinance, in the areas specified, until the building official has issued a quality assurance certificate. The areas specified in the ordinance are Hampton Housing Venture area neighborhoods and areas in the city authorized to request the ordinance. The Hampton Housing Ordinance defines “quality assurance certificate” as a written document, signed by the local building official or his designee, authorizing an applicant or his designee(s) to occupy a vacant dwelling unit as a lessee, subject to the limitations specified in the certificate.
The Hampton Housing Ordinance exempts certain dwellings from the quality assurance certificate requirement. Any nonexempt owner, however, who fails to comply with the ordinance, shall be guilty of a misdemeanor, punishable by a fine not to exceed $1,000 for each offense. The quality assurance certificate appears to be the equivalent of a certificate of compliance.

APPLICABLE LAW AND DISCUSSION

Virginia has long followed the Dillon Rule of strict construction. "This rule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. When a local ordinance exceeds the scope of this authority, the ordinance is invalid."

Section 36-98 directs and empowers the Board of Housing and Community Development "to adopt and promulgate a Uniform Statewide Building Code." Section 36-98 provides that the Building Code "shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions and state agencies." Section 36-105 addresses the actions a locality may take regarding an existing residential structure.

A 1986 opinion of the Attorney General concludes that a locality has no authority to implement a policy requiring the owner of premises to obtain an occupancy permit or a certificate of compliance when the premises are vacated prior to reoccupancy, where the issuance of the permit is conditioned on the owner granting access for an inspection and remedying any violations that are found. 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." In 1994, the General Assembly amended § 36-105 by adding a fourth paragraph specifically authorizing localities to "require the issuance of certificates of compliance with current building regulations for existing residential buildings located in conservation and rehabilitation districts." When new provisions are added to existing legislation by amendment, a presumption arises that, "in making the amendment the legislature 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 presumed further that the legislature acted purposefully with the intent to change existing law. Therefore, the General Assembly altered the interpretation of § 36-105 by this Office by specifically authorizing localities to require certificates of compliance in certain situations. Section 36-105 was further amended in 1995 and 2002. The fourth paragraph of § 36-105 now provides:

The local governing body may, upon an affirmative finding of the need to protect the public health, safety and welfare, require the issuance of certificates of compliance with current building regulations for existing residential buildings located in conservation and rehabilitation districts designated by the local governing body, or in other areas designated as blighted pursuant to § 36-49.1:
after inspections of such buildings upon termination of the rental tenancies or when such rental property is sold, or at specific time intervals, for a specific property, but not more than once each calendar year upon a separate finding that such additional inspections are necessary to protect the public health, safety or welfare. If, however, an inspection has been conducted within the last twelve-month period, no inspection shall occur upon the termination of a rental tenancy or upon a change in ownership.... Such certificate of compliance shall be issued in accordance with the administrative provisions of the Building Code. [Emphasis added.]

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. Section 36-105 is specific in delineating when a locality may require the issuance of a certificate of compliance. Upon making an "affirmative finding of the need to protect the public health, safety and welfare," a locality may require the issuance of a certificate of compliance for certain properties in designated areas.

The Hampton Housing Ordinance applies in Hampton Housing Venture area neighborhoods and in designated areas of the city authorized to request the ordinance. The ordinance does not provide a definition of "venture area," nor does it explain what constitutes a designated area that is authorized to request the ordinance. In addition, I am unable to find in either the Hampton City Charter or any city ordinance a definition of the term "venture area." Section 36-105 is specific in the findings a local governing body must make in order to require the issuance of a certificate of compliance or its equivalent. Section 36-105 authorizes a locality to require "the issuance of certificates of compliance ... for existing residential buildings located in conservation and rehabilitation districts designated by the local governing body, or in other areas designated as blighted pursuant to § 36-49.1:1." The Hampton Housing Ordinance appears to apply to areas other than city-designated conservation and rehabilitation districts or blighted areas. To the extent it does so, I must conclude that the Hampton Housing Ordinance is unauthorized by Virginia law.

CONCLUSION

Accordingly, it is my opinion that the Hampton Housing Ordinance is unauthorized to the extent that the ordinance applies in areas other than conservation and rehabilitation districts designated by the city's local governing body, or it applies in areas other than those designated as blighted under § 36-49.1:1.

1Your inquiry pertains to Article VIII, Chapter 9 of The Hampton Housing Quality Assurance Ordinance entitled "Hampton Housing Quality Assurance Certificate Program, Building and Development Regulations" [hereinafter Hampton, Va., Ordinance].

Reserving existing or future vacancies in established mobile home park solely for seniors, to satisfy federal and state 80% senior occupancy rate requirement, could be interpreted to discriminate against families with children, in violation of state and federal fair housing laws. If mobile home park eventually reaches senior occupancy rate requirement and does not otherwise violate state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors.
ISSUE PRESENTED
You ask whether an established mobile home park, which does not meet the fair housing law eighty-percent senior occupancy requirements to operate and advertise as housing for seniors may later qualify to operate and advertise as such as a result of reserving unoccupied housing units only for seniors.

RESPONSE
It is my opinion that reserving any vacancies that exist or become available in an established mobile home park solely for seniors could be interpreted as discriminating against families with children, in violation of federal and state fair housing laws. If, however, the mobile home park eventually reaches the eighty-percent senior occupancy rate, and it does not otherwise violate the state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors.

BACKGROUND
Your inquiry concerns the application of federal and state antidiscrimination housing laws to an established mobile home park. You relate that the mobile home park currently has a senior occupancy rate below eighty percent.

APPLICABLE LAW AND DISCUSSION
The Federal Fair Housing Act was enacted as part of the Civil Rights Act of 1968. The Virginia Fair Housing Law, originally enacted in 1972, is modeled after the federal law. Both the federal and state fair housing laws seek to prevent the denial of housing opportunities based on, among other classifications, familial status. “However, Congress recognized that many senior citizens wish to live in senior-oriented communities and that the prohibition against familial status discrimination might reduce the availability of affordable senior housing. Congress therefore exempted ‘housing for older persons’ from compliance with the FHA’s familial status provisions.”

Section 36-96.3(A), a portion of the Virginia Fair Housing Law, provides:

It shall be an unlawful discriminatory housing practice for any person:

1. To refuse to sell or rent ..., or other wise make unavailable or deny, a dwelling to any person because of race, color, religion, national origin, sex, elderliness, or familial status.

Section 36-96.7 provides:

A. Nothing in [the Virginia Fair Housing Law] regarding unlawful discrimination because of familial status shall apply to housing for older persons. As used in this section, “housing for older persons” means housing: ... (ii) intended for, and solely occupied by, persons sixty-two years of age or older; or (iii) intended for, and solely occupied by, at least one person fifty-five years of age or older per unit. The following criteria shall be met in determining whether housing
qualifies as housing for older persons under clause (iii) of this subsection:

1. At least eighty percent of the occupied units are occupied by at least one person fifty-five years of age or older per unit; and

2. The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

B. Housing shall not fail to meet the requirements for housing for older persons by reason of:

1. Persons residing in such housing as of September 13, 1988, who do not meet the age requirements of clauses (ii) and (iii) of subsection A, provided that new occupants of such housing meet the age requirements of those clauses; or

2. Unoccupied units, provided that such units are reserved for occupancy by persons who meet the provisions of clauses (ii) and (iii) of subsection A.

Your question pertains to a mobile home park open to the general public that has operated for several years and now seeks to operate and advertise as a facility for seniors. The facility does not have an eighty-percent senior occupancy rate. If eighty percent of the occupied units are occupied by seniors, the mobile home park may operate and advertise as housing for seniors and rent or sell only to seniors without violating state and federal laws that prohibit discrimination in housing based on familial status.

Section 36-96.7(A) creates an exemption from the antidiscrimination provisions of § 36-96.3 for those facilities seeking to operate and advertise as housing available for seniors. To qualify for the exemption, a facility must meet the conditions of § 36-96.7(A). In addition, the facility must adhere to the federal antidiscrimination housing laws and regulations. The effect of § 36-96.7(B)(2) is that unoccupied units are not counted toward meeting the eighty-percent occupancy requirement, so long as those units are reserved for occupancy by at least one senior person. Reserving unoccupied units for occupancy by seniors, however, may violate fair housing laws based on familial status if a provider does not already qualify for the “housing for older persons” exemption.

Recently, the Secretary of Housing and Urban Development issued regulations providing for a transition period for established housing providers that desired to qualify as housing for older persons. The regulations set forth the specific requirements for housing facilities or communities to qualify as housing designed for seniors. For a period of one year following enactment of the regulations, a housing provider could reserve all new and unoccupied units for occupancy by seniors, until reaching the eighty-percent occupancy requirement. During this one-year period, a housing provider that otherwise qualified as housing for older persons could refuse to sell or rent
to applicants based on their familial status without violating the fair housing law. Thereafter, an established housing provider that failed to meet the requirements to claim the exemption for housing for older persons prior to the expiration of the one-year transition period must market available vacancies to the general public and rescind any restrictive policies that negatively impact families with children. If, however, the mobile home park eventually reaches the eighty-percent occupancy rate with occupants that satisfy the age requirement, and it does not otherwise violate the state and federal fair housing laws based on familial status, it may become eligible for the exemption.

CONCLUSION

Accordingly, it is my opinion that reserving any vacancies that exist or become available in an established mobile home park solely for seniors could be interpreted as discriminating against families with children, in violation of the state and federal fair housing laws.11 If, however, the mobile home park eventually reaches the eighty-percent senior occupancy rate requirement, and it does not otherwise violate the state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors.

1The term “senior(s),” as used in this opinion, applies to any person(s) meeting the federal and state fifty-five and older age requirement to qualify for elderly housing.

2See 42 U.S.C. § 3604 (2000); Va. Code Ann. § 36-96.3 (Michie Repl. Vol. 1996) (providing that it is unlawful to refuse to sell or rent dwelling or discriminate in terms, conditions or privileges of sale or rental based on familial status).

3You do not relate when the mobile home park was established. For the purposes of this opinion, I assume the mobile home park was established prior to May 3, 1999.


8See id. §§ 100.304 to 100.308.


1024 C.F.R. § 100.305(e)(5).

11See supra note 2.
Sheriff is not required to remain for screening of individual transported to medical facility for evaluation and treatment under temporary detention order unless order requires transport of individual to another facility to obtain emergency medical evaluation or treatment prior to placement. Sheriff maintains custody of individual until individual is delivered to temporary detention facility.

THE HONORABLE ROBERT J. DEEDS
SHERIFF FOR WILLIAMSBURG-JAMES CITY COUNTY
MARCH 29, 2002

You ask whether, once a patient is transported to a medical facility for evaluation and treatment pursuant to the issuance of an order of temporary detention under § 37.1-67.1 of the Code of Virginia, the office of sheriff is responsible for the custody of the patient after delivery of such patient.

It is my opinion that a sheriff discharges his duty when he transports an individual to a hospital, and that he is not required to remain for the screening process, unless the temporary detention order includes a specific requirement to transport the person to such other medical facility as may be necessary to obtain emergency medical evaluation or treatment prior to placement of the individual. In such situations, the custody of the individual remains with the sheriff until the individual is delivered to the temporary detention facility.

FACTS

You acknowledge that a temporary detention order customarily is issued by a magistrate subsequent to an evaluation by a local community services board employee. You also represent that, upon issuance of such order, the office of the sheriff is required, pursuant to § 37.1-67.1, to transport a person certified for emergency medical evaluation or treatment to a hospital. You report that your office has encountered problems at various medical facilities in relinquishing custody of the patient. Your office has been told that the transporting deputies continue to maintain custody of the patient while a physical examination is performed, and that such deputies remain responsible and, therefore, are liable for the individual while at the facility. Consequently, you advise that your deputies remain with the individual while various administrative matters are accomplished.

APPLICABLE AUTHORITIES

The office of sheriff is a constitutional office created pursuant to Article VII, § 4 of the Constitution of Virginia. The duties of a sheriff “shall be prescribed by general law or special act” of the General Assembly. While the powers and duties of a constitutional officer are those prescribed by statute, except as limited by law, the constitutional officer is free to discharge his prescribed powers and duties in the manner he deems appropriate. The Dillon Rule of strict construction, under which local public bodies may exercise only those powers conferred expressly or by necessary implication, is, however, applicable to constitutional officers.
DISCUSSION

The term "custody" encompasses physical possession and control over the person, and the responsibility to make placement decisions for an individual, as well as decisions concerning an individual's clinical treatment and management. The sheriff has the specific statutory responsibility to provide transportation of prisoners in his custody to the courts, hospitals and medical appointments. Consequently, the sheriff has "custody" of such person during the period of transport unless and until such custody is transferred to another.

A 1980 opinion of the Attorney General responds to the inquiry whether a transporting officer is required under § 37.1-70 to remain at a hospital during the screening process of a person who has been judicially certified as mentally ill. The opinion concludes:

The Code's failure to impose upon a sheriff the specific responsibility to remain at a hospital pending the determination of the person's mental state is in distinct contrast to the duty placed upon him under § 37.1-67.1 to execute an order of temporary detention. It also contrasts with other statutes detailing various duties and powers of a sheriff with regard to mental patients. I further note that if a sheriff were required to stay at a hospital until a decision had been made concerning the patient, then as much as twenty-four hours might elapse before he were free to resume his other duties. In the absence of any indication in the Code that the legislature contemplated such a potential drain on the time and resources of a sheriff's department, I conclude that a sheriff discharges his duty when he transports a certified individual to a hospital and he is not required to remain for the screening process.

The General Assembly has taken no action to alter the conclusion of the 1980 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." In the event, however, that the temporary detention order includes a specific requirement to transport the person "to such other medical facility as may be necessary to obtain emergency medical evaluation or treatment prior to placement," the custody of the individual remains with the sheriff until the individual is delivered to the temporary detention facility. Consequently, in such situations, the sheriff must maintain custody of such individual until final execution of the order.

CONCLUSION

It is my opinion that a sheriff discharges his duty when he transports an individual to a hospital, and that he is not required to remain for the screening process, unless the temporary detention order includes a specific requirement to transport the person to such other medical facility as may be necessary to obtain emergency medical evaluation
or treatment prior to placement of the individual. In such situations, the custody of
the individual remains with the sheriff until the individual is delivered to the temporary
detention facility.

2 See Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); Old v. Commonwealth,
  a defendant found not guilty of a criminal charge by reason of insanity or mental retardation, who
  is committed to the custody of the Commissioner of Mental Health, Mental Retardation and Sub-
  stance Abuse services pursuant to § 19.2-181. Section 19.2-182.2 replaces predecessor § 19.2-181,
  and does not affect the conclusions reached in this opinion. See 1991 Va. Acts ch. 427, at 637.
  superintendent has same responsibility as sheriff to transport prisoners in his care to courts,
  hospitals, etc.).
9 Id. at 315.

OP. NO. 02-063
MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.
RULES OF SUPREME COURT OF VIRGINIA: INTEGRATION OF THE STATE BAR – CANONS
OF JUDICIAL CONDUCT FOR THE STATE OF VIRGINIA.

Special justice, appointed to preside over commitment proceedings involving persons
alleged to mentally retarded or mentally ill and in need of hospitalization, may
represent individuals in commitment hearings held within judicial circuit of such
justice.

THE HONORABLE WILLIAM G. BARKLEY
JUDGE, ALBEMARLE GENERAL DISTRICT COURT
AUGUST 21, 2002

ISSUE PRESENTED

You ask whether a special justice appointed pursuant to § 37.1-88 may represent indi-
viduals in § 37.1-67.3 commitment hearings held in the judicial circuit in which the
special justice serves.

RESPONSE

It is my opinion that a special justice appointed pursuant to § 37.1-88 may represent
individuals in § 37.1-67.3 commitment hearings held in the judicial circuit in which the
special justice serves.
APPLICABLE LAW AND DISCUSSION

The chief judge of each judicial circuit may appoint special justices to perform "the duties required of a judge by [Title 37.1]," pertaining to mental health generally. A special justice must be licensed by the State Bar to practice law. A special justice serves at the pleasure of the appointing chief judge and has "all the powers and jurisdiction conferred upon a judge by [Title 37.1]." Title 37.1 confers on a special justice authority to preside over commitment proceedings of persons "alleged to be mentally retarded" and of persons alleged or reliably reported to be "mentally ill and in need of hospitalization." In all other respects, special justices are not clothed with judicial authority as are general district court judges, juvenile and domestic relations district court judges and circuit court judges. As such, special justices are not viewed as judges in the traditional sense of the word. Rather, they are persons appointed by the chief circuit court judge for the limited purposes set forth in Title 37.1.

Among the powers conferred on a special justice is the authority to preside over commitment hearings conducted pursuant to § 37.1-67.3. If the special justice is not presiding in the particular case, no provision in the Constitution of Virginia or the Virginia Code prohibits him from representing individuals in such hearings in the judicial circuit in which he serves. Similarly, there is no case law or prior opinion of the Attorney General prohibiting such a practice. The Canons of Judicial Conduct for the State of Virginia provide that a "special justice … may practice law in the court on which he serves." Please note that nothing in this opinion should be construed as a comment on the ethical propriety of a special justice serving as counsel in a particular case, as such a question would be within the province of the Judicial Inquiry and Review Commission and the Virginia State Bar.

CONCLUSION

Accordingly, it is my opinion that a special justice appointed pursuant to § 37.1-88 may represent individuals in § 37.1-67.3 commitment hearings held in the judicial circuit in which the special justice serves.

2 Id.
3 Id.
4 Section 37.1-65.1(A), (B) (Michie Repl. Vol. 1996).
7 Id.
8 Id.
9 VA. SUP. CT. R. pt. 6, § III, Canon 6(C), at http://www.courts.state.va.us/scv/amendments/rule3B_2_040101_.html#sectionIII (last modified Apr. 16, 2001).
You ask whether the Department of State Police has the authority to provide certain mental health information maintained by the Central Criminal Records Exchange to the Federal Bureau of Investigation for use in the National Instant Criminal Background Check System (“NICS”) Index.

The Department of State Police has the authority to provide certain mental health information maintained in the Central Criminal Records Exchange to the Federal Bureau of Investigation, so long as it is (i) kept confidential; and (ii) used only to determine a person’s eligibility to possess, purchase or transfer a firearm.

BACKGROUND

You advise that the Federal Bureau of Investigation has requested the Department of State Police to provide mental health information for use in the NICS Index. You relate that the Department of State Police retains certain mental health information that has been forwarded to the Central Criminal Records Exchange pursuant to the requirements of §§ 37.1-67.3 and 37.1-134.18(B) of the Code of Virginia.

You further advise that the United States Department of Justice has issued regulations establishing the policies and procedures for maintaining the NICS Index. The sole purpose of the NICS Index is to provide information to any licensed importer, manufacturer or dealer of firearms as to whether the transfer of a firearm to an unlicensed person would be in violation of federal or state law. The regulations note that, in addition to records obtained from federal agencies, authorized state and local law enforcement agencies may contribute records to the NICS Index.

APPLICABLE LAW AND DISCUSSION

In order to answer your question, three issues must be resolved: (1) whether orders or adjudications related to mental health may be provided to and retained by the Central Criminal Records Exchange; (2) whether the Federal Bureau of Investigation constitutes a criminal justice agency with which the Exchange may share information; and (3) whether the adjudications and orders related to mental health on file with the Exchange may be shared with the Federal Bureau of Investigation.

The first issue to be resolved is whether orders or adjudications related to mental health may be provided to and retained by the Central Criminal Records Exchange.
Chapter 23 of Title 19.2, §§ 19.2-387 through 19.2-392.02, establishes the Central Criminal Records Exchange as a separate division within the Department of State Police and the procedure for reporting criminal offenses to the Exchange. Section 19.2-388 sets forth the duties of the Exchange, including the duty “to receive, classify and file criminal history record information as defined in [§ 9.1-101].”

Section 9.1-101 defines “criminal history record information” as records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges, and any disposition arising therefrom. The term shall not include juvenile record information which is controlled by Chapter 11 (§ 16.1-226 et seq.) of Title 16.1, criminal justice intelligence information, criminal justice investigative information, or correctional status information.

Section 37.1-67.3 requires the district court clerk to forward to the Central Criminal Records Exchange “a [certified] copy of any order for involuntary commitment to a hospital” for mental health treatment. Section 37.1-134.18(B) requires the clerk of a court of competent jurisdiction to forward to the Exchange a certified copy of any court order adjudicating a person mentally incapacitated or any order restoring capacity to such person.

It is clear from reading §§ 19.2-387 through 19.2-392.02, § 9.1-101, and §§ 37.1-67.3 and 37.1-134.18(B) that the General Assembly intended the Exchange to receive orders and adjudications related to mental health. The only ambiguity is whether the General Assembly (i) intends to expand the duties of the Exchange, or (ii) considers orders or adjudication related to mental health to be covered within the definition of “criminal history record information.” The definition of “criminal history record information” contained in § 9.1-101 is written in broad terms and not limited to criminal convictions. Therefore, it is my opinion that orders and adjudications related to mental health are covered within the definition of “criminal history record information” under § 9.1-101. Once received by the Exchange, however, §§ 37.1-67.3 and 37.1-134.18(B) require that such orders “shall be kept confidential in a separate file and used only to determine a person’s eligibility to possess, purchase or transfer a firearm.”

As to the second issue of whether the Federal Bureau of Investigation constitutes a criminal justice agency with which the Exchange may share information, § 19.2-389(A) restricts the dissemination of “criminal history record information” to certain individuals and agencies. Section 19.2-389(A) permits the dissemination of criminal history record information to “[a]uthorized officers or employees of criminal justice agencies, as defined by [§ 9.1-101], for purposes of the administration of criminal justice.” Section 9.1-101 defines “criminal justice agency” to mean “any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice.” Section 9.1-101 also defines “administration of criminal justice” as the...
“performance of any activity directly involving the detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders or the collection, storage, and dissemination of criminal history record information.” The Federal Bureau of Investigation is a criminal justice agency of the federal government. Therefore, under a plain reading of these various statutes, the Federal Bureau of Investigation constitutes a “criminal justice agency” with which the Central Criminal Records Exchange may share information.

The third issue to be addressed is whether adjudications and orders related to mental health on file with the Exchange may be shared with the Federal Bureau of Investigation. Pursuant to § 9.1-102(23), the Department of Criminal Justice Services, the state agency charged with the administration of the criminal history record system, has issued regulations pertaining to the use and security of information retained by the Exchange. Though I find no specific regulation granting authority to the Department of State Police to provide a copy of the form and order to be forwarded under §§ 37.1-67.3 and 37.1-134.18(B), neither statutes nor regulations should be interpreted in ways that produce absurd or irrational consequences. Statutes related to the same subject should be considered in pari materia. In addition, when construing statutes, the fullest possible effect must be given to the legislative intent embodied in the entire statutory enactment.

Article 7, Chapter 7 of Title 18.2, §§ 18.2-308 through 18.2-311.2, regulates the carrying of certain types of weapons in the Commonwealth. Section 18.2-308.1:2 makes it “unlawful for any person who has been adjudicated ... incapacitated pursuant to Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1 and whose competency or capacity has not been restored pursuant to former § 37.1-134.1 or § 37.1-134.16, to purchase, possess, or transport any firearm.” Section 18.2-308.1:3(A) makes it “unlawful for any person involuntarily committed pursuant to § 37.1-67.3 to purchase, possess or transport a firearm during the period of such person’s commitment.” The purpose underlying a statute’s enactment is particularly significant in construing it. The obvious purpose of both the federal and state laws is to regulate and restrict the possession of firearms by individuals who may not possess the requisite mental condition to safely possess such firearms, and who could potentially harm the public. Therefore, adjudications and orders related to mental health maintained by the Exchange may be shared with the Federal Bureau of Investigation.

CONCLUSION

Accordingly, it is my opinion that the Department of State Police is authorized to provide mental health information maintained in the Central Criminal Records Exchange, pursuant to the requirements of §§ 37.1-67.3 and 37.1-134.18(B), to the Federal Bureau of Investigation for use in the NICS Index.

128 C.F.R. §§ 25.1 to 25.11 (2001). The NICS Index is the database managed by the Federal Bureau of Investigation, which contains information provided by federal and state agencies about persons who are prohibited by federal law from possessing a firearm. Id. § 25.2.
"Record means any ... information about an individual that is maintained by an agency, including but not limited to information that disqualifies the individual from receiving a firearm." \textit{Id.} § 25.2.

\textit{Id.} § 25.4.


Section 9.1-102(23) provides that, under the direction of the Criminal Justice Services Board, the Department of Criminal Justice Services has the power and duty to "[a]dopt regulations establishing guidelines and standards for the collection, storage, and dissemination of criminal history record information and correctional status information, and the privacy, confidentiality, and security thereof necessary to implement state and federal statutes, regulations, and court orders[.]


\textit{See supra} note 7.


\textit{Compare} Grenco v. Nathaniel Green, 218 Va. 228, 231, 237 S.E.2d 107, 109 (1977) (noting that purpose of real estate licensing statutes is to protect public from fraud, misrepresentation, and dishonest and incompetent persons).

OP. NO. 02-069

MILITARY AND EMERGENCY LAWS: EMERGENCY SERVICES AND DISASTER LAW — MILITARY LAWS OF VIRGINIA.

CONSTITUTION OF VIRGINIA: EXECUTIVE (EXECUTIVE AND ADMINISTRATIVE POWERS) — BILL OF RIGHTS (LAWS SHOULD NOT BE SUSPENDED) — (TAKING OF PRIVATE PROPERTY).

HEALTH: ADMINISTRATION GENERALLY — DEPARTMENT OF HEALTH AND STATE HEALTH COMMISSIONER — DISEASE PREVENTION AND CONTROL.

ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT.

Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources.
THE HONORABLE JOHN M. O'BANNON, III
MEMBER, HOUSE OF DELEGATES
NOVEMBER 13, 2002

ISSUE PRESENTED

You ask whether the Governor, in responding to a public health emergency, has the legal authority (1) to suspend health professional licensure requirements, including those for out-of-state and retired health care professionals; (2) to enforce quarantines; and (3) to control and allocate private resources, including medical personnel and supplies, for emergency response.

RESPONSE

It is my opinion that, in the event of a state of emergency, the Governor has the authority to suspend licensure requirements of health professionals, including those for out-of-state and retired health professionals, and to enforce quarantines. It is further my opinion that the Governor has the authority to control and allocate services and resources, including state government and private medical personnel and supplies, under any state or federal emergency services program. The Commonwealth's authority to take private resources is limited by the constitutional requirement to provide just compensation.

BACKGROUND

You relate that the Health and Medical Subpanel of Governor Warner's Secure Virginia Panel has issued recommendations that have been accepted by the full panel. The Secure Virginia Panel is a replacement for the Virginia Preparedness and Security Panel that Governor James S. Gilmore created after the September 11, 2002, terrorist attacks. One of the recommendations is to seek an official opinion from the Attorney General to determine if Virginia's laws are adequate to allow the Commonwealth to respond efficiently and effectively to a public health emergency resulting from terrorist activity. For the purposes of this opinion, I assume that the public health emergency resulting from terrorist activity is of the magnitude to compel the President of the United States to proclaim or declare a national emergency. I further assume, for the purposes of this opinion, that such public health emergency meets the definition of a "man-made disaster" and constitutes an "emergency" as that term is defined in § 44-146.16(2).

APPLICABLE LAW AND DISCUSSION

The Commonwealth of Virginia Emergency Services and Disaster Law of 2000 sets forth the statutory framework for the Governor and the executive heads of the Commonwealth and the political subdivisions of the state to deal with emergency situations caused by natural and man-made disasters. Among the stated purposes of the Law, is to confer upon the Governor and the political subdivisions of the Commonwealth specific emergency powers. It is also the purpose of [the Law] and the policy of the Commonwealth that all emergency service functions of the Commonwealth be coordinated to the maximum extent possible with the comparable functions of
the federal government, other states, and private agencies of every type, and that the Governor shall be empowered to provide for enforcement by the Commonwealth of national emergency services programs, to the end that the most effective preparation and use may be made of the nation's resources and facilities for dealing with any disaster that may occur.\(^6\)

The Emergency Services and Disaster Law authorizes the Governor to declare a state of emergency "\([w]\)henever, in the opinion of the Governor, the safety and welfare of the people of the Commonwealth require the exercise of emergency measures due to a threatened or actual disaster.\)"\(^7\) Section 44-146.17(1) gives the Governor broad authority to take action in the event of a disaster, "\([t]o\) proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of [the Law].\)"\(^8\) Accordingly, the Governor has the authority to declare an emergency and waive state law when, in the Governor's opinion, the safety and welfare of the people of Virginia require the exercise of emergency measures.\(^9\) The Governor, therefore, has authority under § 44-146.17 to waive the statutory and regulatory requirements related to the licensure of health professionals during a state of emergency or declared disaster.\(^10\)

Besides the Governor's general ability to waive statutory and regulatory requirements immediately by executive order, health boards may engage in a more lengthy process of promulgating emergency regulations. Health care practitioners are required to be licensed in accordance with regulations promulgated by their respective boards.\(^11\) Section 2.2-4011(A) authorizes the boards to promulgate emergency regulations in "a situation (i) involving an imminent threat to public health or safety." Each of the respective boards may, therefore, promulgate emergency regulations suspending licensure requirements in the event of a public health disaster. Section 2.2-4011(A) requires that "the agency shall state in writing the nature of the emergency and of the necessity for such action .... [S]uch regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations."

You also ask whether the Governor has the legal authority to maintain and enforce a quarantine. The State Health Commissioner has the authority, pursuant to § 32.1-43, "to require quarantine, vaccination or treatment of any individual when he determines any such measure to be necessary to control the spread of any disease of public health importance." In addition, the Board of Health may promulgate regulations and orders to meet any emergency or to prevent a potential emergency caused by a disease dangerous to public health, including procedures specifically responding to any disease listed pursuant to § 32.1-35 that is determined to be caused by an agent or substance used as a weapon.\(^12\)

The State Health Commissioner is further "vested with all the authority of the Board when it is not in session."\(^13\)
Section 44-146.17(1) authorizes the Governor to "direct and compel evacuation of all or part of the populace from any stricken or threatened area ..., implement emergency mitigation, preparedness, response or recovery actions; ... and control ingress and egress at an emergency area, including the movement of persons within the area and the occupancy of premises therein." These powers may reasonably be interpreted to include quarantine under the Governor's authority to control the ingress, egress and movement of persons within an emergency area. The Governor, State Health Commissioner and Board of Health have the authority in a public health emergency to issue orders or regulations to enforce a quarantine.

You further ask whether the Governor has legal authority to control and allocate private resources, including medical personnel and supplies, for emergency response. As the chief executive officer of the Commonwealth, the Governor may direct state employees who are medically trained to participate in emergency response activities as part of their job responsibilities. Similarly, as the commander-in-chief of the armed forces of the Commonwealth, the Governor may direct the National Guard to provide such services. The extent to which the Governor may order the National Guard's use of federal military assets, regularly used by the Guard, however, is subject to federal laws and regulations governing the use of such assets.

Additionally, the Governor may call for privately employed personnel to assist in an emergency response situation. If volunteers are insufficient to meet emergency response needs, the Governor has the ability to require medically trained personnel to provide emergency response services. The Thirteenth Amendment to the Constitution of the United States prohibits "involuntary servitude, except as a punishment for crime." The Thirteenth Amendment does not, however, prevent the state from requiring service of its citizens for military or certain other civic duties. Accordingly, the Governor may use his power as commander-in-chief of the state's military to call out, in addition to the National Guard, the unorganized militia. Under § 44-86, the Governor has the power to order the deployment of "the whole or any part of the unorganized militia." This power includes the ability to call out privately employed medical personnel, as part of the state militia, to respond to a disaster situation. "Whenever any part of the unorganized militia is ordered out, it shall be governed by the same rules and regulations ... as the National Guard or naval militia." Moreover, "[w]henever the Governor orders out the unorganized militia or any part thereof, it shall be incorporated into the Virginia State Defense Force until relieved from service."

Section 44-146.17(1) lists measures the Governor may take to respond to a public health emergency, including those actions "as are in his judgment required to control,
restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs. In addition, public agencies are directed
to utilize the services, equipment, supplies and facilities … of the Commonwealth and the political subdivisions thereof to the maximum extent practicable consistent with state and local emergency operation plans. The officers and personnel of all such departments, offices, and agencies are directed to cooperate with and extend such services and facilities to the Governor and to the State Department of Emergency Management upon request.

In 1997, pursuant to § 44-146.17(1), Governor George Allen promulgated, by executive order, the Commonwealth of Virginia Emergency Operations Plan. The Emergency Operations Plan, as modified by the Secure Virginia Initiative set forth under executive order of Governor Mark R. Warner, provides for state-level emergency operations in response to any type of disaster or large-scale emergency affecting the Commonwealth. The purpose of the Plan is to assign duties and responsibilities to departments, agencies and support organizations, including volunteers, for disaster mitigation preparedness, response and recovery. The Plan also provides that all health and medical-related professional societies and organizations and commercial health services may be requested to provide specific response teams or coordination capabilities during a declared emergency.

The state and local plans currently in place provide for the mobilization of volunteer medical personnel and equipment necessary to address a public health emergency in a disaster situation. The costs of implementing such plans are disbursed from the Virginia Disaster Response Fund, a special fund account administered by the Coordinator of Emergency Management.

The Governor’s ability to control and allocate private resources pursuant to § 44-146.17(1), however, is tempered by the Virginia and United States Constitutions. Article I, § 11 of the Constitution of Virginia prohibits the General Assembly from passing any law “whereby private property shall be taken or damaged for public uses, without just compensation.” To the extent the control and allocation of resources exercised under § 44-146.17(1) amounts to a constitutional “taking,” either temporary or permanent, the Commonwealth would be responsible to provide “just compensation” to the person whose property was acquired or used. In times of extreme emergency or declared disasters, time is of the essence in mobilizing public and private resources to respond to the emergency. There does not appear to be a statutory mechanism, however, to ensure that any “taking” of private property by the Commonwealth during a state of emergency is properly recorded, accounted and reimbursed once the emergency subsides.
Funds are available in specified circumstances to cover the cost of emergency operations. For example, disbursements may be made in specified circumstances from the Virginia Disaster Response Fund to cover the costs of response and recovery under § 44-146.18:1. Allotments may also be made to state agencies and localities to carry out disaster service missions and responsibilities in accordance with Department of Emergency Management guidelines under § 44-146.28(a). Funds may also be accepted from the federal government to pay "a portion of any disaster programs, projects, equipment, supplies or materials or other related costs" under § 44-146.27(A)-(B). Further, the Governor and political subdivisions may accept gifts, grants or loans for purposes of emergency management under § 44-146.27(C). Additionally, the General Assembly may appropriate funds after the emergency through the normal appropriations process or special claims bills.

CONCLUSION

Accordingly, it is my opinion that, in the event of a state of emergency, the Governor has the authority to suspend licensure requirements of health professionals, including those for out-of-state and retired health professionals, and to enforce quarantines. It is further my opinion that the Governor has the authority to control and allocate services and resources, including state government and private medical personnel and supplies, under any state or federal emergency services program. The Commonwealth's authority to take private resources is limited by the constitutional requirement to provide just compensation.

3Section 44-146.16 defines the following words as used in the Emergency Services and Disaster Law:
"(2) 'Man-made disaster' means any condition following an attack by any enemy or foreign nation upon the United States resulting in substantial damage of property or injury to persons in the United States and may be by use of ... nuclear, radiological, chemical or biological means or other weapons or by ... terrorism, foreign and domestic ...., which threaten or cause damage to property, human suffering, hardship or loss of life;
"(2a) 'Emergency' means any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property or natural resources and may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof[.]"
Moreover, § 44-146.17(1) provides that "no rule, regulation, or order issued under this section shall have any effect beyond June 30 next following the next adjournment of the regular session of the General Assembly." Section 44-146.17:1 provides that "[t]he Governor shall cause copies of any order ... proclaimed and published by him pursuant to § 44-146.17 to be transmitted forthwith to each member of the General Assembly." This reporting requirement ensures that the General Assembly is properly apprised of the Governor's actions during an emergency or disaster situation, and that an emergency, with its attendant concentration of power and authority in the Governor, cannot last indefinitely.

"See Boyd v. Commonwealth, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975); see also 1973-1974 Op. Va. Att'y Gen. 448, 449-50. "[A]ny suspension must last only as long as absolutely necessary.... Another important condition is that rights can only be suspended in the area affected by the emergency." I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 92 (1974). In the end, a court will be the final arbitrator of how the balance is struck between individual rights and the abridgement of those rights in times of emergency, disaster or war. Id. at 93. But see VA. CONST. art. I, § 7 ("[A]ll power of suspending laws, ... without consent of the representatives of the people, ... ought not to be exercised.")."

10 In the context of a federally declared emergency, the United States Secretary of Health and Human Services has the power to temporarily waive or modify certain licensure requirements. Section 1135(b) of the Federal Public Health Security and Bioterrorism Preparedness and Response Act of 2002 authorizes the United States Secretary of Health and Human Services "to temporarily waive or modify ... in any emergency area ... during any portion of an emergency period, the requirements of titles XVIII, XIX, or XXI, or any regulation thereunder ... pertaining to— "(2) requirements that physicians and other health care professionals be licensed in the State in which they provide such services, if they have equivalent licensing in another State and are not affirmatively excluded from practice in that State or in any State ... included in the emergency area[.]"


"See, e.g., VA. CODE ANN. § 54.1-2400(3) (LexisNexis Repl. Vol. 2002) (authorizing health regulatory boards "[t]o ... license qualified applicants as practitioners of the particular profession or professions regulated by such board[s]"). Section 54.1-2902 makes it "unlawful for any person to practice medicine, osteopathic medicine, chiropractic, podiatry, or as a physician's or podiatrist's assistant" without a valid license, and § 54.1-3310 makes it "unlawful for any person to practice pharmacy ... unless licensed by the Board [of Pharmacy] as a pharmacist."


"The Governor shall be commander-in-chief of the armed forces of the Commonwealth and shall have power to embody such forces to repel invasion, suppress insurrection, and enforce the execution of the laws." VA. CONST. art. V, § 7; see also VA. CODE ANN. § 44-8 (LexisNexis Repl. Vol. 2002) (parallel statutory authority); 1945-1946 Op. Va. Att'y Gen. 144, 147 ("This power may be used wherever a situation arises where, on account of obstructions, or threats of obstructions to the enforcement of the laws or obedience thereto, the functioning of the government or the health and safety of the people of the State are jeopardized.... The Governor is vested with absolute discretion in its use and in the selection of members of the militia he will embody .... He is the sole judge of whether an exigency exists which requires the aid of the militia and has full discretion as to the method of utilizing that aid. On the other hand, of course, if the facts leave no room for
doubt that an emergency does not exist, the power cannot be exercised under a mere pretense that it does.”).

17 The Governor may “order [the unorganized militia] out either by calling for volunteers or by draft [pursuant to § 44-89].” Section 44-87 (LexisNexis Repl. Vol. 2002).
18 Pursuant to § 44-4, “[t]he unorganized militia shall consist of all able-bodied persons as set out in § 44-1, except such as may be included in §§ 44-2, 44-3, and 44-54.6 and except” as otherwise provided by law. Section 44-1 provides, in part, that “[t]he militia of the Commonwealth of Virginia shall consist of all able-bodied citizens of this Commonwealth and all other able-bodied persons resident in this Commonwealth who have declared their intention to become citizens of the United States, who are at least sixteen years of age and, except as hereinafter provided, not more than fifty-five years of age.” Section 44-2 sets forth the composition of the National Guard. Section 44-3 sets forth the composition of the naval militia. Section 44-54.6 sets forth the composition of the Virginia State Defense Force. Such Force shall consist, in part, of “[s]uch persons of the unorganized militia who may be drafted to fill the force structure of the Virginia State Defense Force or who may be ordered out for active duty until released from such service.” Section 44-54.6(2) (LexisNexis Repl. Vol. 2002).
19 See 1945-1946 Op. Va. Att’y Gen. supra note 14, at 152 (“[T]he Governor may ... order out those militia members best qualified to meet the demands of the occasion.”).
22 “Emergency services” ... include, without limitation, fire-fighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, emergency resource management, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection.” Section 44-146.16(3).
23 Section 44-146.24.
25 Exec. Order No. 7, supra note 1 (requiring review of all current disaster, emergency management, and terrorism risk management plans, including Executive Order No. 73).
26 Exec. Order No. 73, supra note 24, at 3676; Exec. Order No. 7, supra note 1, at 1707.
28 Id. at G-1.
29 See § 44-146.18:1. Under § 44-146.17(2), the Governor has the authority to “appoint a State Coordinator of Emergency Management.”
30 See also U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”).
31 “Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.” United States v. Russell, 80 U.S. (13 Wall.) 623, 629 (1871).
A federal declaration of disaster or national emergency may make available federal funds for emergency response services. See 42 U.S.C. § 5191 (2000) (requiring request for declaration of emergency by President to be made by Governor of affected state; situation must be severe and magnitude beyond state's capability to provide effective response; request must provide information regarding resources used, type of request, and extent of aid required); id. §§ 5192, 5193 (2000) (providing President with broad powers to direct federal agencies, with or without reimbursement, to provide resources, including personnel and equipment, for state and local emergency assistance; setting limits for funding of support efforts).

See § 44-146.18(a) (continuing State Office of Emergency Services and State Department of Emergency Services as Department of Emergency Management).

Section 44-146.27(A).

OP. NO. 02-007
MOTOR VEHICLES: LICENSURE OF DRIVERS - UNLICENSED DRIVING PROHIBITED.
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

Applicability of administrative impoundment provisions where individual is charged with or arrested for driving during license suspension period resulting from DUI conviction.

THE HONORABLE NORMAN DEV. MORRISON
JUDGE, CLARKE COUNTY GENERAL DISTRICT COURT
APRIL 29, 2002

ISSUE PRESENTED

You inquire regarding the administrative impoundment of a motor vehicle following the arrest of an individual for driving such vehicle during the period his driver's license has been suspended or revoked ("during a suspension period") as a result of his conviction for driving under the influence of alcohol ("DUI"), in violation of § 18.2-266 of the Code of Virginia. You specifically ask whether § 46.2-301.1, which requires impoundment in that situation, is applicable only if the arresting law-enforcement officer has charged the individual with driving during a suspension period in violation of § 46.2-301, or is also applicable if the arresting officer has charged the individual with such offense as a violation of § 18.2-272.

RESPONSE

Because the offense of driving during a suspension period may be considered a violation of either § 46.2-301 or § 18.2-272, it is my opinion that the vehicle being driven by an individual who commits said offense should be impounded pursuant to § 46.2-301.1, without regard to whether the individual was arrested and charged under § 46.2-301 or § 18.2-272.

APPLICABLE LAW AND BACKGROUND

Section 46.2-301.1(A) provides, in part:

The motor vehicle being driven by any person (i) whose driver's license, learner's permit or privilege to drive a motor vehicle has been suspended or revoked for ... driving while under the influence
... shall be impounded or immobilized by the arresting law-enforcement officer at the time the person is arrested for driving after his driver's license, learner's permit or privilege to drive has been so revoked or suspended. [Emphasis added.]

The emphasized language clearly states that impoundment or immobilization under § 46.2-301.1 is to be effected at the time an individual is arrested for driving during a suspension period. You relate that driving during a suspension period generally is charged on an arrest warrant or summons as a violation of § 46.2-301, which provides, in part, that

no resident or nonresident (i) whose driver's license, learner's permit, or privilege to drive a motor vehicle has been suspended or revoked or (ii) who has been directed not to drive by any court, by the Commissioner [of the Department of Motor Vehicles], or by operation of law pursuant to [Title 46.2] or (iii) who has been forbidden, as prescribed by law, by the Commissioner, the State Corporation Commission, the Commonwealth Transportation Commissioner, any court, or the Superintendent of State Police, to operate a motor vehicle in the Commonwealth shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in the Commonwealth until the period of such suspension or revocation has terminated.[1]

You further note, however, that, where the individual's driver's license or privilege to drive has been suspended or revoked as a direct result of a DUI conviction, the offense of driving during a suspension period may be charged on an arrest warrant or summons as a violation of § 18.2-272, which provides, in part:

If any person so convicted [of DUI] shall, during the time for which he is deprived of his right so to do, drive or operate any motor vehicle, engine or train in this Commonwealth, he shall be guilty of a Class I misdemeanor.

You advise that there is confusion as to whether § 46.2-301.1 is applicable only where the arresting officer has charged the driver of the vehicle with driving during a suspension period, in violation of § 46.2-301, or whether § 46.2-301.1 also requires impoundment where the officer has arrested the driver for driving during a suspension period, in violation of § 18.2-272, since it appears that either charge may be considered appropriate if the suspension or revocation is the result of a DUI conviction.

DISCUSSION

I. The Historical Derivation of §§ 18.2-272 and 46.2-301 Indicates That Driving During a Suspension Period May Be Charged Under Either Statute Where the Suspension or Revocation Is the Result of a DUI Conviction

The provisions of § 18.2-272 are derived from Section 25, the original statute prohibiting DUI in Virginia. At the time of its enactment in 1924, the entire DUI statute comprised
a single paragraph. Section 25 included the provisions establishing the penalty for violations, provided for automatic loss of the right to drive for a one-year period upon conviction, and set out the offense of driving during that one-year period after the conviction as follows:

It shall be unlawful for any person to drive or run any automobile, car, truck, engine, or train while under the influence of intoxicants. If any person violates the provisions of this section he shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and imprisonment for not less than thirty days nor more than one year, for the first offense, provided the court in a proper case may suspend the jail sentence. Any person convicted of a second or subsequent offense shall be subject to imprisonment for not less than six months nor more than two years. The judgment of conviction shall of itself operate to deprive him of his right to drive any such vehicle or conveyance for a period of one year from the date of such judgment. If any person so convicted shall, during the year, drive any such vehicle or conveyance, he shall be guilty of a misdemeanor; but nothing in this section shall be construed as conflicting with or repealing any ordinance or resolution of any city, town or county, heretofore or hereafter adopted, which restricts still further the rights of such person to drive any such vehicle or conveyance.\(^3\)

The DUI statutes are considerably longer and more complex now. As in the last two sentences of Section 25, § 18.2-271 (A) provides that “the judgment of conviction … shall of itself operate to deprive the person … of the privilege to drive,” and § 18.2-272 makes it a misdemeanor to drive during the period of time that the conviction has deprived him of his privilege to drive. There has been no substantive change in these provisions for over seventy-five years. It is now, and long has been, the appropriate law under which an individual is to be charged if he drives during a suspension period that resulted from a DUI conviction.

The 1952 Session of the General Assembly enacted the precursor provisions of § 46.2-301 in § 46-347.1:

\[\text{No person whose operator's or chauffeur's license has been suspended or revoked by any court or by the Commissioner shall thereafter drive any motor vehicle in this State unless and until such suspension or revocation shall have terminated. Any person violating the provisions of this section shall for the first offense be confined in jail not less than ten days nor more than six months, and for the second or any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be punished by a fine of not less than one hundred nor more than one thousand dollars.}\] \(^4\)
In repealing Title 46 and enacting Title 46.1, the 1958 Session of the General Assembly added language to make § 46.1-350(a) (repealed § 46-347.1) applicable to persons whose license "has been suspended or revoked ... by operation of law pursuant to the provisions of ... § 18-77." Section 18-77 was the designation at that time for the language that previously was enacted as a portion of Section 25 and is presently contained in § 18.2-271(A): "The judgment of conviction [for DUI] ... shall of itself operate to deprive the person so convicted ... of the right to drive ... for a period of one year." Thus, it appears that the 1958 enactment had the effect of making both §§ 46.2-301 and 18.2-272 (predecessor §§ 46.1-350 and 18-78, respectively) expressly applicable to any person driving during a suspension period resulting from a DUI conviction.

The 1991 Session of the General Assembly, however, deleted from § 46.2-301 the reference to § 18-77, which was added to the statute in 1958, and amended § 18.2-272. It is arguable that the General Assembly may have intended that § 46.2-301 no longer be applicable to those who drive during a suspension period that resulted from a DUI conviction. A different intent was evident in 1994, however, when the General Assembly amended § 46.2-301 to provide for an additional ninety-day impoundment for vehicles that previously had been impounded pursuant to § 46.2-301.1 for driving during a suspension period that resulted from a DUI conviction, in violation of § 18.2-266. Because the additional ninety-day impoundment for a conviction of driving during a suspension period was added to § 46.2-301, it must be presumed that the legislature intended the provision to apply to such a conviction obtained under § 46.2-301. Accordingly, it appears that, by 1994, the General Assembly intended the offense of driving during a suspension period to be charged under either § 46.2-301 or § 18.2-272, where the suspension or revocation of the individual’s privilege to drive resulted from a DUI conviction.

II. The Fact That the Impoundment Provisions Have Been Placed in Title 46.2 Does Not Constrain Their Application to Charges Made or Convictions Obtained Pursuant to That Title

It is apparent that the General Assembly’s placement of the impoundment provisions of § 46.2-301.1 in Title 46.2 does not indicate an intent that such provisions be applicable only to charges made, or convictions obtained, pursuant to provisions in that title. There are other provisions in Title 46.2 which are made applicable as the result of actions taken pursuant to provisions located in Title 18.2. Accordingly, because the impoundment provisions of § 46.2-301.1 do not expressly state under which statute an arrest for driving during a suspension period must be made in order to trigger the impoundment requirement, and because such offense lawfully may be charged under either § 46.2-301 or § 18.2-272, where the revocation or suspension resulted from a DUI conviction, I am of the opinion that the impoundment provisions in § 46.2-301.1 were intended to be applicable to an arrest for driving during a suspension period without regard to whether the driver was arrested for violating § 46.2-301 or § 18.2-272, provided the driver’s suspension or revocation resulted from a DUI conviction.
CONCLUSION

It is my opinion that the impoundment provisions of § 46.2-301.1 should be applicable if the offense of driving during a suspension period as a result of a DUI conviction is charged by the arresting officer as a violation of § 46.2-301. Impoundment under § 46.2-301.1 is required also if such offense is charged as a violation of § 18.2-272.\(^7\)

\(^1\)Va. Code Ann. § 46.2-301(B) (Michie Supp. 2001).
\(^3\)Id. at 600 (emphasis added).
\(^6\)Id. ch. 496, at 633, 633-34.
\(^7\)1991 Va. Acts ch. 64, at 90, 90.
\(^8\)Id.
\(^10\)See e.g., §§ 46.2-389, 46.2-391 (providing for license revocation actions to be taken as result of convictions under, among others, §§ 18.2-36.1, 18.2-51.4, 18.2-266, 18.2-272, and 46.2-341.24).
\(^11\)To the extent that this opinion conflicts with a 2000 opinion concluding that an arrest warrant issued for driving after forfeiture of a license for DUI is not sufficient to impound a driver’s vehicle, that opinion is overruled. See 2000 Op. Va. Att’y Gen. 98.

OP. NO. 02-071
MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY – CHILD RESTRAINTS.

Interpretation of ‘bus’ and ‘impractical’ as used in relation to transporting children in child restraint devices, is not appropriate issue for opinion of Attorney General. Purpose of child restraint laws—to protect children from injury—should be foremost in determining whether vehicle transporting child is ‘bus’ entitled to exemption from child restraint laws or whether it is ‘impractical’ to put child restraint device in vehicle. Vehicles exempt from requirements for age specific child restraints before July 1, 2002, remain exempt.

THE HONORABLE FRANK D. HARGROVE, SR.
MEMBER, HOUSE OF DELEGATES
JULY 30, 2002

ISSUE PRESENTED

You inquire regarding the child safety restraint requirements of Article 13, Chapter 10 of Title 46.2, §§ 46.2-1095 through 46.2-1100 (“child restraint laws”). Specifically, you ask for an interpretation of the words “bus” and “impractical” as used in § 46.2-1099.

RESPONSE

It is my opinion that the words “bus” and “impractical,” as used in § 46.2-1099, should be given their usual and ordinary meanings, absent a definition of these terms in the child restraint laws. The determination in each specific case involves an interpre-
tation of facts, such as the size, configuration and use of the vehicle, as well as prior interpretations of those terms as applied to a particular vehicle, and is not an appropriate issue on which to render an opinion. I note, however, that the types of vehicles that were exempt from the requirements for age specific child restraints before July 1, 2002, remain exempt from the requirements of the child restraint laws.

BACKGROUND AND APPLICABLE LAW

The 2002 Session of the General Assembly amended §§ 46.2-1095 and 46.2-1100. Specifically, the amendment to § 46.2-1095(A) increased the age of a child to be secured in a child restraint device from “under the age of four” to “through age five.” The amendment to § 46.2-1100 increased the age limits for children authorized to be secured by seat belt instead of child restraint devices. Section 46.2-1100 raises the age of a child who may be secured by seat belt to “at least four years old but less than six years old,” if the weight and size of the child make the use of the seat belt practical and the use of a child restraint device impractical.

Prior to the 2002 amendment, § 46.2-1095 required any child “under the age of four” who was transported in a motor vehicle manufactured after January 1, 1968, to be secured in a child restraint device, unless the child was transported in a vehicle exempt under subsection F. The 2002 amendments redesignated subsection F as subsection E. The exempt vehicles listed in § 46.2-1095(E) include “taxicabs, school buses, executive sedans, limousines, or the rear cargo area of vehicles other than pickup trucks.” Section 46.2-1099 further exempts vehicles involved in “[t]he transporting of children by public transportation, bus, school bus or farm vehicle.” Further, § 46.2-1099 provides that the child restraint requirements shall not apply to “[t]he transporting of any child in a vehicle having an interior design which makes the use of such device impractical.”

It is my understanding that organizations providing child care are concerned about the impact of the 2002 amendments to the child restraint laws on their operations. I further understand that some childcare organizations use passenger vans that are smaller than a “commercial motor vehicle,” as that term is defined in § 46.2-341.4, but are larger than the typical seven-passenger minivan used by many families in the Commonwealth.

DISCUSSION

Although Title 46.2 defines the terms “school bus” and “farm vehicle,” the motor vehicle statutes do not define the word “bus.” In the absence of a statutory definition, it is assumed that the legislature intended the common, ordinary meaning of the term to apply. The ordinary meaning of the term “bus” is “a large motor vehicle designed to carry passengers [usually] along a fixed route according to a schedule.” Additionally, the definition of “bus” includes “a large motor-driven vehicle … sometimes under charter for a special trip (as by a social group or an athletic team).” Whether a specific motor vehicle falls within the ordinary definitions of “bus” for the purposes of § 46.2-1095(E) is a determination of fact rather than one of law, and is not an appropriate issue on which to render an opinion.
It is significant that the 2002 Session of the General Assembly did not add a definition of "bus," or of any other exempt vehicles, to the child restraint laws. Therefore, the type of vehicles that were exempt before July 1, 2002, should still be exempt from the requirements of the child restraint laws. If a vehicle was considered a "bus" by law enforcement or the courts prior to July 1, 2002, that factual determination should not be affected by the 2002 amendments to the child restraint laws.

Given that the meaning of "bus" was not changed by the 2002 Session of the General Assembly, whatever designation was applied to any particular vehicle prior to July 1, 2002, would not change after July 1, 2002. The design, configuration and use of each motor vehicle are other factors for consideration in that factual determination. If the General Assembly had intended the "bus" exemption to be based solely on the number of passengers the vehicle could carry, it could have established a specific numeric limitation.

In regard to your second question, the word "impractical" also is not defined in Title 46.2. The child restraint laws limit the eligibility of a child to be exempt from being transported in a child restraint device to the impracticality of placing the child in such a device. Section 46.2-1099 provides that the child restraint requirements shall not apply to "[t]he transporting of any child in a vehicle having an interior design which makes the use of such device impractical." Section 46.2-1100 authorizes the use of a seat belt for a child who is at least four but not six years old, and whose weight and size make the use of the child restraint device "impractical" and the use of the seat belt practical.

Again, in the absence of a statutory definition, a term should be given its plain and ordinary meaning. The word "impractical" means "not wise to put into or keep in practice or effect"; "incapable of being put into use or effect or of being accomplished or done successfully or without extreme trouble, hardship or expense." As with the term "bus," the determination whether it would be impractical to put a child restraint device in a motor vehicle due to the interior design of the vehicle or the weight and size of the child is a factual one. It is clear that the purpose of the child restraint laws is to protect children from injury. This purpose should be foremost in determining whether the vehicle transporting a child is a "bus" exempt from the child restraint laws or whether it is "impractical" to put a child restraint device in the vehicle.

CONCLUSION

Accordingly, it is my opinion that the words "bus" and "impractical," as used in § 46.2-1099, should be given their usual and ordinary meanings, absent a definition of these terms in the child restraint laws. The determination in each specific case involves an interpretation of facts, such as the size, configuration, and use of the vehicle, as well as prior interpretations of those terms as applied to a particular vehicle. I note, however, that the types of vehicles that were exempt from the requirements for age specific child restraints before July 1, 2002, remain exempt from the requirements of the child restraint laws.
"Commercial motor vehicle" includes a motor vehicle that "is designed to transport sixteen or more passengers including the driver." Section 46.2-1095(A) (Michie Supp. 2001).

Compare § 46.2-1095(F) (Michie Supp. 2001) with 2002 Va. Acts ch. 358, at 436 (redesignating former subsection F as § 46.2-1095(E), without change to language).

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limited to testing procedures necessary to comply with Clean Air Act, including nontailpipe exhaust tests. Exclusion of tailpipe exhaust tests no longer required by Act.

THE HONORABLE RICHARD L. SASLAW
SENATE MINORITY LEADER
JULY 25, 2002

ISSUE PRESENTED

You ask whether equipment used in performing enhanced emissions inspections tests for motor vehicles must be limited to ASM 50-15 equipment.

RESPONSE

It is my opinion that, although the ASM 50-15 testing equipment must be used for tailpipe exhaust emissions tests performed under the Federal Clean Air Act, Virginia’s emissions inspections laws authorize the use of other equipment or software for nontailpipe tests or checks that are part of the federal motor vehicle inspection and maintenance program. Virginia law provides that its enhanced emissions inspections program shall include, and be limited to, testing procedures necessary to comply with the Clean Air Act. Accordingly, Virginia must include in its program, nontailpipe exhaust tests that comply with the Federal Act and may exclude tailpipe exhaust tests that the Act no longer requires.

BACKGROUND

The State Air Pollution Control Board adopted final Regulations for the Control of Motor Vehicle Emissions in the Northern Virginia Area at its May 2002 Board meeting. These regulations exempt cars built after 1995 from testing using the ASM 50-15 method and implement other testing procedures. The regulations include procedures for conducting an electronic inspection of on-board diagnostic (“OBD”) systems for 1996 and newer diesel-fueled and gasoline-powered vehicles. Under the regulations, OBD inspections on OBD vehicles replace tailpipe exhaust emissions tests, except as specified by the Department of Environmental Quality for quality control or program evaluation purposes.

APPLICABLE AUTHORITIES AND DISCUSSION

The Commonwealth’s enhanced emissions inspection program for Northern Virginia is in response to certain requirements of the Federal Clean Air Act. The Act requires the Environmental Protection Agency to establish national primary ambient air quality standards for several types of air pollutants. The federal agency has promulgated national standards for several air pollutants, including ozone. A portion of Northern Virginia is designated as being in “nonattainment” of the 1-hour standard for ozone.

The Clean Air Act classifies ozone nonattainment areas as “marginal,” “moderate,” “serious,” “severe,” and “extreme,” according to the extent to which they exceed the national standards. The Northern Virginia area is classified as “serious.” The Clean Air Act specifies certain pollution control requirements for ozone nonattainment areas, depending on the severity of an area’s classification. Among the requirements
applicable to “serious” ozone nonattainment areas is state implementation of an enhanced vehicle inspection and maintenance program.\textsuperscript{14} The Clean Air Act requires such a program to include, among other things, “[c]omputerized emission analyzers, including on-road testing devices”\textsuperscript{15} and “[i]nspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems.”\textsuperscript{16}

Article 22, Chapter 10 of Title 46.2, §§ 46.2-1176 through 46.2-1187.3, provides authority to implement the Clean Air Act’s inspection and maintenance program in Virginia. Section 46.2-1180(A) authorizes the State Air Pollution Control Board to adopt regulations to implement and administer Article 22. Section 46.2-1178(C) provides that the emissions inspection program applicable to Northern Virginia “shall be a test and repair enhanced emissions inspection program with the greatest number of inspection facilities consistent with the consumer protection and fee provisions herein and may include on-road testing and remote sensing devices.” (Emphasis added.) Section 46.2-1176, as amended in 1995,\textsuperscript{17} defines “enhanced emissions inspection program,” in part, as

a motor vehicle emissions inspection system established by regulations of the [State Air Pollution Control] Board which shall designate the use of the ASM 50-15 (acceleration simulation mode or method) as the only authorized testing equipment. Only those computer software programs and emissions testing procedures necessary to comply with applicable provisions of Title I of the Clean Air Act\textsuperscript{18} shall be included.

The above definition is the focus of your question.

A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning, without resort to the rules of statutory interpretation.\textsuperscript{19} The definition of “enhanced emissions inspection program,” however, is ambiguous. Although “ASM 50-15” is not defined by statute, § 46.2-1176 indicates in the above definition that it is an “acceleration simulation mode or method” of testing. ASM is a method of analyzing tailpipe exhaust emissions while “driving a vehicle on a dynamometer at a constant speed with a load applied.”\textsuperscript{20} The numbers “50-15” are not a numerical designation for, or an identification of, specific equipment. The numbers refer to operation of a vehicle on a dynamometer at 15 miles per hour and at fifty percent federal test procedure\textsuperscript{2} maximum load.\textsuperscript{22}

One possible reading of the meaning of the first sentence defining “enhanced emissions inspection program” might be that such a program must consist solely of a tailpipe emissions test performed in accordance with the ASM method. Such a reading, however, would be inconsistent with the second sentence of the definition and other provisions of Article 22, the Clean Air Act, and regulations implementing the Act. It would also be inconsistent with the General Assembly’s apparent intent to authorize
a state inspection and maintenance program that complies with the Clean Air Act in order to avoid imposition of a federal implementation plan and possible sanctions. The Act’s sanctions include imposing a prohibition on the award of federal highway grants and requiring increased emission offsets prior to obtaining preconstruction permits for new and modified sources. 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.” It must be presumed that the General Assembly did not intend to enact inconsistent legislation.

The Clean Air Act requires state programs to include an “inspection of emission control diagnostic systems.” The Environmental Protection Agency implemented that statutory requirement in 1996. The federal agency recently extended the deadline for implementing state programs and amended its regulations to allow states the use of periodic checks of the OBD system on OBD vehicles in lieu of traditional inspection and maintenance tests. Accordingly, to interpret the first sentence of the definition of “enhanced emissions inspection program” as precluding any checks or inspections other than the ASM tailpipe exhaust emissions inspection would be inconsistent with provisions of the Clean Air Act requiring OBD inspections. Failure to include the required OBD checks in the state program would subject Virginia to sanctions available under the Clean Air Act.

Additionally, interpreting the first sentence as requiring ASM tailpipe exhaust emission inspections on OBD vehicles would be inconsistent with the second sentence defining “enhanced emissions inspection program,” which limits the program to only those test procedures “necessary” to comply with Title I of the Clean Air Act. Under federal law, tailpipe exhaust tests may be suspended on OBD vehicles that are subject to an OBD check.

Interpreting the first sentence of the definition to limit enhanced emissions inspections to tailpipe exhaust inspections also would be inconsistent with other provisions of Article 22. Sections 46.2-1178(C) and 46.2-1178.1 authorize, as part of the state program, on-road testing and remote sensing devices. The equipment for the ASM mode of tailpipe exhaust emissions testing is set up in fixed inspection stations and is not readily conducive to on-road testing or to being used as a method of remote sensing. Section 46.2-1180(A)(1) authorizes the State Air Pollution Control Board to adopt regulations requiring “[t]he collection of data and maintenance of records ... of the air pollution control systems or devices installed in accordance with § 46.2-1048” and Board regulations. The OBD systems that are subject to the Board’s regulation are within the meaning of the air pollution control systems or devices authorized in § 46.2-1048. The express mandate of § 46.2-1180(A)(1), that the Board’s regulations require collection of data from the inspection results of the air pollution control systems or devices installed as required by federal law, necessarily implies that inspections of the systems and devices are to be conducted.
Interpreting the definition of "enhanced emissions inspection program" to require tailpipe exhaust tests in addition to OBD checks would also be inconsistent with the General Assembly's expressed concern to accommodate consumer interests in the implementation of the state program. Section 46.2-1178(C) requires that the Northern Virginia emissions inspection program have "the greatest number of inspection facilities consistent with the consumer protection ... provisions [contained in Article 22]." Section 46.2-1180(A)(5) requires the State Air Pollution Control Board to include in its regulations requirements for "[t]he protection of consumer interests," including "the time spent waiting for inspections." Requiring consumers to undergo both an OBD test and a tailpipe exhaust emissions test, when only an OBD test is "necessary" to comply with the Clean Air Act, would be inconsistent with the General Assembly's mandate to consider consumer interests.

Finally, a then-unresolved controversy involving the method of tailpipe exhaust emissions inspections may be considered in ascertaining the intent of the General Assembly in its 1995 amendment to the definition of "enhanced emissions inspection program." 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. Underlying the federal regulations prior to September 1995 was a "preference" that state programs use a new method of tailpipe exhaust emissions testing that is more time-consuming and significantly more expensive than the ASM method of testing.

In 1992, the Environmental Protection Agency "promulgated a performance standard for enhanced [inspection and maintenance] program effectiveness that was based on a new test known as IM240." The IM240 test simulates actual driving conditions, including acceleration and deceleration, as opposed, for example, to the ASM method of testing vehicles on a dynamometer at specified speeds and loads. Without using the IM240 method, states would have had difficulty meeting the performance standard. Implementation of IM240, however, was troublesome. The cost of the equipment was "about $150,000 per testing lane, versus $15,000 to $40,000" for testing equipment used at that time. Some states experienced difficulty with the reliability of the IM240 test, and some states reported public opposition because of the longer testing time involved with IM240.

In December 1994, following a meeting with several state governors, the Environmental Protection Agency "announced that it would allow states flexibility in implementing [inspection and maintenance] programs that do not comply with the rule, as long as they result in equivalent emissions reductions." That was the situation at the time of the General Assembly's 1995 amendment to the definition of "enhanced emissions inspection program." Equipment for the ASM test was considerably less expensive for inspection stations, and the ASM test was more consumer-friendly. The definition of "enhanced emissions inspection program" may be reasonably understood as a direction to the State Air Pollution Control Board to use the ASM test for tailpipe exhaust emissions inspections instead of the IM240 test, rather than a mandate to limit such program to tailpipe exhaust emissions inspections.
CONCLUSION

Accordingly, it is my opinion that, although the ASM 50-15 testing equipment must be used for tailpipe exhaust emissions tests performed under the Federal Clean Air Act, Virginia's emissions inspections laws authorize the use of other equipment or software for nontailpipe tests or checks that are part of the federal motor vehicle inspection and maintenance program. Virginia law provides that its enhanced emissions inspections program shall include, and be limited to, testing procedures necessary to comply with the Clean Air Act. Accordingly, Virginia must include in its program, nontailpipe exhaust tests that comply with the Federal Act and may exclude tailpipe exhaust tests that the Act no longer requires.


2 The regulations define "on-board diagnostic system" or "OBD system" as "the computerized emissions control diagnostic system installed on model year 1996 and newer affected motor vehicles." 18:20 Va. Regs. Reg., supra note 1, at 2618 (to be codified at 9 Va. ADMIN. CODE 5-91-20 (defining terms used in regulation)).

3 See id. at 2629 (to be codified at 9 Va. ADMIN. CODE 5-91-420(G)(3)).

4 The regulations define "OBD vehicle" as "a model year 1996 and newer model affected motor vehicle equipped with an on-board diagnostic system and meeting [federal regulation] requirements." Id. at 2618.

5 See id. at 2629 (to be codified at 9 Va. ADMIN. CODE 5-91-420(G)(3)(d)). The Board also authorized an exhaust test in addition to the OBD check if, based on appropriate studies, the Director of the Department of Environmental Quality "determines that (i) the expected failure rate for exhaust testing for these certain vehicles would be greater than 5.0%, (ii) additional emission reductions would be achieved, and (iii) the [Environmental Protection Agency] acknowledges such emission reduction benefits." Id. at 2627 (to be codified at 9 Va. ADMIN. CODE 5-91-410(A)(4)). Such double-testing on the same vehicle—tailpipe and OBD tests—may be conducted, other than for quality control or program evaluation purposes, only when necessary to comply with Title 1 of the Clean Air Act. See Va. CODE ANN. § 46.2-1176 (Repl. Vol. 1998) (defining "enhanced emissions inspection program").


8 See 40 C.F.R. §§ 50.9, 50.10 (2001) (setting forth national 1-hour and 8-hour primary and secondary ambient air quality standards for ozone).

9 "Nonattainment" means an area designated by the Governor, in accordance with § 7407(d) of the Clean Air Act, as "nonattainment" with respect to any air pollutant. 42 U.S.C.A. § 7501(2) (West 1995).


14 42 U.S.C.A. § 7511a(c)(3) (West 1995). The inspection and maintenance program is subject to the approval of the Administrator of the Environmental Protection Agency. See § 7511a(a) (West 1995).


20 SPX CORP., N. VA. ANALYZER SYST. OPERATOR'S MANUAL 1-5 (1998); see id. app. A at A-3.

21 Federal test procedure refers to the federal certification test for new vehicles established in § 7525(a)(1) of the Clean Air Act.

22 SPX CORP., supra note 20, at 5-13.


24 See 42 U.S.C.A. § 7410(m) (West 1995) (authorizing Administrator of Environmental Protection Agency to apply sanctions listed in § 7509(b) of Clean Air Act).


27 Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949) (assuming that "the legislature did not intend to do a vain and useless thing" in enacting or amending statute).


31 See supra notes 24, 25.

32 See supra note 30.

33 Section 46.2-1048 provides that "[n]o motor vehicle registered in the Commonwealth and manufactured for the model year 1973 or for subsequent model years shall be operated on the highways in the Commonwealth unless it is equipped with an air pollution control system, device, or combination of such systems or devices installed in accordance with federal laws and regulations." No such vehicle shall be operated on Virginia's highways "unless it is of a type installed as standard factory equipment, or comparable to that designed for use upon the particular vehicle as standard factory equipment." Id. Section 46.2-1048 "shall not prohibit or prevent shop adjustments or replacements of equipment for maintenance or repair or the conversion of engines to low polluting fuels ..., so long as such action does not degrade the antipollution capabilities of the vehicle power system."

34 See supra note 33.

35 In construing the scope of an administrative agency's statutory authority, the Supreme Court of Virginia has stated that "every power expressly granted, or fairly implied from the language used, or which is necessary to enable the [State Corporation] Commission to exercise the powers expressly granted, should and must be accorded." Portsmouth v. Va. Ry. & P., No. 1244, 141 Va. 54, 61, 126 S.E. 362, 364 (1925), quoted in Fairfax County v. M.&S., Inc., 222 Va. 230, 237,
279 S.E.2d 158, 162 (1981). Additionally, in considering whether authority is implied from powers expressly granted by statute, the Court looks to the purpose and objective of the provision. City of Chesapeake v. Gardner Enterprises, 253 Va. 243, 247, 482 S.E.2d 812, 815 (1997). "The statute must be given a rational interpretation consistent with its purposes, and not one which will substantially defeat its objectives." Id. (citing Mayor v. Industrial Dev. Auth., 221 Va. 865, 869, 275 S.E.2d 888, 890 (1981); Norfolk S. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952); see also 3 Norman J. Singer, Sutherland Statutory Construction § 65.3, at 401 (6th ed. 2001) ("The grant of an express power carries with it the authority to exercise all other activities reasonably necessary to carry it into effect, and this has been employed with great liberality in interpreting statutes granting administrative powers.").


See CRS Report for Congress, supra note 36.

See CRS Report for Congress, supra note 36, under tab entitled "The Vehicle Inspection and Maintenance Program."

Compare CRS Report for Congress, supra note 36, and SPX Corp. 1 5, supra note 20.

See CRS Report for Congress, supra note 40.

See id.

See id.

See id.


OP. NO. 02-081

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES – STATE AND LOCAL MOTOR VEHICLE REGISTRATION.

Locality may issue more than one vehicle license free of charge to former volunteer rescue squad and fire department members meeting statutory length-of-service requirements; may not issue more than one such license, or additional licenses at discounted rate, to active members.

MR. THOMAS J. MccARTHY, JR.
COUNTY ATTORNEY FOR PULASKI COUNTY
AUGUST 20, 2002

ISSUES PRESENTED

You ask whether, pursuant to § 46.2-752(A), a locality may provide more than one vehicle license free of charge to each active or former member of a volunteer rescue squad and fire department. You also ask, if a locality is prohibited from issuing more
than one vehicle license free of charge, whether the locality may issue additional licenses to active members of volunteer rescue squads and fire departments at a discounted rate.

RESPONSE

It is my opinion that a locality may issue more than one vehicle license free of charge to former members of volunteer rescue squads and fire departments, provided they meet the service requirements of § 46.2-752(A)(11), but may not issue more than one such license to active members of those entities. Further, a locality may not issue additional licenses to active members of volunteer rescue squads and fire departments at a discounted rate.

APPLICABLE LAW AND DISCUSSION

Section 46.2-752(A) authorizes “counties, cities and towns [to] levy and assess taxes and charge license fees on motor vehicles, trailers, and semitrailers.” Section 46.2-752(A)(11) allows localities to issue free local vehicle licenses to “former members of volunteer rescue squads [and] former members of volunteer fire departments” “who served at least ten years in the locality.” Localities are also allowed to issue licenses free of charge for vehicles owned or leased by active members of volunteer rescue squads and fire departments. § 46.2-752(A)(11) expressly provides that no “active members of volunteer rescue squads and volunteer fire departments ... shall be issued more than one such license free of charge.” By allowing localities to provide free vehicle licenses as provided in § 46.2-752(A) to active and former volunteer rescue squad and fire department members, among others, the General Assembly recognized that localities may desire to show their appreciation for the important work done by these individuals for the local community. The General Assembly, however, also placed a limit on the number of vehicle licenses that may be issued to active members of volunteer rescue squads and volunteer fire departments.

A primary rule of statutory construction is that one must look first to the language of a statute, and if the statute is clear and unambiguous, it should be given its plain meaning. It is also a maxim of statutory construction that the expression of one thing in a statute means the exclusion of others. A statute specifying the method by which something shall be done evinces a legislative intent that it not be done otherwise.

Section 46.2-752(A) sets forth twelve circumstances in which a vehicle license may be issued free of charge to persons of a certain status. Each of the twelve circumstances in § 46.2-752(A) pertains to vehicles owned or leased by certain individuals. Only in § 46.2-752(A)(11) is there a limitation on the number of vehicle licenses issued free of charge based on the owner or lessor’s status. Section 46.2-752(A)(11) limits the number of vehicle licenses that may be issued free of charge to active members of volunteer rescue squads and fire departments. The statute specifically provides that “no member [of either entity] shall be issued more than one such license free of charge.” The plain meaning of the statute prohibits the locality from providing more than one vehicle license to active members of its volunteer rescue squads and fire departments.
Section 46.2-752(A) does not contain a comparable limitation for former members of
volunteer rescue squads and fire departments who served at least ten years in the
locality. Therefore, a locality may issue a license free of charge for each vehicle
owned or leased by former members of volunteer rescue squads and fire departments
that meet the length-of-service requirements.

You next ask whether a locality that is prohibited from issuing more than one vehicle
license free of charge may issue additional vehicle licenses to active members of
rescue squads and fire departments at a discounted rate. Section 46.2-752(A) specifies
when vehicle licenses may be issued free of charge and provides when the fee for
such licenses may be reduced. Specifically, localities may provide

for a fifty percent reduction in the fee charged for the issuance of
any such license issued for any vehicle owned or leased by any
person who is sixty-five years old or older. No such discount, how­
ever, shall be available for more than one vehicle owned or leased
by the same person.\(^7\)

Under the Dillon Rule of strict construction, local governing bodies may exercise
only those powers conferred expressly or by necessary implication.\(^8\) A locality is not
authorized to issue reduced license fees except as provided in § 46.2-752(A) for those
persons age sixty-five or older. The statute clearly delineates for whom a vehicle
license fee may be reduced. As noted, it is a maxim of statutory construction that the
expression of one thing means the exclusion of others.\(^9\) A statute specifying the
method by which something shall be done evinces a legislative intent that it not be
done otherwise.\(^10\) Because § 46.2-752(A) does not specifically grant a locality the
authority to issue such licenses at a reduced rate to active members of volunteer
rescue squads and fire departments, it is unable to do so.

CONCLUSION

Accordingly, it is my opinion that a locality may issue more than one vehicle license
free of charge to former members of volunteer rescue squads and fire departments,
provided they meet the service requirements of § 46.2-752(A)(11), but may not issue
more than one such license to active members of those entities. Further, a locality may
not issue additional vehicle licenses to active members of volunteer rescue squads
and fire departments at a discounted rate.\(^11\)

\(^2\)Section 46.2-752(A)(11).
\(^3\)Id.
\(^7\)Section 46.2-752(A).

*See source cited supra note 4.

10*See sources cited supra note 5.

11If the locality has adopted an ordinance, pursuant to §46.2-752(A), that provides for a reduced fee for persons age sixty-five or older, active members of volunteer rescue squads and fire departments could receive that discounted rate if they meet the age requirement.

OP. NO. 02-070
MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES - STATE AND LOCAL MOTOR VEHICLE REGISTRATION.

Locality that adopts ordinance to enforce payment of local motor vehicle license fee must issue some form of license upon payment of fee; may prescribe form of license to be displayed on vehicle. Refusal of DMV Commissioner, per agreement with local treasurer or director of finance, to issue or renew vehicle registration for individual whose local license fee is unpaid.

THE HONORABLE ROSS A. MUGLER
COMMISSIONER OF THE REVENUE FOR THE CITY OF HAMPTON
THE HONORABLE MOLLY JOSEPH WARD
TREASURER FOR THE CITY OF HAMPTON
DECEMBER 20, 2002

ISSUES PRESENTED
You pose two questions regarding the issuance of local motor vehicle licenses. First, you ask whether a locality may charge a license fee on motor vehicles pursuant to §46.2-752 without issuing a license. Second, you inquire concerning the physical form of a motor vehicle license, should the issuance of a license be required.

RESPONSE
It is my opinion that, if a locality adopts an ordinance pursuant to §46.2-752(G) to enforce the payment of the local motor vehicle license fee, the locality must issue some form of a license upon payment of the license fee. It is also my opinion that such locality has discretion to prescribe the form of the license, but the form must be such that it may be displayed on the vehicle. Additionally, it is my opinion that §46.2-752(J) authorizes the Commissioner of the Department of Motor Vehicles, pursuant to an agreement with the local treasurer or director of finance, to refuse to issue a vehicle registration to, or renew a registration for, an individual who has not paid the locality’s motor vehicle license fee. If such an agreement is entered into, a locality that has no ordinance in effect pursuant to §46.2-752(G) is not required to issue a license that is displayable upon the vehicle on which a license fee is imposed.

APPLICABLE LAW AND DISCUSSION
Section 46.2-752(A) authorizes counties, cities and towns to impose a local license fee on motor vehicle owners. Section 46.2-752(A) provides, in part:

Except as provided in §46.2-755, 11 counties, cities, and towns may levy and assess taxes and charge license fees on motor vehicles,
trailers, and semitrailers.... The amount of the license fee or tax imposed by any county, city, or town on any motor vehicle, trailer, or semitrailer shall not be greater than the amount of the license tax imposed by the Commonwealth on the motor vehicle, trailer, or semitrailer. The license fees and taxes shall be imposed in such manner, on such basis, for such periods, and subject to proration for fractional periods of years, as the proper local authorities may determine.

Section 46.2-752(G) provides:

Any county, city, or town may by ordinance provide that it shall be unlawful for any owner or operator of a motor vehicle, trailer, or semitrailer to fail to obtain and display the local license required by any ordinance of the county, city or town in which the vehicle is registered or to display upon a motor vehicle, trailer, or semitrailer any such local license after its expiration date. The ordinance may provide that a violation shall constitute a misdemeanor the penalty for which shall not exceed that of a Class 4 misdemeanor and may, in the case of a motor vehicle registered to a resident of the locality where such vehicle is registered, authorize the issuance by local law-enforcement officers of citations, summonses, parking tickets, or uniform traffic summonses for violations. Any such ordinance may also provide that a violation of the ordinance by the registered owner of the vehicle may not be discharged by payment of a fine except upon presentation of satisfactory evidence that the required license has been obtained. [Emphasis added.]

The local motor vehicle fee is imposed on the privilege of operating a motor vehicle and is not a property tax. This Office previously has concluded that the offense prescribed by an ordinance adopted pursuant to § 46.2-752(G) is not the failure to purchase a license decal but is the operation of a vehicle on a public highway without obtaining and displaying the appropriate decal on the motor vehicle. A person may own a motor vehicle and keep it garaged without being subject to the local motor vehicle fee.

Section 46.2-752(G) specifically authorizes localities to adopt ordinances making it "unlawful for any owner or operator of a motor vehicle, trailer, or semitrailer to fail to obtain and display the local license required by" such ordinances. (Emphasis added.) This Office is 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." Without the issuance by the locality of a form of license for payment of the motor vehicle license fee, the provision in § 46.2-752(G), pertaining to failure by the owner or operator to obtain and display the local license, would be meaningless.
Moreover, this interpretation is further supported by additional language in § 46.2-752(G), which provides that a locality may make it unlawful “to display upon a motor vehicle, trailer, or semitrailer any such local license after its expiration date.” (Emphasis added.) This language contemplates there being some type of license being issued that is displayable. Such a license may take a form other than the commonly used decal, as long as the license is displayable.

A locality is not required to adopt an ordinance pursuant to § 46.2-752(G) to enforce payment of its vehicle license fee. A locality may, in place of or in addition to such ordinance, choose to compel the payment of its motor vehicle license fee by agreement with the Department of Motor Vehicles. The 2002 Session of the General Assembly amended § 46.2-752(J) to allow a treasurer or director of finance of a locality to enter into an agreement with the Commissioner of the Department of Motor Vehicles whereby the Commissioner is authorized to refuse to issue or renew a vehicle registration for the failure to pay the locality’s motor vehicle license fee. Specifically, § 46.2-752(J) provides, in part:

Beginning October 1, 1992, the treasurer or director of finance of any county, city, or town may enter into an agreement with the Commissioner whereby the Commissioner will refuse to issue or renew any vehicle registration of any applicant therefor who owes to such county, city or town any local vehicle license fees or delinquent tangible personal property tax. Before being issued any vehicle registration or renewal of such license or registration by the Commissioner, the applicant must first satisfy all such local vehicle license fees and delinquent taxes and present evidence satisfactory to the Commissioner that all such local vehicle license fees and delinquent taxes have been paid in full. The Commissioner shall charge a reasonable fee to cover the costs of such enforcement action, and the treasurer or director of finance may add the cost of this fee to the delinquent tax bill. [Emphasis added.]

Pursuant to an agreement with the local treasurer or director of finance, § 46.2-752(J) authorizes the Commissioner of the Department of Motor Vehicles to refuse to issue a vehicle registration to, or renew a registration for, an individual who has not paid a locality’s motor vehicle license fee. If such an agreement is entered into, a locality that has no ordinance in effect pursuant to § 46.2-752(G) is not required to issue a license that is displayable upon the vehicle on which a license fee is imposed.

CONCLUSION

Accordingly, it is my opinion that, if a locality adopts an ordinance pursuant to § 46.2-752(G) to enforce the payment of the local motor vehicle license fee, the locality must issue some form of a license upon payment of the license fee. It is also my opinion that such locality has discretion to prescribe the form of the license, but the form must be such that it may be displayed on the vehicle. Additionally, it is my opinion that § 46.2-752(J) authorizes the Commissioner of the Department of Motor Vehicles,
pursuant to an agreement with the local treasurer or director of finance, to refuse to
issue a vehicle registration to, or renew a registration for, an individual who has not
paid the locality's motor vehicle license fee. If such an agreement is entered into, a
locality that has no ordinance in effect pursuant to § 46.2-752(G) is not required to
issue a license that is displayable upon the vehicle on which a license fee is imposed.

1. Section 46.2-755 prohibits the imposition of a motor vehicle license fee in certain circumstances.
§ 46.1-65, predecessor to § 46.2-752).
cessor to § 46.2-752(G)).
Gen., supra note 3, at 432.
Henrico Ltd. Partnership, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998)).
6. See also § 46.2-752(K), which provides that "[t]he governing bodies of any two or more counties,
cities, or towns may enter into compacts for the regional enforcement of local motor vehicle
license requirements. The governing body of each participating jurisdiction may by ordinance
require the owner or operator of any motor vehicle, trailer, or semitrailer to display on his vehi­
cle a valid local license issued by another county, city, or town that is a party to the regional com­
pact, provided that the owner or operator is required by the jurisdiction of situs, as provided in
§ 58.1-3511, to obtain and display such license." (Emphasis added.)

OP. NO. 01-060
NOTARIES AND OUT-OF-STATE COMMISSIONERS: POWERS AND DUTIES.
PROPERTY AND CONVEYANCES: RECORDATION OF DOCUMENTS - UNIFORM
RECOGNITION OF ACKNOWLEDGMENTS ACT.

Notary public commissioned by State of Maryland is not authorized by that state to
notarize documents in Commonwealth for recordation In Virginia circuit court clerk's
office.

THE HONORABLE MARILYN L. WILSON
CLERK, CIRCUIT COURT OF AMELIA COUNTY
APRIL 8, 2002

You ask whether a notary public commissioned by the State of Maryland is authorized
to notarize in the Commonwealth documents for recordation in a Virginia circuit court clerk’s office.

It is my opinion that a notary public commissioned in the State of Maryland is not
authorized to notarize in the Commonwealth documents for recordation in a circuit court clerk’s office in Virginia.

FACTS

You state that a deed of gift has been presented to the clerk’s office for recordation.
You further advise that the deed of gift was notarized in Virginia by a notary public
commissioned in the State of Maryland, and not in Virginia. Thus, you inquire whether such deed of gift may be admitted to record in the deed book as a properly acknowledged document.¹

**APPLICABLE LAW AND DISCUSSION**

The Uniform Recognition of Acknowledgments Act² authorizes notarial acts performed outside the Commonwealth for use in the Commonwealth to have the same effect as if performed by a notary public of this Commonwealth, if the notary public performing such acts is “authorized to perform notarial acts in the place in which the act is performed.”³ Again, this statute recognizes that a notary public must possess threshold jurisdictional authority to perform notarial acts in such jurisdiction.

A notary public commissioned by the State of Maryland is authorized to perform the functions of the office of notary public “in any other county or city than the county or city for which the notary is appointed.”⁴ Furthermore, the *Notary Public Handbook* for the State of Maryland provides:

> A notary public commission issued by the State of Maryland does not authorize the holder to act as a notary public in another state or the District Columbia. Similarly, a notary public of another state may not act as a notary public in Maryland, unless the person also holds a commission issued by Maryland.⁵

Therefore, a notary public commissioned in Maryland is not authorized by that state to notarize documents in the Commonwealth for recording in the clerk’s office of a circuit court of the Commonwealth.

Section 55-106 provides, in part:

> Except when it is otherwise provided, the circuit court of any county or city, or the clerk of any such court, or his duly qualified deputy, in his office, shall admit to record any such writing as to any person whose name is signed thereto with an original signature, except as provided in § 55-113, when it shall have been acknowledged by him, or proved by two witnesses as to him in such court, or before such clerk, or his duly qualified deputy, in his office, or the manner prescribed in §§ [sic] Articles 2 (§ 55-113 et seq.), 2.1 (§ 55-118.1 et seq.), and 3 (§ 55-119 et seq.) of [Chapter 6 of Title 55].

The use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.⁶

Your facts indicate that a deed of gift presented for recordation is notarized in Virginia by a notary public commissioned in the State of Maryland, and not in Virginia. Consequently, the instrument does not appear to have been acknowledged in the manner prescribed in Articles 2, 2.1, and 3, Chapter 6 of Title 55.
CONCLUSION

Accordingly, it is my opinion that a notary public commissioned by the State of Maryland is not authorized to notarize in the Commonwealth documents for recordation in a Virginia circuit court clerk’s office.

1Chapter 6 of Title 55, §§ 55-106 to 55-142.9, of the Code of Virginia provides for the recordation of properly acknowledged deeds in circuit courts of the Commonwealth.


OP. NO. 01-129

PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.

Time spent as local elected official does not constitute time spent employed by locality and is not time purchasable as prior service credit.

MR. WILLIAM H. LEIGHTY
DIRECTOR, VIRGINIA RETIREMENT SYSTEM
JANUARY 10, 2002

You ask whether a member of the Virginia Retirement System may purchase prior service credit pursuant to § 51.1-142.2(B.1)(v) of the Code of Virginia for time spent previously as a local elected official.1 You indicate that it is the view of the Board of Trustees of the Retirement System that such time should not be considered to be purchasable prior service.

Section 51.1-142.2(B.1) provides that “[a]ny member in service may purchase prior service credit for ... (v) any period of time when the member was employed by a participating employer and not otherwise eligible to participate in the retirement system because the member was not an employee as defined in § 51.1-124.3.” (Emphasis added.) Section 51.1-124.3 defines “employee” as “any teacher, state employee, officer, or employee of a locality participating in the Retirement System.”

Whether a current member of the Retirement System may purchase prior service credit under § 51.1-142.2(B.1)(v) depends on such member’s prior service as an individual employed by a participating locality. Thus, your inquiry turns on whether a local elected official is, in fact, employed by the participating locality.

Section 51.1-142.2(B.1) provides no definition of the term “employed.” In the absence of any such definition, the term must be given its common, ordinary meaning.2
"Employment" generally is defined as "activity in which one engages or is employed"; "an instance of such activity"; "the act of employing: the state of being employed." Furthermore, the verb "employ" generally means "to use or engage the services of"; "to provide with a job that pays wages or a salary."

Prior opinions of the Attorney General conclude that, where no applicable statutory definition of the term "employee" exists, it must be given its ordinary meaning, considering the context in which it is used. A 1999 opinion notes that the common law test used for determining the existence of an employer/employee relationship involves the consideration of four elements: (1) the employer's selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer's retention of the power of dismissal; and (4) the employer's retention of the power of control.

Applying the rules of statutory construction and the above definitions to this inquiry, I must conclude that a local elected official does not meet the definitions of "employed." Significantly, a local elected official is not "selected" or "engaged" by a locality, and the locality does not retain a power of dismissal or a power of control over him. I am of the opinion, therefore, that the local elected official was not "employed" by the locality.

Accordingly, I agree with the view of the Board of Trustees of the Retirement System, and it is my opinion that time spent as a local elected official does not constitute time spent "employed" by the locality under the statute and, therefore, is not time purchasable as prior service under § 51.1-142.2(B.1)(v).

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1. Your request refers to local elected officials as county supervisors, county board members, and city and town council members. For the purposes of this opinion, whenever the term "local elected official" is used, it shall have the same meaning.


4. Id.

5. Id.


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OP. NOS. 01-044, 01-123

PENSIONS, BENEFITS AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM — GOVERNMENT EMPLOYEES DEFERRED COMPENSATION PLAN ACT — VOLUNTEER FIREFIGHTERS' AND RESCUE SQUAD WORKERS' SERVICE AWARD FUND.
ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW.

No authority for Retirement System to charge Department of Accounts for administrative expenses related to oversight of deferred compensation plan. Retirement System may not recover from participating employees, but may bill participating employers for, expenses related to administration of cash match plan. No authority for Retirement System to charge and collect administrative fee from participants in optional retirement plan for political appointees or from institutions of higher education. Questions regarding method and source by which Retirement System may recover costs incurred and associated with administration of VoISAP when Fund assets are insufficient, or action Retirement System should take for optional retirement plan for school superintendents should request for general fund appropriation be denied, are not appropriate issues for comment by Attorney General.

MR. W. FORREST MATTHEWS, JR.
DIRECTOR, VIRGINIA RETIREMENT SYSTEM
APRIL 29, 2002

You inquire regarding the recovery of Virginia Retirement System administrative expenses incurred in connection with the establishment and administration of certain defined contribution plans created by the General Assembly.

BACKGROUND

You explain that, in addition to defined benefit plans, the Virginia Retirement System administers, or has substantial oversight responsibilities for, several defined contribution plans. These plans include the deferred compensation plan, §§ 51.1-600 through 51.1-606 of the Code of Virginia, and the cash match plan, § 51.1-606; the optional retirement plans for political appointees, § 51.1-126.5, and employees of institutions of higher education, § 51.1-126; and the Volunteer Firefighters' and Rescue Squad Workers' Service Award Fund, §§ 51.1-1200 through 51.1-1211.

You advise that the defined benefit plans are funded by contributions paid into the trust fund and by income generated from investments of the trust fund corpus. You also advise that the trust fund pool of money is available for payments of the benefits earned by members who have contributed to the trust, and to pay the costs of administering the plan. You relate, however, that the defined contribution plans are funded by money specifically designated by each member and within each fund. Furthermore, you advise that accounts of each member, including all investment income generated, remain segregated. Therefore, the defined contribution plans do not have a general source of funds from which administrative costs incurred by the Virginia Retirement System may be paid.

You relate further that § 51.1-126(D) requires the Virginia Retirement System to "develop policies and procedures for the administration of all retirement plans established [for employees on institutions of higher education.]" You observe that § 51.1-124.30(C) directs the Board of Trustees of the Virginia Retirement System to discharge its duties solely in the interest of the beneficiaries of the plan. Furthermore, you relate that the Board is instructed that, while it "may invest the assets of any retirement system or
program it administers on a pooled or consolidated basis ... [it] shall maintain a separate accounting of the funds of each of the retirement systems and programs."

You advise that, in order to cover the cost of administering the deferred compensation plan, the Virginia Retirement System established a procedure whereby each participant would be charged an annual administrative fee. Initially, the administrative fee, set at $12, was charged against the account of each participant in January of each year. The 2000 Session of the General Assembly changed this procedure by amending § 51.1-602(A) to provide that the “[a]dministrative fees related to the VRS program oversight that otherwise would be charged to an employee participating in the plan shall be paid by the participating employer under procedures established by the Board.”

You advise that, pursuant to the procedures established by the Board, the Retirement System has determined the “per participant” share of its administrative expenses, and has sent an invoice to each participating employer requesting payment in that amount which otherwise would have been charged to its employees. You further state that some participating employers have paid these invoices while others have not.

You further advise that the Commonwealth of Virginia has not paid the amount billed on its invoice (approximately $342,000). You believe the state’s failure to pay may be related to the failure of the 2001 Session of the General Assembly to approve budget amendments. Finally, you provide an opinion letter from your outside counsel advising that the facts described above present serious constitutional and tax issues for the Retirement System. The constitutional issue presented by your outside counsel is that the Retirement System has no authority to use defined benefit plan assets to pay administrative expenses for other plans. Similarly, the tax issue raised by your outside counsel relates to using defined benefit plan assets to pay administrative expenses. In your counsel’s opinion, this may result in the plans being disqualified for failing to satisfy the “exclusive benefit rule” of § 401(a) of the Internal Revenue Code. Your outside counsel concludes that, unless the Retirement System has the authority to pay for the administrative costs related to the defined contribution plans, it must either decline to administer the plans or operate the plans in violation of the Internal Revenue Code.

FIRST ISSUE PRESENTED

The Deferred Compensation Plan

Your first inquiry is whether the Virginia Retirement System may charge the Department of Accounts for the administrative fees that previously were charged to all employees of the Commonwealth prior to the 2000 amendment to § 51.1-602(A).

RESPONSE

I cannot conclude that the Retirement System may charge the Department of Accounts for the administrative fees that previously were charged to all participating employees of the Commonwealth before the 2000 amendment.
DISCUSSION

In responding to your inquiry, it is necessary that I apply the pertinent rules of statutory construction to the applicable statutory provisions governing the matter. "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."4 "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."5 Another "settled principle of statutory construction [is] that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary."6 Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.7

The specific deferred compensation plan to which you refer is established and administered "for employees of the Commonwealth and its agencies."8 Therefore, the "participating employer" of such employees is the Commonwealth of Virginia. In my view, the purpose of § 51.1-602 is to authorize the Retirement System to bill the Commonwealth for the expenses that previously were paid by participating employees. There is no statutory authorization which allows the Virginia Retirement System to bill the Department of Accounts. To interpret current law to authorize such action would be contrary to the clear intent of the legislature as expressed in the 2000 amendment to § 51.1-602(A).

Chapter 6 of Title 51.1, §§ 51.1-600 through 51.1-606, establishes the Government Employees Deferred Compensation Plan Act. Section 51.1-602(A) requires that "[t]he Board shall establish and administer a deferred compensation plan for employees of the Commonwealth and its agencies." The last sentence of § 51.1-602(A) provides that "[a]dministrative fees related to the VRS program oversight that otherwise would be charged to an employee participating in the plan shall be paid by the participating employer under procedures established by the Board." Section 51.1-600 defines the term "participating employer," as used in the Act, to mean

the Commonwealth or any political subdivision that has elected pursuant to § 51.1-603.1 to participate in the deferred compensation plan established by the Board pursuant to this chapter or a sponsor of a plan established pursuant to § 403(b) of the Internal Revenue Code of 1986, as amended.

In addition to the 2000 amendment, the 2000 Session of the General Assembly amended the Appropriation Act for the 1998-2000 biennium.9 Part of the amended Appropriation Act contains line item appropriations for individual state departments, agencies, institutions and programs.10 Section 1-133 contains "Central Appropriations" intended to be transferred for various purposes to supplement appropriations to other agencies.11 Item 546(A)(5) within this section is an appropriation for "[e]mployer costs of employee benefit programs when required by salary-based pay adjustments."12 Furthermore, Item 546.10(A) is an appropriation authorizing the Governor "to transfer funds from agency appropriations to the accounts of ... state employees" participating
in the deferred compensation plan authorized by § 51.1-606. In addition, the 2000 General Assembly enacted the Appropriation Act for the 2000-2002 biennium. Similar line item appropriations are included in the 2000 Appropriation Act to supplement employer contributions to employee benefit programs and employer match of employee contributions consistent with § 51.1-606. I can, however, find no authorization in either of these appropriation measures that provides for the payment of administrative expenses incurred by the Virginia Retirement System in the oversight of the deferred compensation plan. In addition, I can find no statutory authorization for the Retirement System to charge and recover such costs from the Department of Accounts.

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. The General Assembly has not imposed a requirement on the Department of Accounts to pay any administrative expenses incurred by the Retirement System. When the General Assembly intends a statute to impose requirements, it knows how to express its intention. Accordingly, I cannot conclude that the Virginia Retirement System may charge the Department of Accounts for the administrative fees previously charged to all participating employees of the Commonwealth prior to the 2000 amendment amending § 51.1-602(A).

SECOND ISSUE PRESENTED

The Cash Match Plan

Next, you advise that the Virginia Retirement System has established a cash match plan under § 51.1-606 of the Government Employees Deferred Compensation Plan Act. You ask whether participating employers or employees who participate in the cash match plan may be charged the “administrative fees related to the VRS program oversight.”

RESPONSE

I must conclude that the General Assembly does not intend for the Virginia Retirement System to recover its administrative expenses from employees who participate in the cash match plan. The Retirement System, however, is authorized to bill participating employers for these expenses.

FACTS AND DISCUSSION

You explain that all participants in the cash match plan are also participants in the deferred compensation plan, although not all members of the deferred compensation plan participate in the cash match plan. You explain that the cash match and the deferred compensation plans are segregated plans in that each plan exists pursuant to a separate trust document and is governed by an independent plan document.

Section 51.1-606(A) authorizes the Department of Accounts, “on behalf of the Commonwealth, ... or any agency of the Commonwealth not covered under the central payroll system,” to transfer funds matching the employees’ voluntary contribution. The cash match plan is coupled with the deferred compensation plan established under § 51.1-602. The cash match plan is applicable to “any agency of the Commonwealth
not covered under the central payroll system. Statutes relating to the same subject should be considered in pari materia.

The cash match plan is also established under the Government Employees Deferred Compensation Plan Act. The provision in § 51.1-602(A), requiring that administrative fees be paid by participating employers, is also applicable to the cash match plan, because it is essentially the same plan as that established pursuant to § 51.1-602. Therefore, I must conclude that the General Assembly does not intend for the Virginia Retirement System to recover its administrative expenses from the participating employees in the cash match plan. The Retirement System, however, is authorized to bill participating employers for these expenses. The same rules applicable to the deferred compensation plan are also applicable to the cash match plan.

THIRD ISSUE PRESENTED
The Optional Retirement Plan for Political Appointees

You ask whether the Virginia Retirement System has authority to charge the participants of the optional retirement plan for political appointees (“plan participants”) an administrative fee, absent specific statutory prohibitions to the contrary.

RESPONSE
I must conclude that the Virginia Retirement System does not have the authority to charge plan participants an administrative fee.

FACTS AND DISCUSSION
You advise that the optional retirement plan for political appointees is established pursuant to the requirements of § 51.1-126.5. You note that § 51.1-126.5(G) requires that “[c]ontributions to the defined contribution account and all earnings thereon shall be credited to an account to be maintained for each participating member.” You also observe that § 51.1-126.5(H) requires the Retirement System to “develop policies and procedures for the administration of the plan,” but is silent as to the issue of recovery of costs incurred in the administration of this plan.

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. Statutes are also to be read as a whole rather than in isolated parts. It is further an accepted principle of statutory interpretation that the mention of one thing implies the exclusion of another. Nowhere in § 51.1-126.5, or anywhere else in the statutes delineating the authority of the Virginia Retirement System, is there a grant of authority permitting the Retirement System to charge and collect an administrative fee from plan participants.

Consequently, I must conclude that the Virginia Retirement System does not have the authority to charge plan participants an administrative fee.
FOURTH ISSUE PRESENTED
The Optional Retirement Plan for Employees of Institutions of Higher Education
You next inquire regarding the optional retirement plan for employees of institutions of higher education. You ask whether the Virginia Retirement System, as a state agency, has the authority to recover administrative costs from the institutions of higher education for which it provides such services.

RESPONSE
I must conclude that the General Assembly has not specifically authorized the Virginia Retirement System to recover its administrative costs from the institutions of higher education.

FACTS AND DISCUSSION
You advise that § 51.1-126(D) mandates that “[t]he Virginia Retirement System shall develop policies and procedures for the administration of all retirement plans established” for employees of institutions of higher education. You relate that the Retirement System is permitted to appoint an advisory committee to assist with the task of developing such policies and procedures. You note, however, that § 51.1-126 is silent as to the manner in which the Retirement System may be paid or reimbursed for the administrative costs incurred in fulfilling its statutory directives.

The General Assembly provides funds for the operating expenses of the agencies of the Commonwealth through Appropriation Acts. Part 1 of the 2000 Appropriation Act sets forth the operating expenses allowed for state agencies, including the Retirement System. An appropriated sum is set forth for each fiscal year for the Retirement System, and categorized as “Administrative and Support Services.” I can find no specific statutory provision or Appropriation Act provisions authorizing the Virginia Retirement System to recover administrative costs from the institutions of higher education for which it provides such services. Accordingly, I must conclude that the General Assembly has not specifically authorized the Virginia Retirement System to recover its administrative costs from the institutions of higher education.

FIFTH ISSUE PRESENTED
The Optional Retirement Plan for School Superintendents and Volunteer Firefighters' and Rescue Squad Workers' Service Award Program
Your last two inquiries regard how and from what source administrative expenses incurred by the Virginia Retirement System in developing policies and procedures for administration of the optional retirement plan for school superintendents and the Volunteer Firefighters' and Rescue Workers' Service Award Program (“VolSAP”) may be recovered.

RESPONSE
Consistent with the historical practice of prior Attorneys General, I am unable to comment on how and from what source the Virginia Retirement System may recover the costs incurred and associated with the administration of VolSAP when there are not
sufficient assets in the VolSAP Fund to do so. For the same reasons, I am also unable
to comment on what action the Retirement System should take for the optional retire-
ment plan for school superintendents in the event that a request for a general fund
appropriation is denied by the General Assembly.

FACTS AND DISCUSSION

You advise that the General Assembly establishes VolSAP in Chapter 12 of Title
51.1. In establishing VolSAP, you note that the General Assembly assigned to the
Board of Trustees of the Virginia Retirement System the responsibility of administering
and managing the investment of the VolSAP Fund as custodian and also requires the
Board to provide staff to carry out the provisions of Chapter 12. In addition, you
observe that § 51.1-1201(A) requires that the Director of the Virginia Retirement System
be appointed to serve as a member and act as chairman of the VolSAP Board. You note
that provision is made for the VolSAP Fund to reimburse the Retirement System for all
costs incurred and associated, directly or indirectly, with the administration of the
program and management and investment of the Fund. The VolSAP Board, or its
designee, is also authorized to request such general fund appropriations as are neces-
sary to maintain the Fund.

You advise further that a general appropriation of $100,000 was made by the General
Assembly for the Retirement System to establish the Fund. You also advise that the
administrative costs and expenses of the program have exceeded $100,000. You relate
that the Fund assets are insufficient to recompense the Retirement System for its
administrative expenses. Finally, you do not know whether the General Assembly will
appropriate any additional funds to compensate the Retirement System for the costs
associated with establishing the VolSAP Fund.

In the event that a request for a general fund appropriation is denied by the General
Assembly, you ask how and from what source the Virginia Retirement System may
recover the costs incurred and associated, directly and indirectly, with the administra-
tion of VolSAP, and the management and investment of the VolSAP Fund when the
Fund assets are insufficient to do so.

Article V, § 15 of the Constitution of Virginia provides that the Attorney General of
Virginia “shall perform such duties ... as may be prescribed by law.” Historically, the
Office has limited responses to requests for official opinions to matters that concern
an interpretation of federal or state law, rule or regulation. The constitutional provision
declaring that the Attorney General shall perform such duties as may be prescribed
by law is implemented by those sections of the Virginia Code 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. It is acknowledged that official opinions of
the Attorney General must be confined to matters of law. The questions that you
raise for these two plans are accounting issues and do not concern official legal
issues.
Accordingly, consistent with the historical practice of prior Attorneys General, I am unable to comment on how and from what source the Virginia Retirement System may recover the costs incurred and associated with the administration of VolSAP when the assets in the VolSAP Fund are insufficient to do so. For the same reasons, I am also unable to comment on what action the Retirement System should take for the optional retirement plan for school superintendents in the event the General Assembly denies a request for a general fund appropriation.

3 The “exclusive benefit” rule states that plan assets are to be used only for the benefit of “employees and their beneficiaries under the trust” or “covered by the trust.” I.R.C. § 401(a)(2); Treas. Reg. § 1.401-2(a)(3) (2001).
8 Section 51.1-602(A) (Michie Supp. 2001).
10 Id. at 2620-3114.
11 Id. at 3063-96.
12 Id. at 3063.
13 Id. at 3077.
15 See id. Item 547(A)(6), at 3629; Item 549(A), at 3643.
18 Since I conclude that there are no statutory provisions or authorization in the Appropriation Act permitting the Virginia Retirement System to charge the Department of Accounts for the administrative expenses incurred in administering such plans, I need not consider your question regarding any recourse available to the Retirement System should Department be unwilling to remit payment in response to any invoices submitted. Attorneys General consistently have declined to render official opinions pursuant to § 2.2-505 when the request does not involve a question requiring interpretations of law. See, e.g., Op. Va. Att’y Gen.: 1997 at 105, 107; 1991 at 122, 124; 1986-1987 at 1, 4, 6; 1977-1978 at 31, 33. Accordingly, I must similarly decline to respond regarding any recourse available to the Retirement System should the Department of Accounts be unable to remit payment in response to any invoices submitted.
19 Section 51.1-602(A).
20 Section 51.1-606(B) (Michie Supp. 2001).
21 Section 51.1-606(A).

See supra note 16.


See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Singer, supra note 16 (explaining maxim, expressio unius est exclusio alterius).

Section 51.1-126(D) (Michie Supp. 2001).


Id. at 3649.

As we discussed earlier, there is a specific statutory authorization to recover such costs from participating employers for the deferred compensation plan and the cash match plan. See §§ 51.1-602, 51.1-606 (Michie Supp. 2001).


See § 51.1-1200.

Id.

See § 51.1-1202.


OP. NO. 02-016

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES – DUTIES OF SHERIFFS.

APPROPRIATION ACT: COMPENSATION BOARD.

Local sheriff is not required to provide more than one deputy sheriff to general district court for courtroom security absent order stating substantial security risk exists in particular case.

THE HONORABLE PAULA N. WYATT
SHERIFF FOR THE CITY OF HOPEWELL
FEBRUARY 20, 2002

You ask whether a local sheriff must provide more than one deputy sheriff to the general district court for courtroom security in the absence of an order stating that a particular case presents a substantial security risk.

You advise that a general district court judge is demanding that the sheriff’s office provide two deputy sheriffs for courtroom security during the criminal docket. You believe that the sheriff is required to provide only one deputy when the general
district court hears criminal cases. The general district court judge, however, insists that your office provide another deputy to serve as a judicial officer.

A 1998 opinion of the Attorney General considers whether a county board of supervisors has the authority to contract with private security personnel to provide security at the county courthouse. The opinion notes that the issue of courtroom security is considered in detail by the General Assembly in a 1988 legislative study. The purpose of the study was to resolve the apparent conflicts between the statutory responsibilities conferred on sheriffs and the limitations placed on their authority to meet such responsibilities contained in the Appropriation Act. Furthermore, the opinion refers to a 1988 opinion noting the following:

[T]he only limits upon a sheriff’s discretion with respect to the evaluation of courtroom security needs is the establishment of “joint responsibilities with the chief judges and, in the absence of an agreement between the sheriff and the chief judges, subjecting a jurisdiction’s courtroom security needs to review by the Compensation Board.”

Item 61(C), § 1-26 of the 2000 Appropriation Act, relating to appropriations for the Compensation Board, provides:

Notwithstanding the provisions of § 53.1-120, or any other section of the Code of Virginia, unless a judge provides the sheriff with a written order stating that a substantial security risk exists in a particular case, no courtroom security deputies may be ordered for civil cases, not more than one deputy may be ordered for criminal cases in a district court, and not more than two deputies may be ordered for criminal cases in a circuit court. In complying with such orders for additional security, the sheriff may consider other deputies present in the courtroom as part of his security force.

This provision, beginning with the phrase “[n]otwithstanding the provisions of § 53.1-120,” indicates a legislative intent to override any potential conflicts with § 53.1-120.

A 1977 opinion of the Attorney General considers similar language used by the General Assembly in the 1977 Appropriation Act. The opinion concludes that, except in extraordinary situations, it is the intent of the General Assembly that the state contribution to the salaries of deputy sheriffs be limited to the numerical restrictions required by the Appropriation Act. The General Assembly has taken no action to alter the conclusion of the 1977 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.”
"The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."\(^{12}\) The language used by the General Assembly is unambiguous. Therefore, I must conclude that a local sheriff is not required to provide more than one deputy sheriff to the general district court for courtroom security in the absence of an order stating that a particular case presents a substantial security risk.

\(^{1}\)You do not define the term "judicial officer" or the duties of a deputy sheriff serving in that capacity. Section 19.2-119 of the Code of Virginia contains the only pertinent definition of the term "judicial officer"; however, such definition is restricted to the Chapter 9 of Title 19.2, addressing bail and recognizances.


\(^{3}\)Id. at 34 & 35 n.8 (referring to 3 H. & S. Docs., Report of the Joint Subcommittee Studying Courtroom Security in the Commonwealth, S. Doc. No. 5 (1988)).

\(^{4}\)Id. at 34-35.


\(^{6}\)Section 53.1-120 generally describes a sheriff’s duty to provide security for the courtrooms and courthouses in his jurisdiction. Section 53.1-120 provides, in part:

“A. Each sheriff shall designate deputies who shall ensure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption. A list of such designations shall be forwarded to the Director of the Department of Criminal Justice Services.

“B. The ... chief general district court judge ... shall be responsible by agreement with the sheriff of the jurisdiction for the designation of courtroom security deputies for the[] respective courts. If the respective chief judge[] and sheriff are unable to agree on the number, type and working schedules of courtroom security deputies for the court, the matter shall be referred to the Compensation Board for resolution in accordance with existing budgeted funds and personnel.”


\(^{10}\)Id. at 382.


This is in response to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

ISSUES PRESENTED

You ask whether the Northern Neck Regional Jail Board has the authority to pay bonuses to its employees, and if so, whether each participating jurisdiction must adopt an ordinance authorizing the Board to pay such bonuses.

RESPONSE

It is my opinion that the Northern Neck Regional Jail Board has no independent authority to pay bonuses to its employees. Instead, the Board has the authority to request the participating localities to fund such bonuses. To make such bonuses effective, each participating jurisdiction must adopt an ordinance pursuant to § 15.2-1508. Additionally, any individual localities, or group thereof, could adopt an ordinance for the sole purpose of providing bonuses to the Board’s employees. The Board may request the participating localities of the regional jail to adopt the Board’s annual budget, which provides for the payment of bonuses to the employees of the jail, and the adoption of such budget by ordinance satisfies the requirements of § 15.2-1508.

FACTS

You relate that the Northern Neck Regional Jail Board recently voted to approve a bonus for all employees of the area’s regional jail and included the bonus in the Board’s annual budget. The budget approved by the Board is submitted to the governing bodies of the participating localities in the regional jail for their approval. The regional jail’s budget is considered by each of the governing bodies separately from their normal county budget adoption process.

APPLICABLE LAW AND DISCUSSION

Regional jails are the creations of two or more counties and cities and are not independent political subdivisions. Such jails are governed by a board consisting of, at a minimum, the sheriff and one representative from each participating locality. The board appoints a superintendent and jail officers who serve at the pleasure of the board. A regional jail may appoint a treasurer or director of finance from a participating jurisdiction as the fiscal agent for the regional jail. Operating and maintenance expenses are “borne by the participating political subdivisions” on a proportional basis, which are reimbursable by the Compensation Board.

Section 53.1-107 requires the regional jail board to submit annually a budget to each of the participating localities. The budget submission requirement imposed on regional jail boards by § 53.1-107 implicitly requires that the proposed budget be approved by the participating jurisdictions. The participating localities may adopt any reasonable procedure for the consideration and approval of a budget submitted by a regional jail.
In the absence of another agreed procedure, the jail board should submit its estimated budget to the local governing body for approval "on or before the first day of April of each year."  

Title 15.2 addresses aspects of the employer/employee relationship in local government. Specifically § 15.2-1500(A) provides that "[e]very locality shall provide for all the governmental functions of the locality, including, without limitation, ... the employment of ... employees needed to carry out the functions of government." Because the statute does not define the terms "employment" and "employee," these terms must be given their common, ordinary meanings. The term "employment" generally is defined as "activity in which one engages or is employed"; "an instance of such activity"; "the act of employing: the state of being employed." An "employee" is "one employed by another usu[ally] for wages or salary and in a position below the executive level." Furthermore, the verb "employ" generally means "to use or engage the services of"; "to provide with a job that pays wages or a salary." 

Employees of a regional jail are deemed to be local employees. As such, § 15.2-1508 authorizes the "payment of monetary bonuses to [such] officers and employees for exceptional services rendered. The payment of a bonus shall be authorized by ordinance." Such ordinance for bonuses must be adopted at a lawful meeting with a recorded vote after appropriate notice.

Section 15.2-1508 requires any bonuses paid to local employees to be approved by ordinance. I assume the Board’s annual budget that is before each participating locality is in the form of an appropriation ordinance. Therefore, it is subject to the notice and recorded vote requirements of § 15.2-1427 applicable to all ordinances. Consequently, it appears the Board’s annual budget, which includes the bonuses for its employees, if adopted by each locality, satisfies the requirements of § 15.2-1508. Additionally, each locality could adopt a separate ordinance for the sole purpose of providing bonuses to the Board’s employees and satisfy the requirements of § 15.2-1508.

CONCLUSION

Accordingly, it is my opinion that the Northern Neck Regional Jail Board has no independent authority to pay bonuses to its employees. Instead, the Board has the authority to request the participating localities to fund such bonuses. To make such bonuses effective, each participating jurisdiction must adopt an ordinance pursuant to § 15.2-1508. Additionally, any individual localities, or group thereof, could adopt an ordinance for the sole purpose of providing bonuses to the Board’s employees. The Board may request the participating localities of the regional jail to adopt the Board’s annual budget, which provides for the payment of bonuses to the employees of the jail, and the adoption of such budget by ordinance satisfies the requirements of § 15.2-1508.

OP. NO. 02-012

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES – REGIONAL JAILS AND JAIL FARMS – UTILIZATION OF JAILS.

COUNTRIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC. – SHERIFF – POLICE AND PUBLIC ORDER.

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

COURTS OF RECORD: GENERAL PROVISIONS.

Responsibility of Colonial Heights police department to transport arrestee to regional jail. Jail superintendent has responsibility to convey prisoners to and from court. Sheriff maintains control of prisoners awaiting further criminal proceedings at courthouse; is responsible for returning them to jail superintendent for transport to regional jail at conclusion of day’s hearings. Any prisoner remaining for further court proceedings within same day should be kept in courthouse holding cell until conclusion of proceedings and released to jail superintendent for transport to regional jail. City council may adopt ordinance requiring sheriff to perform extra transport duties and compensate sheriff accordingly.

THE HONORABLE M. KIRKLAND COX
MEMBER, HOUSE OF DELEGATES
APRIL 5, 2002

You ask several questions regarding the responsibility of transporting to a regional jail persons arrested by the police or ordered to jail by the court on a capias. You first ask whether the sheriff for the City of Colonial Heights, or the city police department,
has the duty to transport to the regional jail persons arrested by the police or taken into custody on a criminal capias. You also ask what steps may be taken by the city council to require the sheriff to transport the prisoner. You next ask whether the sheriff may be required to keep temporarily in the courthouse holding cell an arrestee who will be returned to court for further proceedings within the same day.

It is my opinion that the police department is responsible for transporting an arrestee to the regional jail. Once at the regional jail, the jail superintendent is responsible for conveying prisoners to and from court. The city council may adopt an ordinance requiring the sheriff to perform extra transport duties and may compensate the sheriff accordingly. Prisoners awaiting further criminal proceedings at the courthouse are within the control of the sheriff, who is responsible for returning them to the jail superintendent for transport to the regional jail at the conclusion of the day's hearings. If it is necessary that a prisoner remain for further court proceedings within the same day, the prisoner should be kept in a courthouse holding cell until the proceedings are concluded and then released to the jail superintendent for transport to the regional jail.

FACTS
You advise that the City of Colonial Heights participates in a regional jail. You relate that the sheriff for the City of Colonial Heights has advised the city police chief that, due to a lack of funding, the sheriff's office no longer will transport persons arrested by the police to the regional jail. You note that the sheriff has declined to transport persons to jail who have been ordered by the court to be taken into custody on a criminal capias.

APPLICABLE LAW AND DISCUSSION
"The sheriff is a constitutional officer who serves independent of county and city governments" and whose duties are "prescribed by general law or special act." Section 15.2-1609 of the Code of Virginia sets forth the duties of sheriffs:

The sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law. He shall enforce the law or see that it is enforced in the locality from which he is elected; assist in the judicial process as provided by general law; and be charged with the custody, feeding and care of all prisoners confined in the county or city jail. He may perform such other duties, not inconsistent with his office, as may be requested of him by the governing body.

In addition, the Supreme Court of Virginia has specified that 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.\(^6\)

The creation of a separate police force does not relieve the sheriff of his duty to enforce the criminal laws.\(^6\) "[T]he law imposes upon [sheriffs] the mandatory duty of service of process." Section 17.1-112 requires that "the sheriff of the county or city in which any court is held shall attend it and act as its officer."

Section 15.2-1701 provides that, "[w]hen a locality provides for a police department, the chief of police shall be the chief law enforcement officer for that locality." Section 15.2-1704(A) further provides:

The police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law, and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.

Section 15.2-1704(B) provides that, with the exception of certain service issues, a local police force "has no authority in civil matters." The service of criminal process, however, is one of the mandatory duties of the police department.\(^8\)

The Code of the City of Colonial Heights requires that the city sheriff "shall perform such other duties as may be prescribed and ordained by the city council." The city council has adopted no ordinance requiring the sheriff to transport to the regional jail persons arrested by the police or ordered held by the court.

You enclose with your request a copy of a commitment order form instructing the sheriff, jail officer or correctional officer to take into custody and convey to the court an accused who is not otherwise released. While the language in the commitment order confirms the authority of several different officers to take control of an accused, it does not mandate that the sheriff transport the accused to the local jail. This form is used when the police bring an arrestee before a magistrate and the arrestee is denied bail. In Colonial Heights, the magistrate is located in the police department building. In such a case, the commitment order clearly is issued to the arresting police officer, and it is the responsibility of such officer to take the arrestee to the regional jail. Thus, the response to another question you ask is that the form in and of itself does not require the sheriff to transport the arrestee to the regional jail. Further, since the creation of the local police department shifted from the sheriff to the police department the bulk of the responsibility for enforcing criminal laws and conducting criminal proceedings, the duty of transporting arrestees to a regional jail lies with the police department, as set forth more fully below.

Prior opinions of the Attorney General address variations on this issue. A 1974 opinion addresses the question whether it is the duty of the sheriff or the police department
to take custody of and return prisoners from other jurisdictions to the local jail. The prior opinion notes that it is the duty of the police department to investigate crimes; thus, where an accused is in another jurisdiction, it is the duty of the police department, as part of its investigatory function, to pick up and return the accused from another jurisdiction. Once the accused is brought to the jurisdiction, he becomes the responsibility of the sheriff at the local jail. The opinion further concludes that, where it becomes necessary to secure the presence of a criminal witness from another jurisdiction or a state prison, the sheriff is the appropriate officer to transport the witness to and from court. The circumstances addressed in the 1974 opinion involve a local jail. The City of Colonial Heights participates in a regional jail and has no local jail.

A 1982 opinion of the Attorney General concludes that, when a prisoner is confined to a regional jail, it is the duty of the superintendent of the regional jail, rather than the sheriff, to transport the prisoner to and from courts, hospitals, etc. Further, § 53.1-79.1 authorizes sheriffs and jail superintendents to enter into cooperative agreements “to transfer and transport prisoners between the respective facilities” without a court order. The prisoner in this situation, however, has not been brought to the regional jail, and there is no cooperative agreement in effect.

In the situation at issue, there is no local jail, the city council has not adopted an ordinance requiring the sheriff to transport prisoners to and from the regional jail, and no cooperative agreement exists. The police bring an arrestee to the city police department where a capias is served on him, and the magistrate, who is located in the police department building, issues the commitment order. In these circumstances, the commitment order clearly is issued to the arresting police officer. Therefore, it is the duty of the police department to take the arrestee to the regional jail. Once at the regional jail, the jail superintendent has the duty of transporting prisoners to and from court. Each political subdivision participating in the regional jail bears the cost of transporting prisoners from its jurisdiction to and from the regional jail.

Prisoners awaiting further criminal proceedings at the courthouse are within the control of the sheriff, who returns them to the jail superintendent for transport to the regional jail at the conclusion of the day’s hearings. If it is necessary to keep a prisoner for further court proceedings within the same day, however, the prisoner should be taken to one of the courthouse holding cells until the proceedings are concluded and then released to the jail superintendent for transport to the regional jail. You note, however, that there are only four courthouse holding cells. In cases where the prisoners are too numerous to be kept safely in the courthouse holding cells, the jail superintendent must transport them to the regional jail and return them the same day for the remaining proceedings. The regional jail superintendent would receive payment for such transport costs from the participating jurisdictions.

You also inquire what steps may be taken by the city council to require the sheriff to transport arrestees to the regional jail, and whether the council must provide compensation to the sheriff for such transport. A sheriff “may perform such other duties, not inconsistent with his office, as may be requested of him by the governing body.”
The city council may adopt an ordinance to this effect, pursuant to the powers granted to them under the City Code. The effect of such an ordinance would be to shift a portion of the duties now laid upon the police department to the sheriff. The City Code provides that the sheriff shall receive only such compensation as is “allowed by general law.” Section 15.2-1613 provides that “[a]ny county or city may appropriate funds for the operation of the sheriff’s office.” Assuming that the city council adopts an ordinance requiring the sheriff to perform extra transport duties that formerly resided with the police department, the city may compensate the sheriff accordingly.

Finally, you ask whether Virginia law authorizes a judge or magistrate to order the sheriff to transport arrestees to the regional jail, and what steps are required to cause a sheriff to transport the arrestee. As noted above, the sheriff is an officer of the court and subject to its orders and directions. A court may directly order the sheriff to perform a transport duty as part of his function as an officer of the court. A separate police department exists in this situation, however. Therefore, the duty of transporting arrestees is the duty of the police department.

CONCLUSION

It is my opinion that the police department is responsible for transporting the arrestee to the regional jail. Once at the regional jail, the jail superintendent has the duty of conveying prisoners to and from court. Prisoners awaiting further criminal proceedings at the courthouse are within the control of the sheriff, who would return them to the jail superintendent for transport to the regional jail at the conclusion of the day’s hearings. If it is necessary to keep a prisoner for further court proceedings within the same day, however, the prisoner should be taken to one of the courthouse holding cells until the proceedings are concluded and then released to the jail superintendent for transport to the regional jail.

Furthermore, if the city council adopts an ordinance requiring the sheriff to perform extra transport duties that formerly were required of the police department, the city may compensate the sheriff accordingly.

1A “capias” is a written order of a court requiring “an officer to take a named defendant into custody.” BLACK'S LAW DICTIONARY 199, 1602 (7th ed. 1999) (defining “capias,” “writ”).
2Section 53.1-105 allows any combination of two or more cities to “establish, maintain and operate a regional jail.”
4VA. CONST. art. VII, § 4; VA. CODE ANN. § 15.2-1600(A) (Repl. Vol. 1997) (requiring counties and cities to elect sheriffs).
6See Malbon, 195 Va. at 372, 78 S.E.2d at 686.
OP. NO. 02-105

PRISONS AND OTHER METHODS OF CORRECTION: STATE CORRECTIONAL FACILITIES – EMPLOYMENT AND TRAINING OF PRISONERS – TREATMENT AND PRIVILEGES OF PRISONERS.

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT.

Authority for Department of Corrections to employ prisoners to perform roofing work on buildings located on prison grounds; no requirement to procure such services under Acts competitive sealed bidding procedures.

THE HONORABLE HARRY B. BLEVINS
MEMBER, SENATE OF VIRGINIA
NOVEMBER 15, 2002

ISSUE PRESENTED

You ask whether the Department of Corrections may use inmates, rather than the competitive bidding process, to perform roofing repairs at the St. Brides Correctional Center.

RESPONSE

It is my opinion that § 53.1-41 authorizes the Department of Corrections to employ prisoners to perform roofing work on buildings located on the prison grounds. The Department is not required to procure such services under the competitive sealed bidding procedures of the Virginia Public Procurement Act.
APPLICABLE LAW AND DISCUSSION

Section 53.1-32(A) provides that "[i]t shall be the general purpose of the state correctional facilities to provide proper employment, training and education in accordance with Chapter 18 (§ 22.1-339 et seq.) of Title 22.1 and § 53.1-32.1 ... of prisoners committed or transferred thereto." Section 53.1-41 provides that,

[to the extent feasible, it shall be the duty of the Director [of the Department of Corrections] to provide persons sentenced to the Department with opportunities to work and to participate in career and technical education programs as operated by the Department of Correctional Education in accordance with § 22.1-339 et seq. Such work opportunities may include business, industrial, agricultural, highway maintenance and construction, and work release programs as hereafter specified in [Article 3, Chapter 2 of Title 53.1]. In addition, prisoners may be employed to improve, repair, work on or cultivate public property or buildings. [Emphasis added.]

Additionally, the 1996 Appropriation Act specifically tasked the Department of Corrections to develop a plan that would, among other things, use inmate labor for roofing work in prison construction projects. Specifically, the Act provides for the use of inmate labor "to reconstruct the St. Brides Correctional Center for use as a facility for youthful offenders and/or juvenile offenders."4

"If a statute is clear and unambiguous, a court will give the statute its plain meaning."5 Sections 53.1-32(A) and 53.1-41 set forth the Commonwealth's policy that inmates should be provided opportunities to work on public projects during their incarceration. Section 53.1-41 explicitly provides for the use of prisoners' labor to improve, repair and work on public buildings. This statute imposes a duty on the Director of the Department of Corrections to provide work opportunities for prisoners. In the situation you present, it appears that the Department of Corrections has afforded prisoners the opportunity to perform roofing services. Section 53.1-41 clearly authorizes this type of work. The Department of Corrections is not required to procure such services under the competitive sealed bidding procedures of the Virginia Public Procurement Act.6

CONCLUSION

Accordingly, it is my opinion that § 53.1-41 authorizes the Department of Corrections to employ prisoners to perform roofing work on buildings located on the prison grounds. The Department is not required to procure such services under the competitive sealed bidding procedures of the Virginia Public Procurement Act.

1Sections 22.1-339 to 22.1-345 comprise the statutes governing the Department of Correctional Education.

2Section 53.1-32.1 requires that the Director of the Department of Corrections shall maintain a classification system for all prisoners and place prisoners in appropriate program assignments.
OP. NO. 02-078

PROFESSIONS AND OCCUPATIONS: CONTRACTORS.

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES — WATER SUPPLY SYSTEMS GENERALLY — GENERAL PROVISIONS FOR PUBLIC UTILITIES — POWERS OF CITIES AND TOWNS.

HEALTH: STATE BOARD OF HEALTH — ENVIRONMENTAL HEALTH SERVICES — PUBLIC WATER SUPPLIES.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law.

MR. JOHN A. RUPP
CITY ATTORNEY FOR THE CITY OF RICHMOND
DECEMBER 6, 2002

ISSUE PRESENTED

You ask whether the City of Richmond may continue to require that only licensed plumbing contractors or master plumbers install backflow prevention devices on water lines where cross connection may result in contamination of the city’s potable water supply, in light of recent amendments to the Board for Contractors Regulations that expand the list of professions authorized to install such devices.

RESPONSE

It is my opinion that the City of Richmond may continue to require that only licensed plumbing contractors or master plumbers install backflow prevention devices to prevent contamination of the city’s potable water supply. Such a requirement appears to be an appropriate exercise of the city’s police power and is not inconsistent with state law.

APPLICABLE LAW AND DISCUSSION

The State Board of Health is responsible for promulgating regulations “governing waterworks, water supplies, and pure water ... to protect the public health and promote the public welfare.” Article 3 of the Board’s Waterworks Regulations requires that “[a]n approved backflow prevention device ... shall be installed at each service connection to a consumer’s water system where, in the judgment of the water purveyor or the division, a health, pollution or system hazard to the waterworks exists.” The

1996 Va. Acts ch. 912, at 1714, 2013 (citing Item 457(B)).

1Id.


regulations prescribe the type of backflow prevention device to be installed by water utility owners, depending on the degree of hazard that exists. All such devices must comply and be installed in accordance with the Uniform Statewide Building Code.

The Board for Contractors regulates individuals who install backflow prevention devices, including plumbing contractors, plumber tradesmen, and fire sprinkler and landscape irrigation contractors. Pursuant to the authority delegated by § 54.1-1102(A), the Board has adopted regulations governing tradesmen. The regulations define “plumber” as a “tradesman who does plumbing in accordance with the Virginia Uniform Statewide Building Code,” and “plumbing work” to include “the installation, maintenance, extension, or alteration or removal of piping, fixtures, appliances and appurtenances in connection with [backflow prevention devices, boilers, and public/private water supply systems].”

The Board for Contractors amended its Board for Contractors Regulations, effective September 1, 2001, to require that plumbing contractors must meet “all applicable tradesman licensure standards.” Prior to September 1, 2001, “fire sprinkler contracting,” a recognized contracting specialty, included “the installation, repair, improvement, or removal of sprinkler systems using water as a means of fire suppression when annexed to real property.” The amended definition provides that “[t]his specialty may engage in the installation of backflow prevention devices in the fire sprinkler supply main and sprinkler system when the installer has received formal vocational training approved by the board that included instruction in the installation of backflow prevention devices.” A landscape irrigation contractor installs, repairs, improves or removes irrigation sprinkler systems or outdoor sprinklers. The Board for Contractors also amended the definition of “landscape irrigation contracting” to provide that “[t]his specialty may install backflow prevention devices incidental to work in this specialty when the installer has received formal vocational training approved by the board that included instruction in the installation of backflow prevention devices.” These amendments to the Board for Contractors Regulations expand the classifications of licensed entities that may install backflow prevention devices.

You ask whether, in light of these amendments, the City of Richmond may continue to require, as an exercise of its police power, that only licensed plumbers be allowed to install backflow prevention devices for water systems connected to the city’s water supply system.

The city owns and operates “water supplies and water production, preparation, distribution, and transmission ... facilities ... for the purpose of furnishing water for the use of its inhabitants.” As a water utility owner, the city must operate the waterworks, treat water in a manner that provides a safe and healthy supply of potable water, and maintain conditions throughout the water supply system that assure a high degree of capability and reliability.

The Code for the City of Richmond provides:
Application for gas or water service connections shall be made by owners of premises to be served or by the occupants thereof through licensed plumbers, unless otherwise authorized in Chapter 5 (Buildings and Building Regulations), to the Director [of Public Utilities] on forms provided and no gas or water service shall be connected until the Director shall approve such application.[20]

Ordinances adopted pursuant to a city’s police power[21] “must have a clear, reasonable and substantial relation to the public health, safety, morals, or welfare, and must be reasonably appropriate for the police power objective sought to be obtained.”[22] Local ordinances “must not be inconsistent with the ... laws ... of this Commonwealth.”[23]

A 1973 opinion has dealt with a locality’s power in a similar situation.[24] At issue in that opinion was whether a locality is authorized to require that certain plans submitted to the locality be prepared by a certified professional engineer rather than by a licensed land surveyor.[25] The opinion determined that a locality, under its general police powers, is authorized to require such plans to be submitted by certified professional engineers.[26] Since the required plans were not intended for recording, but only for the locality’s site approval process, there was no intention to preempt the locality’s prerogative under its general police powers to restrict the preparation of such plans to those it felt best qualified.[27]

It is apparent that the regulation of plumbing and reasonable standards to protect the integrity of a locally operated water supply is a proper exercise of a locality’s police power.[28] I am aware of no statutory provision that requires localities, or anyone else, to use the services of fire sprinkler contractors or landscape irrigation contractors to install backflow prevention devices. The Board for Contractors Regulations defining those contracting specialties merely set forth a list of work that the person is authorized to perform from the Board’s perspective. The regulations allow those persons licensed as fire sprinkler and landscape irrigation contractors to install backflow devices.[29] The regulations do not supplant a locality’s ability, under its general police powers, to require licensed plumbers to install backflow prevention devices when such requirement is related directly to the protection of the city’s water supply system.

CONCLUSION

It is my opinion that the City of Richmond may continue to require that only licensed plumbing contractors or licensed master plumbers install backflow prevention devices to prevent contamination of the city’s potable water supply. Such a requirement appears to be an appropriate exercise of the city’s police power and is not inconsistent with state law.

A “water purveyor” is “an individual, group of individuals, partnership, firm, association, institution, corporation, governmental entity, or the federal government which supplies or proposes to supply water to any person within this state from or by means of any waterworks.” 12 VA. ADMIN. CODE 5-590-10 (West 2002) (defining “owner” or “water purveyor”).

Division,” for purposes of the Waterworks Regulations, means “the Commonwealth of Virginia, Department of Health, Division of Water Supply Engineering.” Id.

12 VA. ADMIN. CODE 5-590-610.

See 12 VA. ADMIN. CODE 5-590-620, 5-590-630.

All backflow prevention devices “shall be installed in a manner approved by the water purveyor and in accordance with the Uniform Statewide Building Code.” 12 VA. ADMIN. CODE 5-590-630(A)–(B).


18 VA. ADMIN. CODE 50-30-10 (West Supp. 2002).


See cite supra note 15.

See 18 VA. CODE ANN. § 15.2-2143 (LexisNexis Supp. 2002).


See, e.g., Rountree Corp. v. City of Richmond, 188 Va. 701, 51 S.E.2d 256 (1949) (challenging City of Richmond plumbing code, found to be proper exercise of city’s police power).

OP. NO. 02-106

PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS.

CIVIL REMEDIES AND PROCEDURE: ACTIONS – TORT CLAIMS AGAINST THE COMMONWEALTH OF VIRGINIA.

School division coaches and other school personnel may render first aid to students when necessary. Unless such persons are certified athletic trainers, they may not employ physical modalities or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. Certified athletic trainers are responsible for actions of noncertified individuals acting under their supervision and direction; must ensure that such individuals do not perform functions requiring professional judgment or discretion of certified athletic trainers. School board that fails to hire certified athletic trainer is entitled to absolute sovereign immunity. Absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire certified athletic trainer.

THE HONORABLE PHILLIP A. HAMILTON
MEMBER, HOUSE OF DELEGATES
DECEMBER 6, 2002

ISSUES PRESENTED

You pose three questions related to the authority of athletic coaches and other noncertified athletic trainers employed by Virginia’s school divisions to render aid and assistance to students during athletic or recreational activity. Specifically, you ask whether coaches, not hired as certified athletic trainers, engage in the practice of athletic training when they advise students to use whirlpools or ice packs, or when they tape a student athlete’s ankles and wrists in the course of a game or practice. You also inquire concerning the supervisory role certified athletic trainers exercise over noncertified athletic trainers with regard to the prevention, recognition, evaluation and treatment of athletic-related injuries. Finally, you question the liability of a school division that fails to employ certified athletic trainers.

RESPONSE

It is my opinion that school division coaches and other school personnel may render first aid to students when necessary. Unless such persons are certified athletic trainers, they may not employ physical modalities or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. It is also my opinion that certified athletic trainers are responsible for the actions of noncertified individuals acting under their supervision and direction, and must ensure that such individuals do not perform functions requiring the professional judgment or discretion of certified athletic trainers. Finally, it is my opinion that a school board that fails to hire a certified athletic trainer is entitled to absolute sovereign immunity, and that, absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire a certified athletic trainer.
BACKGROUND
You note that § 54.1-2957.4 makes it unlawful for a person to practice or hold oneself out as practicing as an athletic trainer unless he is a certified athletic trainer. Prior to July 1, 2002, coaches and other noncertified athletic trainers employed by school divisions typically assisted students with the prevention and treatment of athletic-related injuries, including the administration of whirlpool treatments, application of heat and cold treatments to physical injuries, and taping of ankles and wrists.4 You relate that there are questions as to what aid a school coach may render given the mandates of § 54.1-2957.4.

APPLICABLE LAW AND DISCUSSION
Section 54.1-2957.4 and regulations of the Board of Medicine³ stipulate that all persons engaged in the practice of athletic training ⁴ hold a certificate as a certified athletic trainer from the Board.⁵ The regulations provide that applicants for certification must have graduated from an accredited educational program for athletic trainers or must be credentialed as a certified athletic trainer from the National Athletic Trainers’ Association Board of Certification or other Board-approved credentialing body.⁶ In addition, applicants for certification must present to the Board of Medicine written evidence that they have passed an entry-level certification examination for athletic trainers.⁷ In accordance with the statutory definition of “practice of athletic training” ⁸ and the Board regulations, certified athletic trainers are responsible for evaluating and documenting the treatment being administered by them to an individual and for planning the treatment program.⁹

You inquire as to the activities a coach may undertake to treat student athlete injuries. Section 54.1-2957.6 provides certain exceptions to the requirement that certified athletic trainers be used to prevent and treat student athlete injuries. Any individual may render first aid as needed, and coaches, physical education instructors and other persons may conduct or assist with exercise or conditioning programs or classes within the scope of their duties without engaging in the practice of athletic training.¹⁰ A coach who is not a certified athletic trainer, however, may not direct or administer the use of whirlpools or employ heat, cold, sound, light, electricity, exercise or mechanical devices (“physical modalities”), or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. Such activity is considered the practice of athletic training, which is prohibited by § 54.1-2957.4(A), unless the person performing the activity is a certified athletic trainer.

You also inquire concerning the supervisory role athletic trainers exercise over noncertified athletic trainers with regard to the prevention, recognition, evaluation and treatment of athletic-related injuries. The Board’s regulations provide that certified athletic trainers “shall be responsible” for the actions of persons acting under their direction and supervision.¹¹ The regulations also impose an affirmative duty on certified athletic trainers to ensure that noncertified persons, acting under their supervision, do not engage in activities that require the professional judgment and discretion of athletic trainers.¹² Certified athletic trainers must provide daily, on-site supervision to student
athletic trainers acting under their direction and are authorized to delegate only such nondiscretionary tasks as are appropriate for student trainers.  

Finally, you ask whether a school division that fails to employ a certified athletic trainer is subject to liability. A school division serves as an agent of the state in the performance of duties imposed by the Constitution and the laws of the Commonwealth. A school board, as an agent of the state, enjoys absolute immunity for its acts unless that immunity is abrogated by statute. A school board, therefore, is entitled to sovereign immunity for failure to hire a certified athletic trainer for its athletic programs.

Employees of a school board may be afforded a qualified form of immunity that shields the employee from liability for acts of simple negligence. The factors to be considered in determining whether a school board employee is entitled to claim sovereign immunity include (1) the nature of the function performed by the employee; (2) the extent of the state’s interest and involvement in that function; (3) the degree of control and direction exercised over the employee; and (4) whether the employee is required to exercise judgment and discretion. The Supreme Court of Virginia has also held that the doctrine of sovereign immunity will not serve as a defense for any governmental employee with respect to loss attributable to gross negligence, intentional wrongdoing, or acts performed outside the employee’s scope of employment.

A school board employee, such as the school division superintendent or high school principal, would be entitled to claim sovereign immunity should a plaintiff file a suit alleging simple negligence on the part of the employee for failing to hire an athletic trainer. To institute a suit, a plaintiff would have to properly allege the normal elements of a tort, i.e., duty, breach, causation and damages. Moreover, assuming the school board employee meets the test for sovereign immunity, in order to expose the employee to liability, a plaintiff has the burden of proving that failure to hire a certified athletic trainer was grossly negligent. Such a standard is a high burden for a plaintiff to demonstrate. Whether such a failure is grossly negligent in any given circumstance is a factual determination. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. It is important to note that there is no statutory requirement that a school division hire a certified athletic trainer. Therefore, there is no statutory duty imposed on the school board or its employees to hire a certified athletic trainer.

CONCLUSION

Accordingly, it is my opinion that school division coaches and other school personnel may render first aid to students when necessary. Unless such persons are certified athletic trainers, they may not employ physical modalities or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. It is also my opinion that certified athletic trainers are responsible for the actions of noncertified individuals acting under their supervision and direction, and must ensure that such individuals do not perform functions requiring the professional judgment or discretion of certified athletic trainers. Finally, it is my opinion that a school board that fails to
hire a certified athletic trainer is entitled to absolute sovereign immunity, and that, absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire a certified athletic trainer.

1Such modalities include the use of "heat, light, sound, cold, electricity, exercise or mechanical or other devices." VA. CODE ANN. § 54.1-2900 (LexisNexis Repl. Vol. 2002) (defining "practice of athletic training").

2Section 54.1-2957.6(C) provides a transition period for coaches and others similarly situated before certification is required. Specifically, § 54.1-2957.6(C) provides that "any person who, prior to June 30, 1999, is employed in Virginia as an athletic trainer, or in the performance of his employment duties engages in the practice of athletic training, shall not be required to obtain a certificate from the Board [of Medicine] to continue to be so employed until July 1, 2002."

3Pursuant to the authority granted in § 54.1-2957.4, the Board of Medicine has promulgated regulations governing the certification of athletic trainers. See 18 VA. Admin. Code 85-120-10 to 85-120-150 (West Supp. 2002).

4Section 54.1-2900 defines "practice of athletic training" as "the prevention, recognition, evaluation, and treatment of injuries or conditions related to athletic or recreational activity that requires physical skill and utilizes strength, power, endurance, speed, flexibility, range of motion or agility or a substantially similar injury or condition resulting from occupational activity immediately upon the onset of such injury or condition; and subsequent treatment and rehabilitation of such injuries or conditions under the direction of a licensed physical therapist and the patient's physician or under the direction of any doctor of medicine, osteopathy, chiropractic, podiatry, or dentistry, while using heat, light, sound, cold, electricity, exercise or mechanical or other devices."

5See 18 VA. Admin. Code 85-120-40; see also id. 85-120-10 (defining "athletic trainer" and "certified athletic trainer" as "a person certified by the Virginia Board of Medicine to engage in the practice of athletic training as defined in § 54.1-2900").

618 VA. ADMIN. CODE 85-120-60.

718 VA. ADMIN. CODE 85-120-70.

8See supra note 4.

918 VA. ADMIN. CODE 85-120-110.

10Section 54.1-2957.6 "shall not be construed to prohibit any individual from providing first aid, nor any coach, physical education instructor or other person from conducting or assisting with exercise or conditioning programs or classes within the scope of their duties as employees or volunteers." Section 54.1-2957.6(A) (LexisNexis Repl. Vol. 2002).

1118 VA. ADMIN. CODE 85-120-120(A).

1218 VA. ADMIN. CODE 85-120-120(B).

1318 VA. ADMIN. CODE 85-120-130(B).


608 (1988) (holding that doctrine of sovereign immunity protects high school teacher supervising physical education class)).

17 Messina, 228 Va. at 313, 321 S.E.2d at 663 (citing James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980)).


19 In Banks v. Sellers, a student asserted that the division superintendent of schools and the school principal negligently failed to provide a safe environment for her. 224 Va. 168, 294 S.E.2d 862 (1982). The Court held that the employees were entitled to sovereign immunity since the exercise of their powers required a "considerable degree of judgment and discretion." Id. at 173, 294 S.E.2d. at 865.

20 See G. Crabtree v. E. Dingus & T. Salyers, 194 Va. 615, 618, 74 S.E.2d 54, 56 (1953) ("Gross negligence ... is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another.").


OP. NO. 02-119
PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS.
MENTAL HEALTH GENERALLY: SUBSTANCE ABUSE SERVICES.

Parent may request and consent to drug testing for minor child; is not precluded from obtaining results of nondiagnostic drug testing performed on minor child not receiving treatment for substance abuse.

THE HONORABLE HARRY B. BLEVINS
MEMBER, SENATE OF VIRGINIA
DECEMBER 10, 2002

ISSUE PRESENTED
You ask whether § 54.1-2969, relating to the consent of a minor to certain medical procedures, prohibits a parent from requesting drug testing of the minor child without the child's written consent.

RESPONSE
It is my opinion that § 54.1-2969 does not preclude a parent from requesting and consenting to drug testing for his or her minor child or from obtaining the results of nondiagnostic drug testing performed on a minor child who is not receiving treatment for substance abuse.

FACTS
You relate that you have received numerous inquiries resulting from the dissemination of information by local physicians claiming that parents cannot request drug testing of their minor child without the child's written consent. Therefore, you request an interpretation of § 54.1-2969 and its application to a parental request for drug testing of a minor child.
APPLICABLE LAW AND DISCUSSION

Section 54.1-2969 establishes the authority for obtaining consent from certain minors for surgical and medical treatment when parental consent is not available. With regard to substance abuse treatment, § 54.1-2969(E) provides:

A minor shall be deemed an adult for the purpose of consenting to:

3. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse as defined in § 37.1-203.[1]

Section 54.1-2969(K) provides that “[n]othing in subdivision 3 of subsection E shall prevent a parent, legal guardian or person standing in loco parentis from obtaining the results of a minor’s nondiagnostic drug test when the minor is not receiving care, treatment or rehabilitation for substance abuse as defined in § 37.1-203.” Section 54.1-2969(K) makes it clear that a parent has the right to access the results of nondiagnostic drug tests of a minor child.[2]

Parents generally have the authority to make medical decisions for their children, including the authority to request and consent to testing, treatment, or both.[3] Section 54.1-2969(E)(3) simply permits a minor child to consent to substance abuse treatment without the permission of a parent or guardian if the child desires such treatment. Nothing in § 54.1-2969(E)(3) precludes a parent from consenting to such treatment for the child.

CONCLUSION

It is my opinion that § 54.1-2969 does not preclude a parent from requesting and consenting to drug testing for his or her minor child or from obtaining the results of nondiagnostic drug testing performed on a minor child who is not receiving treatment for substance abuse.

[1]"Substance abuse" is defined as "the use, without compelling medical reason, of alcohol and other drugs which results in psychological or physiological dependency or danger to self or others as a function of continued use in such a manner as to induce mental, emotional or physical impairment and cause socially dysfunctional or socially disordering behavior." VA. CODE ANN. § 37.1-203(2) (LexisNexis Supp. 2002).


[3]The Supreme Court has held that drug testing of minors in a school setting is permissible when a parent or guardian consents to such testing. Vernonia School Dist. v. Acton, 515 U.S. 646 (1995); see also Parham v. J. R., 442 U.S. 584, 600 (1978) (holding that child’s liberty interest in not being confined unnecessarily for medical treatment is inextricably linked with parent’s interest in child’s welfare and health), cited in Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278-79 (1990).
You request clarification regarding disposal of specific personal property belonging to a tenant who is removed by the sheriff from a residential premises pursuant to an action of unlawful detainer or ejectment.

The actions of your office, as described below, with regard to the storage of personal property removed from a residential premises pursuant to unlawful detainer or ejectment are consistent with §§ 55-237.1 and 55-248.38:2.

FACTS

You advise that some sheriffs seize firearms found during the eviction process in the case of tenants whose property is to be stored. You explain that these sheriffs seize such weapons for the general welfare of the public. Your office, however, does not plan to seize any weapons that are to be stored. You advise that your office will inspect all weapons prior to transporting them to storage to ensure that such weapons are not loaded. Your office will empty any loaded weapons prior to transport.

You further advise that any open alcohol containers found during the eviction process will not be allowed to be stored, and that you will supervise the disposal of open containers. Unopened alcoholic containers, however, will be stored. You state that, following the twenty-four-hour eviction period, it becomes the right and duty of the landlord to dispose of the tenant’s personal property.

In both instances, you ask whether the actions of your office are consistent with §§ 55-237.1 and 55-248.38:2 of the Code of Virginia.

APPLICABLE AUTHORITIES AND DISCUSSION

Sections 55-237.1 and 55-248.38:2 are nearly identical statutory provisions, which provide, in part:

At the landlord’s request, the sheriff shall cause [the tenant’s] personal property to be placed into a storage area designated by the landlord, which may be the dwelling unit. The tenant shall have the right to remove his personal property from the landlord’s designated storage area at reasonable times during the twenty-four hours after eviction from the premises or at such other reasonable times until
the landlord has disposed of the property as provided herein. During that twenty-four hour period and until the landlord disposes of the remaining personal property of the tenant, the landlord and the sheriff shall not have any liability for the loss of such personal property.\(^1\)

In the case of *Huffman v. Kite*, the Supreme Court of Virginia considered the meaning of a state statute using the word "shall" in connection with circuit court appointments of school trustee electoral board members within thirty days after July 1.\(^2\) The Court reasoned that the time limit imposed on the circuit courts by the statute was not mandatory:

> If it appears from the nature, context, and purpose of the act that the legislature intended that "shall" be treated as advisory or directory, then it should be accorded that meaning.\(^3\)

Therefore, "the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent."\(^4\)

Sections 55-237.1 and 55-248.38:2 do not discriminate as to the classification of personal property subject to storage and are advisory in nature. A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act."\(^5\) 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.\(^6\) A 1985 opinion of the Attorney General, however, 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.\(^7\)

**CONCLUSION**

Therefore, it is my opinion that the actions of your office with regard to the storage of personal property removed from a residential premises pursuant to unlawful detainer or ejectment are consistent with §§ 55-237.1 and 55-248.38:2.

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2. 198 Va. 196, 93 S.E.2d 328 (1956).
3. *Id.* at 202, 93 S.E.2d at 332.
OP. NO. 01-111
PROPERTY AND CONVEYANCES: PROPERTY OWNERS’ ASSOCIATION ACT.
ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW (OFFICIAL OPINIONS OF ATTORNEY GENERAL).

Attorney General declines to interpret provision of Act that does not address question whether retirement community developer, which controls homeowners’ association, may establish budget for association that is not based on fact. Act requires developer to provide to potential buyers disclosure statement reflecting financial status of association. Developer may retain control of association and bill homeowners for association expenses, provided developer retains ownership of majority of development lots.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
APRIL 17, 2002

ISSUE PRESENTED

You ask whether a retirement community developer, which controls the community’s homeowners’ association, may establish a budget for the association that is not based on fact. You next ask whether the developer is required to provide to potential buyers a disclosure statement reflecting the financial status of the association. Finally, you ask whether such developer may retain control of the association and bill the homeowners for association expenses.

RESPONSE

It is my opinion that the developer you describe is required to provide to potential buyers a disclosure statement reflecting the financial status of the association, and that the developer may retain control of the association and bill the homeowners for association expenses, provided the developer retains ownership of a majority of the lots constituting the development.

BACKGROUND

You advise that a constituent living in a retirement community has been advised that the homeowners’ association is carrying a significant deficit, which accumulated in 1999 and 2000 allegedly from the building of community facilities and the care of common grounds. You relate that, when the constituent was in the process of purchasing her home, she reviewed a 1998 balanced budget sheet for the association based on the construction of 1,800 homes. To date, however, approximately 500 homes have been built. Neither your constituent, nor others who have begun residing in the community, have seen disclosure statements for the association actually showing deficits for the years 1999 and 2000.

APPLICABLE AUTHORITIES AND DISCUSSION

At its 1989 Session, the General Assembly established the Virginia Property Owners’ Association Act in Chapter 26 of Title 55 of the Code of Virginia (the “Act”) to govern the operation of property owners’ associations. The Act guarantees certain rights and protections to individual association members and grants associations the right to enforce rules and regulations and to impose and enforce liens for unpaid assess-
ments. Additionally, the Act places upon the associations certain reporting and accounting requirements. Section 55-510.1(A) of the Act provides that meetings of the board of directors of such associations “shall be open to all members of record” of the association. “Minutes shall be recorded and shall be available as provided in [§ 55-510(B)].” Section 55-510(B) provides:

[A]ll books and records kept by or on behalf of the association ... shall be available for examination and copying by a member in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the association. This right of examination shall exist without reference to the duration of membership and may be exercised ... upon five days’ written notice reasonably identifying the purpose for the request and the specific books and records of the association requested.

Turning to your question whether a developer may establish a budget for the association that is not based on fact, I must first note the following: Article V, § 15 of the Constitution of Virginia provides that the Attorney General of Virginia “shall perform such duties ... as may be prescribed by law.” The constitutional provision declaring that the Attorney General shall perform such duties as may be prescribed by law is implemented by those sections of the Virginia Code 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. Generally, it is recognized that official opinions of the Attorney General must be confined to matters of law. The duty to issue opinions is one of the most significant responsibilities of the Attorney General. The requirements of this responsibility have been acknowledged consistently by constitutional commentators.

The fact that Virginia’s Attorney General was originally a member of the judicial department, and the Commonwealth’s continuing insistence upon keeping the office popularly elected and independent of the Governor, would indicate that a Virginia Attorney General properly sees his opinion-giving function as a quasi-judicial one to be exercised to advance the best interests of the law and the public at large rather than to ease the job of state offices and agencies.

As a result, there are instances in which the Attorney General must decline to render an official opinion so as not to interfere with matters of appropriate legislative or judicial consideration, or of purely local concern. Consequently, the Attorney General historically has been required to limit responses to requests for official opinions to matters that require an interpretation of federal or state law, rule or regulation.

Since I find no provision in the Act addressing the specific question whether a retirement community’s developer, which controls the community’s homeowners’ association, may establish a budget for the association that is not based on fact, I cannot interpret a provision of the Act that does not respond to this specific question.
Accordingly, I regret to advise that I am unable to render an opinion regarding the question.

Turning to your next question, § 55-512(A) of the Act requires that the association make available to an owner “within fourteen days after receipt of a written request ..., an association disclosure packet.” The packet, once received by the owner from the association, “shall be delivered” to the prospective purchaser.  The information in the packet must be “current as of a date specified on the association disclosure packet.” Section 55-512(A) further requires:

An association disclosure packet shall contain the following:

2. A statement of any expenditure of funds approved by the association or the board of directors which shall require an assessment in addition to the regular assessment during the current year or the immediately succeeding fiscal year;

3. A statement, including the amount of all assessments and any other mandatory fees or charges currently imposed by the association and associated with the purchase, disposition and maintenance of the lot and to the right of use of common areas, and the status of the account;

6. A copy of the association’s current budget or a summary thereof prepared by the association, and a copy of its statement of income and expenses or statement of its financial condition for the last fiscal year for which such statement is available.

The use of the word “shall” in this statute strongly implies that its terms are intended to be mandatory, rather than permissive or directive. Designed as a disclosure law created to provide consumers complete information with which they may consider a decision to purchase, the Act contemplates such decisions before the transaction closes. Once the purchase transaction is complete, the Act does not provide any remedies. Failure to provide the required disclosure statements as required by the Act is a ground for the purchaser to void the contract of purchase. The right to cancel the contract is waived after the transaction is closed. Therefore, the developer you describe is required to provide to potential buyers a disclosure statement reflecting the financial status of the association.

Finally, § 55-509.2 provides that, “once the majority of the members of the board of directors are owners of improved lots in the association,” and the developer “no longer holds a majority of the votes in the association” all records held or controlled by the developer must be provided to the association. When the language of an enactment is plain and unambiguous, as in this case, its plain meaning must be
applied. Accordingly, the words must be taken as written and the history of the particular enactment, extrinsic facts, or general rules of construction of enactments that have doubtful meaning do not apply. Consequently, in response to your final inquiry, a developer may retain control of the association and bill the homeowners for association expenses, provided the developer retains ownership of a majority of the lots constituting the development.

CONCLUSION

It is my opinion that the developer you describe is required to provide to potential buyers a disclosure statement reflecting the financial status of the association, and that the developer may retain control of the association and bill the homeowners for association expenses, provided the developer retains ownership of a majority of the lots constituting the development.


4 Section 55-510.1(A) (Michie Supp. 2001).

5 See VA. CODE ANN. tit. 2.2, ch. 5, §§ 2.2-500 to 2.2-518 (LexisNexis Repl. Vol. 2001) ("Department of Law").


7 See id. at 668.

8 See id. at 668 n.42.

9 Id. at 669 (emphasis added).


12 "The disclosure packet, once received by the seller from the association, shall be delivered by the seller to the purchaser. The association shall have no obligation to deliver the disclosure packet to the purchaser of the lot." Section 55-512(A)(14).

13 Section 55-512(A).


OP. NO. 02-116

PROPERTY AND CONVEYANCES: RECORDATION OF DOCUMENTS — FORM AND EFFECT OF DEEDS AND COVENANTS; LIENS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).
COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS - BONDS.

Circuit court clerk may not decline to record deed of trust containing grantor's social security number. Modification of deed of trust offered for recordation may expose clerk to liability.

THE HONORABLE J. JACK KENNEDY, JR.
CLERK, WISE COUNTY-CITY OF NORTON CIRCUIT COURT
DECEMBER 19, 2002

ISSUES PRESENTED

You inquire whether a clerk of the circuit court may decline to accept a deed of trust for recordation that contains the grantor's social security number. You also ask whether a circuit court clerk would be subject to liability for recording a deed of trust containing the grantor's social security number if, prior to recordation, the clerk redacts the social security number from the instrument.

RESPONSE

It is my opinion that a circuit court clerk may not decline to record a deed of trust that contains the grantor's social security number. It is also my opinion that the clerk's modification of a deed of trust offered for recordation may expose him to liability.

APPLICABLE AUTHORITIES AND DISCUSSION

Section 55-106 requires that a clerk of the circuit court of any county or city, "[e]xcept when it is otherwise provided, ... shall admit to record any such writing as to any person whose name is signed thereto with an original signature, ... when it shall have been acknowledged by him."

Section 55-108 provides that such writing "shall be an original or first generation printed form, or legible copy thereof, pen and ink or typed ribbon copy, and shall meet the standards for instruments as adopted under §§ 17-60[1] and 42.1-82 of the Virginia Public Records Act." A clerk's authority to refuse to record an instrument is very limited. Further, assuming that a document meets the parameters required by statute, a clerk may not inquire as to its legal sufficiency or add requirements for recording.

You first ask whether a clerk of the circuit court may decline to record among the public records a deed of trust that contains the grantor's social security number. Specifically, you inquire whether federal law provides a basis for a circuit court clerk to decline to record such an instrument.
Section 405(c)(2)(C) of the Social Security Act sets forth the circumstances under which an individual may be required to furnish his social security number. Section 405(c)(2)(C)(viii)(I) of the Federal Act provides that “[s]ocial security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number.” (Emphasis added.) An “authorized person” under § 405(c)(2)(C)(viii)(III) is defined as “an officer or employee of ... any State, political subdivision of a State ... who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990.” A “related record” under § 405(c)(2)(C)(viii)(IV) is “any record ... that indicates, directly or indirectly, the identity of any individual with respect to whom a social security account number ... is maintained pursuant to this clause.” The provisions of § 405(c)(2)(C)(viii) appear to be directed to employers and other entities charged with the collection of taxes.

A circuit court clerk, as an employer, is bound by the confidentiality provisions of the Social Security Act with respect to the social security numbers of his employees. The act of recording a deed of trust, however, does not implicate § 405(c)(2)(C)(viii) of the Act. Whether a social security number appears on the instrument offered for recordation is irrelevant to the function performed by the clerk. There is no provision of law requiring or prohibiting a social security number from appearing on an instrument offered for recordation. In performing recordation functions, a clerk is not acting in the capacity of an “authorized person,” as contemplated by § 405(c)(2)(C)(viii) of the Act.

Mortgage instruments are prepared and offered for recordation to individuals and entities other than the clerk of the circuit court. Presumably, the grantor voluntarily provides the social security number that appears on an instrument offered for recordation. Federal law requires that individuals be informed whether disclosure of a social security number is voluntary, by what authority the number is solicited, and the uses that will be made of it. The disclosure of the grantor’s social security number is to the preparer of the instrument. A clerk must assume that the social security number is knowingly and voluntarily provided by the grantor for the purpose of appearing on a deed of trust. The clerk has no duty to inquire beyond the statutory requirements for the recordation of an instrument. Moreover, a clerk is limited in his ability to refuse to record an instrument that meets the statutory requirements for recordation. The presence of a social security number on an instrument is not a sufficient reason for refusing to record such an instrument. The most effective way for an individual to avoid the public display of his social security number in this situation is to refuse to authorize the preparer of the instrument to include the social security number on the instrument for recordation.

Therefore, a circuit court clerk may not decline to record a deed of trust containing the grantor’s social security number. Such clerk is not bound by the confidentiality provisions of federal law when recording such instruments.
You next ask whether a clerk would be subject to liability for recording a deed of trust containing the grantor’s social security number if, prior to recordation, the clerk redacts the grantor’s number from the instrument.

Virginia law has long recognized the constructive notice associated with the act of recording, and the effect of recording on interests in real property. The Constitution of Virginia dictates that a circuit court clerk is to serve “in the office of which deeds are recorded,” and that the duties of such constitutional officer “shall be prescribed by general law or special act.” The clerk’s office is a central repository of land records that are, “[a]s a matter of public policy, ... established in the public domain to protect those whose interests may be affected by those writings, and the duties of the clerk to record and index the writings run from him to them.” The recordation of deeds by a circuit court clerk is considered a ministerial act. The accurate and permanent retention of all such writings is singularly the most basic function of the clerk.

A circuit court clerk “may be held personally liable for damages resulting from his omission or neglect in respect of the performance of duties imposed on him by law.” The clerk is required to post bond to assure the faithful performance of those duties. The liability of a clerk that redacts a social security number from an instrument offered for recordation is predicated upon the proof of damages resulting from the alteration or modification. It is difficult to envision a basis for liability in the circumstances you pose. Practical considerations make it unlikely that an individual grantor would be damaged by removing his social security number from a deed of trust, or that a third party examining the public record would suffer damages by that number being redacted. Any alteration or modification of the public record, however, gives rise to a potential cause of action. In the absence of statutory authority, and regardless of the motivation behind the removal of such information from a deed of trust, a circuit court clerk who removes a social security number upon recordation of an instrument does so at the risk of liability.

**CONCLUSION**

Accordingly, it is my opinion that a circuit court clerk may not decline to record a deed of trust that contains the grantor’s social security number. It is also my opinion that the clerk’s modification of a deed of trust offered for recordation may expose him to liability.

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2. 1984-1985 Op. Va. Att’y Gen. 380, 381; see also Va. Code Ann. § 55-58.1 (LexisNexis Supp. 2002) (setting forth specific requirements for recording deeds of trust); § 55-106 (Michie Butterworth Repl. Vol. 1995) (providing that clerk of circuit court “shall admit to record any such writing as to any person whose name is signed thereto with an original signature, ... when it shall have been acknowledged by him, or proved by two witnesses as to him in such court, or
before such clerk"); § 55-106.5 (Michie Butterworth Repl. Vol. 1995) ("A clerk may refuse any
document for recording in which the name or names of the person under which the document is
to be indexed does not legibly appear or is not otherwise furnished."); § 55-108 (Michie Butterworth

1984-1985, supra note 2, at 381.


of social security numbers under Federal Privacy Act).

6See supra note 2.

Certain personal information, such as social security numbers, may not be appropriate for inclusions
in a public record. The Identity Theft Task Force of the Attorney General has recommended
that Virginia law be modified in this area to prevent identity theft. See The Report of the Attorney
General’s Identity Theft Task Force (Oct. 29, 2002), at http://www.oag.state.va.us/Protecting/
Consumer%20Fraud/ID%20TASK%20Force/IDTHEFTFINALRPT.pdf.

7See Porter v. Wilson, 244 Va. 366, 369, 421 S.E.2d 440, 442 (1992) (citing Jones v. Folks,
149 Va. 140, 144, 140 S.E. 126, 127 (1927)); McCauley v. Grim, 115 Va. 610, 613, 79 S.E.
1041, 1043 (1913) (quoting Building Authority v. Groves, 96 Va. 138, 140, 31 S.E. 23, 23
(1898)).


10See 15 Mich. JUR. Recording Acts § 13, at 767 (1998); see also Lohr v. Larsen, 246 Va. 81, 87,
431 S.E.2d 642, 645 (1993) (holding that, since government employee is liable for negligence in
performing ministerial act, use of judgment and discretion is element in determining immunity);
generally are not entitled to sovereign immunity for commission of intentional torts, whether
acting within or without scope of employment); First Va. Bank-Colonial v. Baker, 225 Va. at 78,
301 S.E.2d at 11 (holding that malfeasance of clerk’s ministerial duty is not entitled to protection
that court clerk is accorded absolute immunity when acting in obedience of judicial order or under
court’s direction).

1176 C.J.S. Registers of Deeds § 14(a), at 458 (1994). A government official normally is entitled
to sovereign immunity in the exercise of official duties. See Messina v. Burden, 228 Va. 301, 313,
321 S.E.2d 657, 663 (1984) (listing among factors to be considered in determining entitlement to
immunity (a) nature of function performed; (b) extent of state’s interest and involvement in
function; (c) state’s degree of control and direction over employee; and (d) whether act involved
use of judgment and discretion).

Vol. 2002).
2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and that tangible personal property of association shall be entitled to exemption from personal property tax on household goods is not declaratory of law existing prior to July 1, 2002, effective date of legislation, and is not retroactive in its application.

THE HONORABLE TERRIE L. SUIT
MEMBER, HOUSE OF DELEGATES
AUGUST 14, 2002

ISSUE PRESENTED

You pose two questions concerning the status and effect of an amendment to a tax statute. You ask whether the 2002 amendment to § 55-428, changing the tax treatment of residential cooperative associations, is (1) declaratory of the law existing prior to July 1, 2002, and (2) if it is not, whether it is retroactive in its application.

RESPONSE

It is my opinion that the 2002 amendment to § 55-428, is not declaratory of the law existing prior to July 1, 2002. Additionally, the 2002 amendment is not retroactive in its application, and the tax exemptions provided therein for residential cooperative associations are applicable as of July 1, 2002, the effective date of the statute.

FACTS

Chapter 34 of the 2002 Acts of Assembly amends and reenacts § 55-428 by adding subsections F and G to the statute, relating to taxation of cooperative interests under the Virginia Real Estate Cooperative Act, §§ 55-424 through 55-506.1 Section 55-428(F) provides that any residential cooperative association under the Act shall not be considered a business for purposes of state and local taxation; § 55-428(G) provides that the tangible personal property of a residential cooperative association is entitled to the same exemption from personal property tax on household goods that is available to individuals or families. Residential cooperative associations are real estate cooperatives, residential in nature, where ownership title to the individual units and common areas are held by the association and members of the association are entitled to exclusive possession of a particular unit.2

You inquire whether the 2002 amendment to § 55-428 is declarative of the law existing prior to July 1, 2002, and if it is not, whether it may be applied retroactively. If the amendment to § 55-428 is declarative of the law existing prior to July 1, 2002, or if it is retroactive in its application, then any residential cooperative previously subject to local business, professional and occupational license ("BPOL") tax or local tangible personal property taxes prior July 1, 2002, could seek a refund for taxes paid in prior years or prevail in pending tax contests based solely on the change to § 55-428. Generally, taxpayers assessed with local taxes may protest an assessment (i) within three years of the last day of the tax year for which the assessment is made, (ii) within one year of the date of the assessment, (iii) within one year of the date of the Tax Commissioner’s final determination under § 58.1-3703.1(A)(5)3 or § 58.1-3983.1(D),4 or (iv) within one year from the date of the final determination under § 58.1-3981,5 whichever is
If it is determined that the 2002 amendment to § 55-428 is retroactive, localities may be subject to refund claims from taxpayers for the previous tax years and may lose certain pending taxpayer protests based solely on the changes to § 55-428.

**APPLICABLE LAW AND DISCUSSION**

The 2002 Session of the General Assembly added the following subsections to § 55-428:

**F.** Any residential cooperative association, the members of which are owners of cooperative interests in a cooperative under [the Virginia Real Estate Cooperative Act], shall not be deemed to be a business for any state and local purposes, including, but not limited to, liability for payment of sales, meals, hotel, motel or gross receipts taxes and business licenses, to the extent that it collects payments from residents of the cooperative.

**G.** Any tangible personal property owned by a residential cooperative association that would be considered household goods and personal effects if owned and used by an individual or by a family or household incident to maintaining an abode shall be considered household goods and personal effects owned and used by an individual or by a family or household incident to maintaining an abode for purposes of § 58.1-3504 and any local ordinance authorized thereby.

Chapter 34 does not state that it is declaratory of existing law. There are two types of declaratory statutes: “(1) statutes declaratory of the common law, and (2) statutes declaratory of prior statutes and prior legislative intent.”[7] “Taxes can only be assessed, levied and collected in the mode pointed out by express statutory enactment.”[9] The BPOL tax is a creature of statute, not common law.[10] Chapter 34 amends a tax statute. Therefore, if the 2002 amendment to § 55-428 is declaratory of existing law, it may only be declaratory of prior statutes or the legislative intent thereof. Before the enactment of the 2002 amendments to § 55-428, a tax statute exempting residential cooperative associations from the BPOL tax did not exist. In addition, the Tax Commissioner issued rulings indicating that the law prior to the 2002 amendment to § 55-428 was that residential cooperative associations, if engaged in business activity, were subject to BPOL tax.[11] Given the statutory nature of tax law and the absence of any exempting language for residential cooperative associations in any statute prior to the passage of Chapter 34, the 2002 amendment to § 55-428, therefore, is not declaratory of the law existing prior to July 1, 2002.

Chapter 34 contains no emergency enactment clause[12] and provides no retroactive application within the act itself.[13] Generally, legislation enacted during “a regular session” of the General Assembly becomes effective on July 1 following the session’s adjournment.[14] Exceptions to this include appropriation acts, emergency legislation and redistricting laws.[15]
You suggest that the decision of the Supreme Court of Virginia in *Sussex Community Services Association v. Virginia Society for Mentally Retarded Children*\(^6\) may lend support to interpreting the 2002 amendment to § 55-428 as applying retroactively. In *Sussex*, the Court determined that the language of a statute implied that it was retroactive in its application.\(^7\) The Supreme Court considered whether legislation providing that certain group homes were to be considered single-family residences "when construing any restrictive covenant"\(^8\) was to be applied retroactively. The proponents of retroactive application relied on the word "any" to include covenants recorded prior to the effective date of the legislation.\(^9\) The opponents of retroactive application argued that there was no clear intent that the legislation was retroactive and, therefore, it was presumed prospective only.\(^10\) The Court determined that the placement of the word "any" before "covenant" indicated a legislative intent that the legislation was retroactive as well as prospective.\(^11\) The Court found that word "any," when used as an "unrestricted modifier[",]"\(^12\) "is generally considered to apply without limitation,"\(^13\) and that, therefore, the statute applied retroactively to any covenants existing even prior to the enactment of the legislation.\(^14\)

The Supreme Court has recognized, however, that retrospective laws are disfavored, "and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest."\(^15\) Moreover, subsequent to the Court's decision in *Sussex*, the General Assembly has made it clear that, where a statute is "reenacted," the changes to the statute will be effective prospectively absent a specific retroactive date. Specifically, § 1-13.39:3 provides:

> Whenever the word "*reenacted*" is used in the title or enactment of a bill or act of assembly, it shall mean that the changes enacted to a section of the Code of Virginia or an act of assembly are in addition to the existing substantive provisions in that section or act, and are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specified date. [Second emphasis added.]

Given the mandate of § 1-13.39:3, it is clear that, in order to operate retroactively, the 2002 amendment to § 55-428 must contain some manifest indication on its face; otherwise, it may only operate prospectively. Neither Chapter 34 nor the amendment in question contains any specific date, as required by § 1-13.39:3, upon which the amendment is to apply retroactively. Therefore, the 2002 amendment to § 55-428, adding subsections F and G, is applicable on and after July 1, 2002.

**CONCLUSION**

Accordingly, it is my opinion that the 2002 amendment to § 55-428 is not declaratory of the law existing prior to July 1, 2002. Additionally, the 2002 amendment is not retroactive in its application, and the tax exemptions provided therein for residential cooperative associations are applicable as of July 1, 2002, the effective date of the statute.


3Section 58.1-3703.1(A)(5) pertains to the appeal and ruling of a BPOL tax assessment.

4Section 58.1-3983.1(D) pertains to appeals and rulings of certain local business tax assessments.

5Section 58.1-3981 pertains to correction of an erroneous local tax assessment by the commissioner of the revenue.


12“All laws enacted at a regular session ... shall take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted ... unless in the case of an emergency (which emergency shall be expressed in the body of the bill) the General Assembly shall specify an earlier date ....” Va. Const. art. IV, § 13.


14See supra note 12.

15Va. Const. art. IV, § 13 (appropriation and emergency laws); art. II, § 6 (redistricting laws).


17Id.

18Id. at 243, 467 S.E.2d at 469 (quoting § 36-96.6(C)).

19Id.

20Id. at 242, 467 S.E.2d at 469.

21Id. at 244, 467 S.E.2d at 470.

22Id. at 243, 467 S.E.2d at 469.

23Id. at 244-45, 467 S.E.2d at 470.

OP. NO. 02-051

RULES OF SUPREME COURT OF VIRGINIA; INTEGRATION OF THE STATE BAR - CANONS OF JUDICIAL CONDUCT FOR THE STATE OF VIRGINIA.

Doctrine of judicial immunity provides judges with absolute immunity from civil liability. Court personnel share absolute judicial immunity when carrying out order of court. Probation officers and other public officials enjoy sovereign immunity for activities requiring exercise of judgment and discretion and are liable, as are court personnel, for negligent performance of simple ministerial tasks and claims of gross negligence.

MR. FRANK KILGORE
COUNTY ATTORNEY FOR BUCHANAN COUNTY
JULY 19, 2002

ISSUE PRESENTED

You inquire regarding the potential liability of various officials who participate in carrying out a judge’s order assigning a criminal probationer or a criminal defendant to pick up litter along a public highway or stream ("litter cleanup") as a condition of probation or as a condition to avoid conviction. You ask whether judges, court personnel, probation officers, and participating public officials, when carrying out such a community service program, are immune from civil liability.

RESPONSE

It is my opinion that (1) judges enjoy absolute judicial immunity when entering such an order; (2) court personnel would enjoy either judicial immunity or sovereign immunity for most activities connected to such a litter cleanup program; and (3) probation officers and other public officials would enjoy sovereign immunity for most activities connected with the program.

FACTS

You relate that judges assign criminal probationers or criminal defendants to litter cleanup. A probation officer designates an area of a road or stream to be cleaned of litter. Citizen volunteers monitor the road and report any problems to the probation officer. There is no supervision during work performance, but other public officials check the areas for cleanliness.

APPLICABLE LAW AND DISCUSSION

1. Judges

A judge’s decision to assign a probationer or a criminal defendant to litter cleanup, as a condition of probation or a condition to avoid conviction, is a judicial decision for which there can be no civil liability. A judge is entitled to judicial immunity when performing official acts within the scope of his jurisdiction. A judge who sentences a criminal defendant to litter cleanup, as a condition of probation or a condition to avoid conviction, is performing an official act within the scope of his jurisdiction. Therefore, a judge is immune from civil liability in this context.
II. Court Personnel

The liability of court personnel depends on the nature of the function they are performing. If they are carrying out an order of the court, they would likely be entitled to judicial immunity because court clerks “have absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge’s direction.”

If court personnel are acting on their own authority, they may be protected by the doctrine of sovereign immunity for any discretionary decisions they make. The doctrine of sovereign, or governmental, immunity extends to certain officers and employees of immune governmental units, provided the officers or employees are acting within the scope of their employment or duties and the conduct does not constitute intentional misconduct or gross negligence. The doctrine of sovereign immunity, however, would not apply when they are carrying out ministerial tasks. Governmental employees are entitled to sovereign immunity if they meet the test set forth by the Supreme Court of Virginia. The factors to be considered include: (1) the nature of the function performed by the employee; (2) the extent of the state’s interest and involvement in that function; (3) the degree of control and direction exercised over the employee; and (4) whether the employee is required to exercise judgment and discretion.

Court personnel involved in the implementation of a court-ordered litter cleanup program are performing an important public function as a part of the criminal justice system. The entity employing them is the court, which has an interest, and is directly involved, in carrying out the program. The court also exercises supervisory control over these employees. Consequently, these employees are protected by the doctrine of sovereign immunity for any discretionary decisions that they make while participating in the litter cleanup program. Accordingly, they are not liable for claims of simple negligence. Court personnel are not protected by the doctrine of sovereign immunity, however, while carrying out simple ministerial tasks, e.g., carrying out instructions given by a supervisor. Neither would they be protected by sovereign immunity where a plaintiff alleges and proves that they are guilty of gross negligence.

III. Probation Officers

You relate that probation officers do not supervise probationers performing litter cleanup. They merely allot sections of the road to probationers, and the court appoints citizen volunteers to monitor the roads and report any problems to probation officers. Probation officers would enjoy the benefit of the doctrine of sovereign immunity when engaging in activities that require the exercise of judgment and discretion. Like court personnel, they are participating in an important public program in which the government has a strong interest. The government also exercises control and direction over probation officers. Therefore, they are entitled to the protection of sovereign immunity when performing discretionary activities, such as deciding which sections of road to allot to a probationer or whether a probationer has satisfactorily performed his duties. For such activities, probation officers could only be held liable for acts of gross negligence. They would, however, be liable for the negligent performance of
simple ministerial tasks. While your request does not detail all of the activities these officials may carry out, and, therefore, it is not possible to categorize all of their activities as ministerial or discretionary, the Supreme Court of Virginia has held that ministerial acts include driving a car in routine traffic or acts which do not require the exercise of judgment and discretion.

IV. Other Participating Public Officials

Other public officials would, like probation officers, have sovereign immunity for activities which require them to exercise judgment and discretion. In such an instance, they could only be held liable for acts of gross negligence; however, they would be liable for the negligent performance of ministerial acts.

CONCLUSION

Accordingly, it is my opinion that the doctrine of judicial immunity would provide judges with absolute immunity from civil liability. Court personnel would share absolute judicial immunity for any activities undertaken while specifically carrying out a judge’s order. For other activities, the doctrine of sovereign immunity would bar claims for simple negligence when performing activities that require the exercise of judgment and discretion. Court personnel would be liable for the negligent performance of simple ministerial tasks and claims of gross negligence. Probation officers and other public officials would also enjoy sovereign immunity for activities requiring the exercise of judgment and discretion, but would be liable for simple negligence in the performance of ministerial tasks and for claims of gross negligence.

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1You do not relate what positions within the court constitute “court personnel.” For the purposes of this opinion, I assume that the term “court personnel” refers to court clerks and deputy clerks.


3"Judicial immunity" means “[t]he immunity of a judge from civil liability arising from the performance of judicial duties.” BLACK’S LAW DICTIONARY 753 (7th ed. 1999).


8Id. at 313, 321 S.E.2d at 663 (citing James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980)).

9See VA. SUP. CT. R. pt. 6, § III, Canon 3(C)(2) (judge’s staff and court officials are subject to judge’s direction and control and must observe standards of diligence that apply to judge).

10See, e.g., Messina, 228 Va. at 311, 321 S.E.2d at 662 (holding that defendant government employee, acting within scope of his employment, is eligible to claim sovereign immunity, absent claim of gross negligence).
OP. NO. 02-077
STATE WATERS, PORTS AND HARBORS: VIRGINIA RESOURCES AUTHORITY.
ADMINISTRATION OF GOVERNMENT: GOVERNOR'S SECRETARIES — SECRETARY OF
COMMERCE AND TRADE.

Authority is political subdivision created in Commerce and Trade Secretariat for state
government organizational purposes. Such inclusion does not alter independent
nature of Authority to govern its affairs according to enabling statutes. Board of
Directors has exclusive power over personnel issues of Authority, with exception of
appointment of Executive Director.

MR. WILLIAM G. O'BRIEN
CHAIRMAN, BOARD OF DIRECTORS, VIRGINIA RESOURCES AUTHORITY
SEPTEMBER 19, 2002

ISSUES PRESENTED

You pose two questions concerning the status of the Virginia Resources Authority.
Specifically, you ask whether the Authority, as a political subdivision of the Com­
monwealth, is organizationally separate and distinct from state executive branch agencies
organized within the Commerce and Trade Secretariat. You also ask whether the
Board of Directors of the Authority has the exclusive power over personnel issues,
with the exception of the Governor’s ability to appoint the Executive Director pursuant

RESPONSE

It is my opinion that the Virginia Resources Authority, as a political subdivision of the
Commonwealth, is a state-created governmental entity within the Commerce and
Trade Secretariat for state government organizational purposes; however, such inclu­
sion does not alter the independent nature of the Authority to govern its own affairs
in accordance with its enabling statutes. It is also my opinion that the Board of Direct­
ors of the Authority has the exclusive power over personnel issues, with the exception
of the Governor’s ability to appoint the Executive Director pursuant to § 62.1-202.

FACTS

In 1984, the General Assembly created the Virginia Resources Authority “as a public
body corporate and as a political subdivision of the Commonwealth.” Additionally,
“[t]he exercise by the Authority of the duties and powers conferred by [Chapter 21 of
Title 62.1] shall be deemed to be the performance of an essential governmental func­
tion of the Commonwealth.” The purpose of the Authority is
to encourage the investment of both public and private funds and to make loans, grants, and credit enhancements available to local governments to finance water and sewer projects, drainage projects, solid waste treatment, disposal and management projects, recycling projects, professional sports facilities, resource recovery projects, public safety facilities, and the remediation of brownfields and contaminated properties.\(^4\)

A board of directors governs the Authority.\(^5\) The Board of Directors of the Authority consists of four state officials and seven members appointed by the Governor, "subject to confirmation by the General Assembly," each of whom serves a four-year term.\(^6\) The Governor designates one member of the Board to serve as chairman, and the Board may choose its own vice-chairman.\(^7\)

The Governor appoints the Executive Director of the Authority, who is responsible for directing the day-to-day activities of the Authority.\(^8\) The Executive Director reports to the Board and serves as *ex officio* secretary to the Board.\(^9\) The Executive Director also "perform[s] other duties as instructed by the Board of Directors in carrying out the purposes of [the Authority]."\(^10\) Section 62.1-203 grants to the Authority certain powers to effect its purposes, including the power "[t]o employ officers, employees, agents, advisers and consultants, including without limitations, attorneys, financial advisers, engineers and other technical advisers and public accountants and, the provisions of any other law to the contrary notwithstanding, to determine their duties and compensation without the approval of any other agency or instrumentality."\(^11\)

It is my understanding that the Authority does not directly receive any state appropriations. The Authority has "the power to borrow money and issue its bonds in amounts the Authority determines to be necessary or convenient to provide funds to carry out its purposes and powers and to pay all costs and expenses incurred in connection with the issuance of bonds."\(^12\) It has "the power to pledge any revenue or funds of or under the control of the Authority to the payment of its bonds and credit enhancements, subject only to any prior agreements with the holders of particular bonds or the beneficiaries of particular credit enhancements pledging money or revenue."\(^13\) The issuance of bonds by the Authority "shall [not] constitute a debt or a pledge of the faith and credit of the Commonwealth, or any political subdivision thereof other than the Authority, but shall be payable solely from the revenue, money or property of the Authority as provided for in [Chapter 21 of Title 62.1]."\(^14\)

**APPLICABLE LAW AND DISCUSSION**

Previously, this Office has distinguished state agencies from independent political subdivisions by reviewing factors that assess the entity’s reliance on the state for control and funding.\(^15\) Specifically, a state agency is an entity that serves as a subordinate or auxiliary body to fulfill a state purpose, is dependent upon state appropriations, and is subject to state control to a great degree.\(^16\) For example, the exercise of powers of an agency is subject to prior approval or postexercise veto by a higher authority of state government.\(^17\)
A political subdivision is created by the legislature to exercise some portion of the state's sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred upon it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.

The Authority, by the terms of its organic statute, is "a political subdivision." Given that the Authority possesses and exercises those statutory powers and functions embodied in the term "political subdivision," there is no need to resort to the multifactor test of previous opinions of this Office to determine whether the Authority is a "state agency" or a "political subdivision." Depending on the context, however, a political subdivision may be considered a state agency for limited purposes. Section 2.2-204 provides that the Secretary of Commerce and Trade is responsible to the Governor for the Virginia Resources Authority. It is the inclusion of the Authority in § 2.2-204 that prompts your first inquiry.

Prior to the recodification of Title 2.1, the Virginia Resources Authority was not an entity listed as a governmental unit organized under the Commerce and Trade Secretariat. Nevertheless, in recodifying Title 2.1, the General Assembly listed the Virginia Resources Authority among state executive branch agencies and other commissions for which the Secretary is responsible to the Governor. As a political subdivision, the Authority is different from typical executive branch state agencies that are organized under the Commerce and Trade Secretariat. Such executive branch state agencies report to their respective Secretaries. A Secretary appointed by the Governor has the authority to (1) "resolve administrative, jurisdictional, operational, program, or policy conflicts between agencies or officials assigned;" (2) "direct the formulation of a comprehensive program budget for the functional area ... encompassing the services of agencies assigned for consideration by the Governor;" and (3) "hold agency heads accountable for their administrative, fiscal and program actions in the conduct of the respective powers and duties of the agencies." The Authority, however, is unlike many of the agencies listed in § 2.2-204 in that it operates independently of the Secretary through its Board of Directors. As such, it is a unique state-created entity that is merely listed with state executive branch agencies and other authorities in § 2.2-204.

For state government organizational purposes, the General Assembly has determined that the Virginia Resources Authority should be among those agencies for which the Secretary of Commerce and Trade is responsible to the Governor. Presumably, the inclusion within the Commerce and Trade Secretariat is due to the role the Authority plays in economic development throughout the Commonwealth. The Authority's inclusion within the Secretariat, however, does not transform the Authority into a state executive branch agency directly under the control of the Secretary of Commerce and Trade. Section 2.2-204 merely requires the Secretary to be responsible to the
Governor for the Virginia Resources Authority. This responsibility may include reporting on the activities of the Authority. Section 2.2-204 does not confer upon the Secretary any supervisory power over the Authority; that power is vested in the Authority’s Board of Directors. Consequently, the Authority should not be considered a “state executive branch agency” although it is listed among other such agencies in § 2.2-204.

You also ask whether the Virginia Resources Authority has the exclusive power to hire and establish the compensation of personnel, with the exclusion of the Executive Director. The Authority’s inclusion in § 2.2-204 does not negate or override its status as a political subdivision that is governed by a board of directors. Pursuant to § 62.1-203(8), only the Board of Directors of the Authority is authorized to hire, terminate, compensate and determine the duties for its personnel. The Board exercises this power “without the approval of any other agency or instrumentality.” As such, with the exception of the appointment of the Executive Director, no other state entity or person may direct the personnel policies of the Board.

CONCLUSION

Accordingly, it is my opinion that the Virginia Resources Authority, as a political subdivision of the Commonwealth, is a state-created governmental entity within the Commerce and Trade Secretariat for state government organizational purposes; however, such inclusion does not alter the independent nature of the Authority to govern its own affairs in accordance with its enabling statutes. It is also my opinion that the Board of Directors of the Authority has the exclusive power over personnel issues, with the exception of the Governor’s ability to appoint the Executive Director pursuant to § 62.1-202.


3Section 62.1-200.

4Section 62.1-198.

5See § 62.1-201.

6Section 62.1-201(A).

7Section 62.1-201(B).

8Section 62.1-202.

9Id.

10Id.

11Section 62.1-203(8).

12Section 62.1-204.

13Section 62.1-206.

14Section 62.1-207.
17 "Id."
21 Section 62.1-200.
24 2001 Va. Acts ch. 844, supra, at 1203 (enacting § 2.2-204).
25 Section 2.2-200(C)(1).
26 Section 2.2-200(C)(2).
27 Section 2.2-200(C)(3).
28 Other entities listed in § 2.2-204 are also categorized as "political subdivisions." E.g., Virginia Housing and Development Authority (see VA. CODE ANN. § 36-55.27 (Michie Repl. Vol. 1996)); Virginia Economic Development Partnership Authority (see § 2.2-2234(C) (LexisNexis Repl. Vol. 2001)); Virginia Tourism Authority (see § 2.2-2315(C) (LexisNexis Repl. Vol. 2002)); and the Tobacco Indemnification and Community Revitalization Commission (see VA. CODE ANN. § 3.1-1107(A) (LexisNexis Supp. 2002)).
29 Section 62.1-201(A).
30 E.g., Department of Labor and Industry; Department of Mines, Minerals and Energy; Department of Professional and Occupational Regulation; Department of Housing and Community Development.
31 Section 62.1-203(8).

OP. NO. 02-113

TAXATION: GENERAL PROVISIONS OF TITLE 58.1 (SECRECY OF INFORMATION).
TRADE AND COMMERCE: TRANSACTING BUSINESS UNDER ASSUMED NAME.

Commissioner of revenue may release names and addresses of businesses licensed within his locality for purposes of solicitation. Business is considered trading under assumed or fictitious name when assumed or fictitious name certificate is filed in appropriate clerk's office.

THE HONORABLE GENE R. ERGENBRIGHT
COMMISSIONER OF THE REVENUE FOR THE CITY OF STAUNTON
DECEMBER 19, 2002

ISSUES PRESENTED

You ask several questions regarding the disclosure of information received by your office. You first ask whether a commissioner of the revenue may distribute, upon request, a list of the names and addresses of businesses licensed within his locality.
Second, you ask when a business is considered to be trading under an assumed or fictitious name for purposes of § 58.1-3. Finally, you inquire whether a commissioner of the revenue may disclose the names and addresses of licensed businesses within his locality to be used for solicitation purposes.

RESPONSE

It is my opinion that § 58.1-3 does not prohibit a commissioner of the revenue from releasing the names and addresses of businesses licensed within his locality. It is further my opinion that a business is considered to be trading under an assumed or fictitious name, for the purposes of § 58.1-3, when an assumed or fictitious name certificate is filed as required by § 59.1-69(A). Finally, it is my opinion that a commissioner of the revenue may release the names and addresses of licensed businesses within his locality to be used for solicitation purposes.

APPLICABLE LAW AND DISCUSSION

You first ask whether a commissioner of the revenue is prohibited from releasing the names and addresses of businesses licensed within his locality. Section 58.1-3(A) requires that tax officials keep confidential certain information received by them:

Except in accordance with a proper judicial order or as otherwise provided by law, the ... commissioner of the revenue ... 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.

Section 58.1-3(B) permits the release of certain information by a commissioner of the revenue. Section 58.1-3(B) provides, in part, that “[t]his section 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 and divulging, upon written request, the name and address of any person, firm or corporation transacting business under a fictitious name.”

Section 58.1-3(A) protects information related to “transactions, property, including personal property, income or business of any person, firm or corporation.” The disclosure prohibition does not extend to whether a person, firm or corporation is licensed to do business. Section 58.1-3(B) provides an explicit exception to the confidentiality requirements of § 58.1-3(A). This Office previously has concluded that a commissioner of the revenue is authorized to release the names, addresses, and telephone numbers of businesses licensed within his locality.

You also ask when a business is considered to be trading under an assumed or fictitious name for the purposes of § 58.1-3(B). An assumed or fictitious name certificate is required when the name under which business is transacted does not fairly disclose true ownership. While § 58.1-3(B) does not prohibit a commissioner of the revenue from releasing the names and addresses of businesses licensed within his locality, it does require a written request before a commissioner may disclose the true ownership of businesses using assumed or fictitious names.
Chapter 5 of Title 59.1, §§ 59.1-69 through 59.1-76, sets forth the requirements for transacting business in the Commonwealth under an assumed or fictitious name. “[T]he object of [Chapter 5] is to protect the public by giving information as to the person with which it deals and to afford it protection against possible fraud and deceit.” Section 59.1-69(A) prohibits any “person” from conducting or transacting business in Virginia under an assumed or fictitious name without filing an assumed or fictitious name certificate.

The primary purpose of statutory construction is to “ascertain and give effect to legislative intent.” Statutes are to be read as a whole rather than in isolated parts. Section 58.1-3(B) removes from the protection of privacy the actual identity of a business trading under a fictitious name, requires a written request prior to the release of the true identity of a business, and provides access to such information to the public. The apparent purpose of Chapter 5 of Title 59.1 and the exemption from privacy under § 58.1-3(B) is to protect the public from fraud and deceit by persons trading under assumed and fictitious names. Accordingly, the phrase, “assumed or fictitious name,” should have the same meaning in both statutory schemes. Therefore, a business required by § 59.1-69(A) to sign, acknowledge, and file an assumed or fictitious name certificate with the appropriate circuit court is a business considered to be trading under a fictitious name for purposes of § 58.1-3(B).

You also inquire whether the names and addresses of licensed businesses may be disclosed when the proposed use is for solicitation purposes. You believe § 58.1-4 may prohibit you from releasing the names and addresses of licensed businesses when you suspect that the information will be used for solicitation purposes. Section 58.1-4 prohibits, “for the purpose of solicitation,” the disclosure of any information gathered by a person, firm or corporation preparing a state tax return required by Title 58.1 or federal income tax or estate tax return for another party.

Section 58.1-4 is a general prohibition against the disclosure of certain tax information by parties who prepare tax returns for other persons. Regardless of a commissioner of the revenue’s involvement in completing or assisting with a business, professional and occupational license application or return, once the license is issued, § 58.1-3(B) specifically allows a local tax official to disclose the name and address of a business that is licensed in his locality. Section 58.1-3(B) authorizes the release of this information without regard to the motivations behind the request. The general prohibitions provided in § 58.1-4 may not be interpreted to repeal by implication the disclosure specifically authorized by § 58.1-3. A commissioner of the revenue, therefore, is not prohibited from releasing nonprotected information that will be used for purposes of solicitation.

As commissioner of the revenue, you may provide the name and address of a business licensed within your locality. You need not do so, however, absent a request pursuant to The Virginia Freedom of Information Act. Upon such request, a commissioner of the revenue is not required to create a list that does not already exist.
CONCLUSION

Accordingly, it is my opinion that § 58.1-3 does not prohibit a commissioner of the revenue from releasing the names and addresses of businesses licensed within his locality. It is further my opinion that a business is considered to be trading under an assumed or fictitious name, for the purposes of § 58.1-3, when an assumed or fictitious name certificate is filed as required by § 59.1-69(A). Finally, it is my opinion that a commissioner of the revenue may release the names and addresses of licensed businesses within his locality to be used solicitation purposes.

1See also 1989 Op. Va. Att’y Gen. 304, 305 (concluding that commissioner of revenue may not release information related to amounts of coal and taxes collected from coal company).
4I assume that you are seeking guidance as to when a written request is required in connection with the release of information regarding the true ownership of a business.
5See Tate v. Atlanta Oak Flooring Co., 179 Va. 365, 368-69, 18 S.E.2d 903, 905 (1942).
6Tate, 179 Va. at 367-68, 18 S.E.2d at 904.
7"No person, ... shall conduct or transact business in this Commonwealth under any assumed or fictitious name unless such person, ... shall sign and acknowledge a certificate setting forth the name under which such business is to be conducted or transacted, and the names of each person, ... owning the same, with their respective post-office and residence addresses ... and file the same in the office of the clerk of the court in which deeds are recorded in the county or city wherein the business is to be conducted." VA. CODE ANN. § 59.1-69(A) (Michie Repl. Vol. 2001).
10See Supervisors v. Commonwealth, 116 Va. 311, 313, 81 S.E. 112, 112-13 (1914) (noting that law does not favor repeal by implication, unless repugnance is plain, and then only to extent of repugnancy); see also 1996 Op. Va. Att’y Gen. 134, 135.
11See generally Associated Tax Service v. Fitzpatrick, 236 Va. 181, 186-87, 372 S.E.2d 625, 628-29 (1988) (holding that real estate tax information must be released pursuant to Freedom of Information Act request regardless of purpose or motivation behind request).

OP. NO. 02-094
Allowance of credit against individual and corporate income tax in amount equal to 50% of fair market value of land or interest in land donated for conservation purposes. Donor of land or interest in land may transfer tax credit to other taxpayers to make full use of credit. Meaning of ‘taxpayer’ for purposes of Act.

THE HONORABLE WILLIAM J. HOWELL
MEMBER, HOUSE OF DELEGATES
NOVEMBER 19, 2002

ISSUES PRESENTED
You inquire concerning the maximum tax credit that may be transferred in connection with the donation of land for conservation purposes under the Commonwealth’s land conservation tax credit program. You also ask whether a taxpayer transferee in receipt of the tax credit must carry it forward as set forth in § 58.1-512(B). You further inquire as to the meaning of the term “taxpayer” as that word is used in § 58.1-513(C).

RESPONSE
It is my opinion that § 58.1-512(A) allows a credit against individual and corporate income tax in an amount equal to fifty percent of the fair market value of any land or interest in land donated for conservation purposes. It is further my opinion that the donor of the land or interest in land may transfer such credit to other taxpayers in order to utilize fully the tax credit. Each individual taxpayer receiving a transferred credit is subject to the provisions of § 58.1-512(B.1). Finally, the term “taxpayer,” for purposes of § 58.1-513(C), means that any person, corporation, partnership, organization, trust, or estate subject to state or local taxation may hold and transfer the land conservation tax credit. Only those taxpayers subject to state income taxes, however, may benefit from actual use of the tax credit to offset a tax liability.

BACKGROUND
You relate that there have been questions regarding the ability to benefit fully from tax credits authorized by the General Assembly to encourage land conservation. You further relate that these questions involve the interplay between the statutory language establishing the land conservation credit amount and the annual limitation per taxpayer. Therefore, you seek guidance as to the maximum amount of credit available to a taxpayer for donations of land or interests in land for conservation purposes in excess of $1,200,000, and how such credit may be fully utilized.

APPLICABLE LAW AND DISCUSSION
The General Assembly enacted the Virginia Land Conservation Incentives Act of 19991 “to supplement existing land conservation programs to further encourage the preservation and sustainability of Virginia’s unique natural resources, wildlife habitats, open spaces and forested resources.”2 Among the incentives provided to encourage land preservation is a tax credit to offset individual and corporate income tax liability for “an amount equal to fifty percent of the fair market value of any land or interest in land located in Virginia which is conveyed … for conservation … purposes.”3 The amount of the credit that a taxpayer may claim to offset his state income tax is limited to $100,000 annually for tax years beginning on or after January 1, 2002.4 A taxpayer
is allowed to carry forward any unused tax credit "for a maximum of five consecutive taxable years following the taxable year in which the credit originated until fully expended." Prior to the enactment of §58.1-513(C), if a taxpayer donated land worth more than $1,200,000, a portion of the tax credit was lost, because the taxpayer was limited to $100,000 credit per tax year for no more than six years.

The 2002 Session of the General Assembly added subsection C to §58.1-513, relating to land preservation income tax credits:

Any taxpayer holding a credit under this article[7] may transfer unused but otherwise allowable credit for use by another taxpayer on Virginia income tax returns. A taxpayer that transfers any amount of credit under this article shall file a notification of such transfer to the Department [of Taxation] in accordance with procedures and forms prescribed by the Tax Commissioner.[8]

Your inquiry concerns whether the phrase “unused but otherwise allowable credit” in §58.1-513(C) refers to the amount of the tax credit a taxpayer may claim to offset his tax liability or to the total allowable amount of the tax credit. Section 58.1-512(A) provides that “there shall be allowed as a credit … an amount equal to fifty percent of the fair market value of any land or interest in land located in Virginia” conveyed for the land conservation purposes specified therein. (Emphasis added.) Section 58.1-512(B.1) provides that “[t]he amount of the credit that may be claimed by a taxpayer shall not exceed … $100,000 for 2002 taxable years and thereafter.” (Emphasis added.) Section 58.1-512(A) provides the mechanism to calculate the upper limit of the tax credit allowed to the taxpayer. Section 58.1-512(B.1) limits the amount of the tax credit that a taxpayer may claim to offset his income tax liability.

Absent ambiguity, the plain meaning of a statute must prevail.9 “[A] word in a statute is to be given its everyday, ordinary meaning unless the word is a [term] of art.”10 It is clear that the words “otherwise allowable” in §58.1-513(C) refer to the calculation of the total amount allowed as a credit pursuant to §58.1-512(A). The “otherwise allowable” amount of the tax credit is fifty percent of the fair market value of the donated land or interest in land. The term “use” means to “avail oneself of.”11 An “unused” tax credit is a credit that one has not availed oneself of. Reading §§58.1-512(A)-(B.1) and 58.1-513(C) together, the total “allowable credit” (one-half of the value of the property) may be used, to the extent of $600,000 (100,000 per year for six years), by the taxpayer originally receiving the credit for the donation of land. To the extent a taxpayer holding a credit is unable to “avail himself of the credit” in any one year or over the course of six years, the credit may be transferred to another taxpayer.

Section 58.1-513 encourages conservation by enhancing the value of the tax credit available for land valued in excess of $1,200,000. Section 58.1-513(C) permits a taxpayer to transfer an “unused but otherwise allowable credit.” Section 58.1-513(C) thus allows the transfer of the unused tax credit to another taxpayer or other taxpayers to fully use the credit available for the donation of land.
You next ask whether a taxpayer in receipt of a transferred credit must carry it forward for use in future years as is the case with the original transferor taxpayer. While § 58.1-513(C) permits the transfer of unused tax credit amounts, the limitations applicable to individual taxpayers in § 58.1-512(B.1) remain unchanged. Therefore, an individual taxpayer continues to be limited by the $600,000 amount ($100,000 per year for a period of six years). For example, a person donating land valued at $1,800,000 for conservation purposes in 2002 would be allowed a tax credit of $900,000. Assuming that he will have a tax liability of at least $100,000 each year for the years 2002 through 2007, he could use $600,000 of his tax credit to offset his state income tax liability. In addition, he could transfer $300,000 to another taxpayer. The taxpayer transferee would still be subject to the $100,000 per year limit contained in § 58.1-512(B.1).

Finally, you inquire as to the meaning of the term “taxpayer,” as that term is used in § 58.1-513(C). For the purposes of § 58.1-513(C), the term “taxpayer” means “every person, corporation, partnership, organization, trust or estate subject to taxation under the laws of this Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth.” Any person, corporation, partnership, organization, trust or estate falling into these categories could hold and transfer a tax credit. For example, a nonprofit corporation subject to sales tax, but not income tax, may transfer its credit to a taxpayer subject to income tax.

CONCLUSION

It is my opinion that § 58.1-512(A) allows a credit against individual and corporate income tax in an amount equal to fifty percent of the fair market value of any land or interest in land donated for conservation purposes. It is further my opinion that the donor of the land or interest in land may transfer such credit to other taxpayers in order to utilize fully the tax credit. Each individual taxpayer receiving a transferred credit is subject to the provisions of § 58.1-512(B.1). Finally, the term “taxpayer,” for purposes of § 58.1-513(C), means that any person, corporation, partnership, organization, trust, or estate subject to state or local taxation may hold and transfer the land conservation tax credit. Only those taxpayers subject to state income taxes, however, may benefit from actual use of the tax credit to offset a tax liability.

5Id.
7See supra note 1. A taxpayer holding a credit pursuant to the Virginia Land Conservation Incentives Act of 1999 is one that has properly received the tax credit as a result of donating land or an interest in land or is in the chain that has received the credit from the original source.


Section 58.1-512(B.1). The donor of the land or interest in land may not directly benefit from more than $600,000 of the credit amount.

Section 58.1-1 defines the term “taxpayer” as used in Title 58.1.

OP. NO. 02-019
TAXATION: LICENSE TAXES.

Compensation received by standing trustee for performance of administrative duties associated with Chapter 13 bankruptcy is subject to local business license taxation.

THE HONORABLE KENNETH R. MELVIN
MEMBER, HOUSE OF DELEGATES
APRIL 2, 2002

You ask whether compensation received by a standing trustee in a Chapter 13 bankruptcy is subject to local business license taxation.

It is my opinion that such compensation is subject to local business license taxation.

APPLICABLE LAW AND DISCUSSION

Pursuant to federal bankruptcy law, a standing trustee in a Chapter 13 bankruptcy receives compensation for his duties as trustee. The source of this compensation is a percentage of the payments made by Chapter 13 debtors.

Chapter 37 of Title 58.1 of the Code of Virginia sets forth the enabling legislation for the local assessment of business license taxes. Section 58.1-3703(A) authorizes the governing body of a locality to adopt an ordinance assessing a business, professional and occupational license (“BPOL”) tax on the gross receipts of any person, firm or corporation that is operating a licensable business within the locality.

In an analogous opinion of the Attorney General, the inquiry concerned whether commissioners of accounts were subject to BPOL taxes on the fees charged and received by them for their administration of fiduciary accounts. The 1997 opinion concludes that such amounts are gross receipts subject to local license taxation.

Similar to commissioners of accounts, who perform administrative duties relative to the fiduciary accounts for which they are appointed, a standing trustee performs administrative duties relative to the bankruptcies for which they are appointed and receive compensation. In light of the 1997 opinion, concluding that the compensation of commissioners of accounts is subject to BPOL taxes, it is my opinion that the compensation of federal bankruptcy trustees similarly is subject to BPOL taxes. Additionally, I am aware of no federal law exempting the compensation of such trustees from local business license taxation.
CONCLUSION

Accordingly, it is my opinion that compensation received by a standing trustee in a Chapter 13 bankruptcy for the performance of his administrative duties associated with such bankruptcy is subject to local business license taxation.

1 If the number of Chapter 13 bankruptcy cases “commenced in a particular region so warrants,” a regional United States trustee may, with the approval of the United States Attorney General, “appoint one or more individuals to serve as standing trustee.” 28 U.S.C.A. § 586(b) (West 1993).

2 See id. § 586(e)(1) (West 1993).

3 See id. § 586(e)(2) (West 1993).


7 Id.


9 Compare Public Salary Tax Act of 1939, 4 U.S.C.A. § 111 (West Supp. 2001) (authorizing states to tax pay of federal employees so long as tax does not discriminate against such employee because of source of pay or compensation), and Jefferson County v. Acker, 527 U.S. 423, 439-42 (1999), cert. denied, 532 U.S. 1051 (2001) (holding that local tax paid by state and federal judges on compensation received by them shows no discrimination due to source of compensation).

OP. NO. 02-044

TAXATION: LICENSE TAXES.

Department of Taxation may add language in guideline definition of "contractor" to clarify and explain which businesses are included in "contractor" classification for purpose of determining maximum BPOL tax rate, provided language is consistent with license tax laws.

THE HONORABLE CHRISTOPHER B. SAXMAN
MEMBER, HOUSE OF DELEGATES
MAY 31, 2002

ISSUE PRESENTED

You ask whether the Department of Taxation has the authority to promulgate, for the purpose of determining the maximum local business, professional and occupational license ("BPOL") tax rate, a definition of the term "contractor" in its Guidelines for Business, Professional and Occupational License Tax ("2000 BPOL Guidelines") that contains language in addition to the statutory definition of the term.

RESPONSE

It is my opinion that the Department of Taxation has the authority to promulgate a guideline definition of the term "contractor" that clarifies and explains which businesses are included in the "contractor" classification for the purpose of determining
the applicable maximum BPOL tax rate, provided the language is consistent with the license tax laws of this Commonwealth.

**BACKGROUND**

From the information you provide, it appears that a commissioner of the revenue is relying on the 2000 BPOL Guidelines to require a business license from a real estate developer and another entity that own lots upon which others build houses for resale to the public. You relate that neither entity is required to obtain a regulatory contractor’s license under § 54.1-1117 to transact business.

**APPLICABLE LAW AND DISCUSSION**

Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735 of the *Code of Virginia*, contains Virginia’s laws governing license taxes. Section 58.1-3700 authorizes localities to require a business license and to impose BPOL fees and taxes. An essential predicate to licensure is that the person be engaged in a business. Section 58.1-3700.1 defines “business,” for the purposes of license taxation, as “a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit. It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction.”

Whether an organization is required to secure a local business license is a determination of fact that is the responsibility of the commissioner of the revenue. I shall assume for the purposes of this opinion that the two entities in question have properly been found by the local commissioner of the revenue to be engaged in business.

The classification of a business for purposes of BPOL taxation is also a determination of fact that is the responsibility of the commissioner of the revenue. You relate that the commissioner of the revenue has determined that the entities are to be classified as “contractors” for the purpose of determining the appropriate BPOL tax rate. Section 58.1-3706(A) sets maximum rates that may be assessed on the gross receipts of different classes of businesses. Section 58.1-3706(A)(1) sets the maximum rate of tax “[f]or contracting” at “sixteen cents per $100 of gross receipts.” If the licensable business is not engaged in contracting and is not specifically listed in § 58.1-3706(A), the business may be subject to tax at a maximum rate of “thirty-six cents per $100 of gross receipts.”

In determining which classification to apply to the business in question, the local commissioner of the revenue appears to be relying on the definition of “contracting” as set forth in § 5.1.1 of the Department of Taxation’s 2000 BPOL Guidelines. The Department of Taxation is required by law to “promulgate guidelines for the use of local governments in administering the BPOL taxes.” Prior opinions of the Attorney General defer to the interpretations of the law by an agency charged with administering the law unless the agency interpretation clearly is wrong. The 2000 BPOL Guidelines interpret the relevant license tax laws for the purposes of implementing those provisions at the local level. The 2000 BPOL Guidelines are “accorded the weight of a regulation under § 58.1-205.”
The license required under § 58.1-3700 is for revenue, rather than regulatory, purposes. Therefore, it is not relevant for local BPOL tax purposes whether a business is required to obtain a state contractor’s license for regulatory purposes. Section 58.1-3714(D) defines “contractor” for the purpose of local license taxation. The guideline in question expressly refers to, and incorporates by reference, the statutory definition of “contractor.” The guideline also includes additional language referring to a business that employs “persons constructing for their own account for sale.” It is this additional language that appears to prompt your inquiry.

The purpose of the questioned guideline is to explain which businesses will be classified as engaged in contracting for purposes of determining the maximum rate allowed by state law. The maximum rates for various classifications are set forth in § 58.1-3706(A), which includes the rate “[f]or contracting, and persons constructing for their own account for sale.” The first sentence of § 5.1.1 of the 2000 BPOL Guidelines clearly indicates that it is interpreting and applying this provision: “The maximum rate for local license taxes imposed upon a person engaged in contracting and persons constructing for their own account for sale is sixteen cents per one hundred dollars of gross receipts.”

Therefore, for BPOL tax purposes, the Department defines “contractor” in its guideline consistent with § 58.1-3714(D), other provisions of the relevant license tax statutes, and opinions of the Attorney General. The guideline in question interprets the relevant license tax statutes as requiring that a business be classified as engaged in contracting for purposes of the classifications described in § 58.1-3706(A) if it either meets the definition of “contractor” in § 58.1-3714(D) or is constructing for its own account for sale.

As noted previously, § 58.1-3701 mandates that the Department of Taxation promulgate guidelines, which must, by their nature, amplify and clarify statutory provisions. The language of § 5.1.1 of the 2000 BPOL Guidelines does not contradict the statutory definition of the term “contractor.”

The Supreme Court of Virginia has stated often that courts “are not permitted to add language to a statute. When the legislature has used words of a plain and definite meaning, courts cannot accord those words a meaning that amounts to holding that the legislature did not mean what it actually expressed.” Section 5.1.1 may not be invalidated merely because the Department of Taxation chose to promulgate a guideline that repeats or references a statutory definition and includes additional wording obtained from another relevant tax statute. A state agency that adopts regulations under an enabling statute normally is free to select any method that is reasonable and that is not inconsistent with the Constitution or statutes of the Commonwealth. The guideline does not redefine the term “contractor.” Instead, § 5.1.1 recognizes an additional situation that is treated as a contractor for BPOL tax purposes. Sections 58.1-3714(D) and 58.1-3706(A)(1) provide a statutory foundation for the guideline definition of “contractor.” Thus, no conflict exists where the Department of Taxation
has merely amplified, for purposes of clarifying the maximum BPOL tax rate, in its 2000 BPOL Guidelines, the statutory definition of "contractor."\(^7\)

**CONCLUSION**

It is my opinion that the Department of Taxation has the authority to promulgate a guideline definition of the term "contractor" that clarifies and explains which businesses are included in the "contractor" classification for the purpose of determining the applicable maximum BPOL tax rate, provided the language is consistent with the license tax laws of this Commonwealth.

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5. Section 5.1.1 of the 2000 BPOL Guidelines provides:
   "The maximum rate for local license taxes imposed upon a person engaged in contracting and persons constructing for their own account for sale is sixteen cents per one hundred dollars of gross receipts. In lieu of the tax, a license fee may be charged by the locality. The amount of the fee depends upon the locality's population. [Citation omitted.]
   "A. A person shall be classified as a contractor if he accepts contracts to perform, or regularly performs, or engages others to perform, any of the work described in paragraph B of § 58.1-3714 on buildings, structures or real estate owned by him when the buildings, structures or real estate are sold upon completion of such work; or, if he regularly performs, or engages others to perform, any of the work described in paragraph B of § 58.1-3714 on buildings, structures or real estate owned by others.
   "B. Contractors include persons who subdivide and improve real estate, and speculative builders who build houses or other buildings with the intention to offer the subdivided lots or completed buildings for sale. A person who would otherwise be classified as a contractor shall not lose such classification because real estate is temporarily leased until it can be sold, or leased with an option to purchase instead of sold, unless the leasing activity constitutes a separate licensable business. Any gross receipts from such leases shall be considered ancillary to the business of contracting.
   "C. The mere subdivision of land into lots, without more, is not contracting. However, a person who installs water or sewer systems, roads, or engages in any other activity described in subsection B of § 58.1-3714 on his own land with the intent to offer the land for sale is a contractor regardless of whether the land is subdivided.
   "D. A person shall not be deemed to be engaged in the business of contracting solely because he acts as his own prime contractor to build or improve a building which he intends to occupy as his residence, office or other place of business, or actually so occupied within a reasonable time prior to the sale of the premises."

   Note that the reference in above § 5.1.1(A) and (C) to "paragraph B of § 58.1-3714" should be to paragraph D of § 58.1-3714. The 1998 Session of the General Assembly amended and reenacted § 58.1-3714 by replacing subsection B with the subsection D designator and adding a new subsection B. See 1998 Va. Acts ch. 503, at 1229, 1129-30.


its administration is entitled to great weight); cf. Chesapeake Hospital Authority v. Commonwealth, 262 Va. 551, 554 S.E.2d 55 (2001) (holding that Tax Commissioner’s rulings and policies regarding assessments under § 58.1-205 are not entitled to great weight unless expressed in regulations).

8Section 58.1-3701.


102000 BPOL GUIDELINES § 5.1.1 quoted supra note 5.

11Section 58.1-3706(A)(1) (emphasis added).

122000 BPOL GUIDELINES § 5.1.1, supra note 5 (emphasis added).

13See comment following § 5.1.1 of 2000 BPOL Guidelines listing two opinions of the Attorney General.


17See id.

OP. NO. 02-114

TAXATION: LICENSE TAXES.

No conflict between statutory and regulatory definitions of ‘definite place of business’ for purposes of administering BPOL tax. Determination whether business activity at particular location is sufficient for it to become definite place of business, rather than visit, is question of fact for local taxing official. Consistent administration of local tax assessments. Criteria for establishing definite place of business should be same for taxing jurisdictions located in or outside Commonwealth. Application of internal and external consistency tests for purposes of avoiding double taxation and fairly apportioning BPOL tax assessments.

THE HONORABLE ROSS A. MUGLER
COMMISSIONER OF THE REVENUE FOR THE CITY OF HAMPTON
DECEMBER 12, 2002

ISSUES PRESENTED

You pose several questions regarding the business, professional and occupational license (“BPOL”) tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735. First, you ask whether a commissioner of the revenue should rely on the meaning of “definite place of business” as that phrase is defined in § 58.1-3700.1 or as defined in the Guidelines for Business, Professional and Occupational License Tax (“2000 BPOL Guidelines”). Second, you inquire concerning the meaning of “visit” as it relates to “definite place of business.” You also inquire whether the criteria for determining “definite place of business” are different if the location is outside the Commonwealth. Finally, you inquire concerning the applicability of § 58.1-3732(B)(2), which requires a locality to deduct from gross receipts income or other taxes, based on income, imposed by jurisdictions outside the Commonwealth.
RESPONSE

It is my opinion that there is no conflict between the definitions of “definite place of business” in § 58.1-3700.1 and the 2000 BPOL Guidelines. Accordingly, you, as a commissioner of the revenue, should rely on both definitions when administering the BPOL tax statutes. It is also my opinion that, whether the activity of a business at a particular location is sufficient for it to become a definite place of business, rather than a visit, is a question of fact to be determined by the local taxing official. It is further my opinion that local tax assessments should be administered consistently and that the criteria for establishing a definite place of business should be the same, whether other taxing jurisdictions are located in or outside the Commonwealth. Lastly, it is my opinion that § 58.1-3732(B)(2) should be applied to businesses outside the Commonwealth so that the assessments are fairly apportioned between the activity within the taxing jurisdiction and the activity outside the Commonwealth.

APPLICABLE LAW AND DISCUSSION

You first ask whether you should rely on the meaning of “definite place of business” as defined in § 58.1-3700.1 or in the 2000 BPOL Guidelines. The definition of “definite place of business” is identical in § 58.1-3700.1 and in the 2000 BPOL Guidelines, with the exception of the language emphasized below, which appears only in the guidelines:

[A]n office or a location at which occurs a regular and continuous course of dealing where one holds one's self out or avails one's self to the public for thirty consecutive days or more, exclusive of holidays and weekends. A definite place of business for a person engaged in business may include a location leased or otherwise obtained from another person on a temporary or seasonal basis and real property leased to another. A person’s residence shall be deemed to be a definite place of business if there is no definite place of business maintained elsewhere and the person is not subject to licensure as a peddler or itinerant merchant. [2] [Emphasis added.]

Section 58.1-3701 mandates that the Department of Taxation promulgate guidelines, which by their nature, must amplify and clarify statutory provisions. The guidelines are subject to the “Administrative Process Act” and accorded the weight of a regulation under § 58.1-205. The additional language in the 2000 BPOL Guidelines does not alter the meaning of the statutory definition of “definite place of business.” The additional language, “where one holds one’s self out or avails one’s self to the public” and “exclusive of holidays and weekends,” simply amplifies and clarifies the meaning of “regular and continuing course of dealing” in the statutory definition by specifying the conduct that will be deemed a definite place of business. Accordingly, you, as a commissioner of the revenue, should rely on both definitions when administering the local BPOL tax statutes.

Section 58.1-3701 also provides that “[t]he Tax Commissioner shall have the authority to issue advisory written opinions in specific cases to interpret the provisions of
[Chapter 37] and the guidelines issued pursuant to this section." To the extent you have remaining questions concerning the interplay between the statutory definition and the guideline definition of "definite place of business," I refer you to the Tax Commissioner who is authorized to issue such opinions.

You next ask for a definition of the word "visit" as it relates to "definite place of business." Section 58.1-3703.1(A)(3)(a) provides:

Whenever the tax imposed by [an] ordinance [levying a local BPOL tax] is measured by gross receipts, the gross receipts included in the taxable measure shall be only those gross receipts attributed to the exercise of a privilege subject to licensure at a definite place of business within this jurisdiction. In the case of activities conducted outside of a definite place of business, such as during a visit to a customer location, the gross receipts shall be attributed to the definite place of business from which such activities are initiated, directed, or controlled.

Section 58.1-3703(A)(3)(a) pertains to the situs of gross receipts for purposes of local BPOL taxation. The statute clearly provides that gross receipts derived from activities conducted outside of a definite place of business, such as during a customer visit, are attributed back to that place of business. The Supreme Court of Virginia has stated that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.'"9 "'[T]ake the words as written' and give them their plain meaning."10 The word "visit" is not defined in Title 58.1. Absent a statutory definition, words are given their ordinary meaning.11 The word "visit" means "a journey to and stay or short sojourn at a place for a particular purpose."12 It would appear, therefore, that a journey to, and stay at, a customer's location is a "visit."

Whether a visit becomes a definite place of business or an additional place of business is a question of fact. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.13 Accordingly, I am unable to render an opinion regarding at what point a "visit" becomes a "definite place of business." The local commissioner of the revenue is responsible for making factual determinations in matters of local BPOL taxation.14 In making a determination, however, the factors to consider would include the number and frequency, as well as the length and purpose, of the visits. As noted previously, the Tax Commissioner is authorized to issue advisory opinions on the situs of gross receipts, and you may elect to seek additional guidance from him.15

You also inquire whether the criteria are different for determining a "definite place of business" located outside the Commonwealth. Section 58.1-3703.1(A)(3)(b) provides:

If the licensee has more than one definite place of business and it is impractical or impossible to determine to which definite place of business gross receipts should be attributed under the general
rule, the gross receipts of the business shall be apportioned between the definite places of businesses on the basis of payroll. Gross receipts shall not be apportioned to a definite place of business unless some activities under the applicable general rule occurred at, or were controlled from, such definite place of business. Gross receipts attributable to a definite place of business in another jurisdiction shall not be attributed to this jurisdiction solely because the other jurisdiction does not impose a tax on the gross receipts attributable to the definite place of business in such other jurisdiction.

The criteria for determining whether a business located in or outside the Commonwealth constitutes a definite place of business are the same. The importance of this determination is that gross receipts are assigned to a definite place of business either by direct attribution or by apportionment. Gross receipts assigned to a definite place of business located in another state may not be taxed by any Virginia locality. The Supreme Court of Virginia has acknowledged that an internal consistency test must be applied to decisions on apportionment. An assessment is internally consistent if applying the text of the taxing statute, and assuming that every other jurisdiction applied the same statute, the taxpayer would not be subjected to a risk of double taxation. As such, tax assessments should be internally consistent and, therefore, the criteria for establishing a definite place of business are the same whether the other taxing jurisdictions are located in or outside the Commonwealth.

Finally, you inquire concerning the application of § 58.1-3732(8)(2). Section 58.1-3732(B)(2) requires the deduction of “[a]ny receipts attributable to business conducted in another state or foreign country in which the taxpayer ... is liable for an income or other tax based upon income” for purposes of local BPOL taxation. In considering the application of the BPOL tax to businesses outside the Commonwealth, assessments should be fairly apportioned, which initially requires that the assessment be both internally and externally consistent. The internal consistency test requires that other jurisdictions apply the same tax statutes and precludes double taxation. External consistency requires that an assessment apply only to the “‘portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.’” Section 58.1-3732(B)(2) should be applied to businesses outside the Commonwealth so that the assessments are fairly apportioned between the activity in your jurisdiction and the activity outside the Commonwealth. For specific guidance in particular factual situations, I refer you to the Tax Commissioner for questions regarding apportionment.

CONCLUSION

Accordingly, it is my opinion that there is no conflict between the definitions of “definite place of business” in § 58.1-3700.1 and the 2000 BPOL Guidelines. Thus, you, as a commissioner of the revenue, should rely on both definitions when administering the BPOL tax statutes. It is also my opinion that, whether the activity of a business at
a particular location is sufficient for it to become a definite place of business, rather than a visit, is a question of fact to be determined by the local taxing official. It is further my opinion that local tax assessments should be administered consistently and that the criteria for establishing a definite place of business should be the same, whether other taxing jurisdictions are located in or outside the Commonwealth. Lastly, it is my opinion that § 58.1-3732(B)(2) should be applied to businesses outside the Commonwealth so that the assessments are fairly apportioned between the activity within the taxing jurisdiction and the activity outside the Commonwealth.


2 2000 BPOL Guidelines ch. 1, supra note 1.


6 2000 BPOL Guidelines ch. 1, supra note 1.

7 The remainder of § 58.1-3701, however, provides that “the Tax Commissioner shall not be required to interpret any local ordinance. The guidelines and opinions issued pursuant to this section shall not be applicable as an interpretation of any other tax law.”


14 See op. no. 02-044, supra note 3 (concluding that classification of business for purposes of BPOL taxation is determination of fact for commissioner of revenue).

15 See op. no. 02-033, supra note 8.

16 Section 58.1-3703.1(A)(3)(a) sets forth the general rule for measuring gross receipts.

17 Compare § 58.1-3703(A)(3)(a) and (b) (LexisNexis Supp. 2002).

18 See City of Winchester v. American Woodmark Corp., 252 Va. 98, 102, 471 S.E.2d 495, 497 (1996). The Court also acknowledged the requirement to apply an external consistency test in apportionment decisions. See id. The application of the external consistency test, however, is not pertinent to your inquiry.

19 Id. (citing Goldberg v. Sweet, 488 U.S. 252, 261 (1989)).

20 Id.
21 Id.
22 Id. (quoting Goldberg, 488 U.S. at 262).
23 Op. no. 02-033, supra note 8.

OP. NO. 01-118

TAXATION: LICENSE TAXES.

Question whether locality may impose $500 flat-fee license tax on out-of-state itinerant merchants and peddlers without violating Commerce Clause involves factual determination that is inappropriate for comment by Attorney General.

MR. MICHAEL M. COLLINS
COUNTY ATTORNEY FOR ALLEGHANY COUNTY
APRIL 12, 2002

ISSUE PRESENTED

You ask whether a locality may impose a $500 flat-fee license tax on out-of-state itinerant merchants and peddlers without violating the Commerce Clause of the Constitution of the United States.

RESPONSE

I regret that I am unable to render an opinion on your question, because such a determination depends on a resolution of questions of fact. Attorneys General traditionally have declined to render official opinions when the request involves a question of fact rather than one of law. I have outlined, however, the state of the law for your consideration in making a factual determination.

FACTS

You advise that Alleghany County imposes on every itinerant merchant or peddler subject to a business, professional and occupational license, a $500 flat tax. Such tax is imposed regardless of the in-state or out-of-state status of the itinerant merchant or peddler. You advise that the Alleghany County Code specifically provides that the terms "peddlers" and "itinerant merchants" shall have the same meaning as prescribed in § 58.1-3717 of the Code of Virginia, which establishes a maximum $500 license tax per year that localities may impose on peddlers and itinerant merchants. You relate that Homier Distributing Company, Inc., an itinerant out-of-state merchant, objects to the county’s $500 license tax, claiming that the tax discriminates in favor of local interests, in violation of the Commerce Clause of the United States Constitution.

You relate that Homier paid the county’s $500 license tax for a one-day sale held in the county, and that Homier’s gross receipts from the sale were $15,983. Homier argues that a nonitinerant local retailer would have been taxed only $15.98 for the same sale (i.e., a rate of 10 cents per $100 of gross receipts), while Homier was taxed $500 (i.e., a rate of $3.13 per $100 of gross receipts).

CONSTITUTIONAL CONSIDERATIONS

The Commerce Clause of the Constitution of the United States provides that Congress shall have the power "[t]o regulate commerce ... among the several states." The
Supreme Court of the United States has long construed the Commerce Clause as a restraint on state and local power. Modern jurisprudence regarding state and local taxation under the Commerce Clause emerged in the late 1930s, when the Court began to shun formalistic distinctions that lacked substance and to focus on the practical effect of the tax imposed, or its effect despite any distinctions in form. In prior decisions, the Court merely held that a state or locality could regulate “local,” but not “national,” commerce.

After 1938, the apportionment of a local tax to cover those activities rationally related to a taxing authority’s power and interest became the central inquiry. The Court announced that, for a tax to be valid under the Commerce Clause, the tax cannot, in effect, reach revenue generated by activities lacking a substantial nexus with the taxing jurisdiction. In the case of Complete Auto Transit, Inc. v. Brady, the Court spelled out this apportionment rule, announcing a four-pronged test to assess the validity of a local tax under the Commerce Clause. The tax must be (1) applied to an activity with a substantial nexus with the taxing authority, (2) fairly apportioned, (3) nondiscriminatory to interstate commerce, and (4) fairly related to the services provided by the state or locality. The Court also restated the realist approach, noting that the focus is not on the tax statute’s formal language, but rather on its practical effect.

DISCUSSION

Your question relates to the classification of itinerant and fixed merchants for purposes of analysis of Commerce Clause implications. “Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.” In General Motors Corporation v. Tracy, the Court held that regulated and unregulated sellers of natural gas served different markets, so that sales of each may be taxed differently without violating the Commerce Clause. “The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.” Fixed and itinerant merchants both sell merchandise at retail from stores or other places of business, the difference between them being the expected period of occupancy in those stores or places of business. Therefore, it is clear that fixed and itinerant merchants serve the same market for the purposes of Commerce Clause analysis.

The fact that a local $500 flat tax burdens all in-state and out-of-state itinerant merchants equally, regardless of where else they travel or where they are based, reflects that the tax does not discriminate against interstate commerce when addressing only the taxation of itinerant merchants. Analysis must, however, be made of both the burdened class and the preferred class. Should itinerant merchants be compared with fixed merchants, it becomes apparent that the fixed merchants’ receiving the more favorable tax rates are located within the locality.

In the case of American Trucking Associations, Inc. v. Scheiner, the Court reviewed the Commerce Clause cases involving flat taxes. The Court concluded that a flat tax “has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that
enacted the measure rather than 'among the several States.'” The “hydraulic pressure” arises because “[f]lat-rate license taxes, ‘if adopted by many cities and states, bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical (and, in particular, with the same total quantity of sales) that sells in only one place.’”

Indeed, the Court has suggested that a flat tax, which “bears no relationship to the taxpayers’ presence or activities in a State,” will invariably fail the fourth prong of the test articulated in Complete Auto Transit. Even before the Complete Auto Transit case, the Court struck down flat taxes when local merchants paid a graduated rate. In the case of West Point Wholesale Grocery Co. v. Opelika, the Court wrote:

In our opinion the tax here in question falls squarely within the ban of those cases. This is particularly so in that Opelika places no comparable flat-sum tax on local merchants. Wholesale grocers whose deliveries originate in Opelika, instead of paying $250 annually, are taxed a sum graduated according to their gross receipts. Such an Opelika wholesaler would have to gross the sum of $280,000 in sales in one year before his tax would reach the flat $250 amount imposed on all foreign grocers before they may set foot in the City. The Commerce Clause forbids any such discrimination against the free flow of trade over state boundaries.

The Court has recognized that a discriminatory tax may be upheld if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” An example may be found in the compensatory tax doctrine. “[F]or a tax system to be ‘compensatory,’ the burdens imposed on interstate and intrastate commerce must be equal.” Another example of a legitimate local purpose is when administrative difficulties make collection of more finely calibrated user charges impracticable.

In the case of American Trucking Association v. Scheiner, after noting that the pre-Complete Auto Transit cases injudiciously upheld various flat taxes without regard to their discriminatory consequences for interstate businesses, the Court noted:

Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely graduated [sic] user-fee schedule would pose genuine administrative burdens.

Moreover, while the Court has struck down flat taxes, with statements such as “when the measure of a tax bears no relationship to the taxpayers’ presence or activities in a State ... under the fourth prong of the Complete Auto Transit test ... the State is imposing an undue burden on interstate commerce,” it has not specifically concluded that the only mode of taxation available to states involves graduated taxes on gross receipts or other activity.
There are instances where genuine administrative burdens exist due to the nature of a particular taxpayer's activities. For instance, it would not be unreasonable to conclude that out-of-state itinerant merchants might be less inclined to report their gross sales after leaving a locality. Similarly, such merchants may be less inclined to register with the State Corporation Commission to do business in the Commonwealth, and might create additional litter or public safety problems. Finally, such merchants might be less likely to register as a dealer and report and pay over sales and local excise taxes, such as meals taxes, and less likely to file income tax returns and satisfy the corresponding liabilities. Any such conclusion, however, must be based upon factual considerations.

Ultimately, any determination regarding whether a flat tax on itinerant merchants offends the Commerce Clause depends on a resolution of questions of fact. This Office traditionally has declined to render official opinions when the request involves a question of fact rather than one of law.\textsuperscript{26}

**CONCLUSION**

Accordingly, I am unable render an opinion as to whether a locality may impose a $500 flat fee license tax on out-of-state itinerant merchants and peddlers without violating the Commerce Clause of the United States Constitution due to the factual nature of any such determination.

\begin{footnotes}
\item[\textsuperscript{1}] Alleghany County, Va., Code § 38-9(2)(i) (1996).
\item[\textsuperscript{2}] \textit{id.} § 38-2.
\item[\textsuperscript{3}] Section 58.1-3717 provides:
\begin{quote}
"A. For the purpose of license taxation pursuant to § 58.1-3703, any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler."
"B. For the purpose of license taxation pursuant to § 58.1-3703, the term 'itinerant merchant' means any person who engages in, does, or transacts any temporary or transient business in any county, city or town and who, for the purpose of carrying on such business, occupies any location for a period of less than one year."
"C. Any tax imposed pursuant to § 58.1-3703 on peddlers and itinerant merchants shall not exceed $500 per year. Dealers in precious metals shall be taxed at rates provided in § 58.1-3706."
"D. This section shall not apply to a peddler at wholesale or to those who sell or offer for sale in person or by their employees ice, wood, charcoal, meats, milk, butter, eggs, poultry, game, vegetables, fruits or other family supplies of a perishable nature or farm products grown or produced by them and not purchased by them for sale. A dairyman who uses upon the streets of any city one or more vehicles may sell and deliver from his vehicles, milk, butter, cream and eggs in such city without procuring a peddler's license."
"E. The local governing body imposing such tax may by ordinance designate the streets or other public places on or in which all licensed peddlers or itinerant merchants may sell or offer for sale their goods, wares or merchandise."
\end{quote}
\item[\textsuperscript{4}] Alleghany County, Va., Code, \textit{supra} note 1, at § 38-9(2)(b).
\item[\textsuperscript{5}] U.S. Const. art. 1, § 8, cl. 3.
\item[\textsuperscript{6}] See, \textit{e.g.}, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (ruling that laws of New York State, granting certain individuals exclusive navigational rights of state waters for term of years, violated Commerce Clause by prohibiting vessels involved in interstate commerce from navigating said waters).
\end{footnotes}

Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable.

THE HONORABLE GERALDINE M. WHITING
COMMISSIONER OF THE REVENUE FOR ARLINGTON COUNTY
MARCH 5, 2002

You ask whether a local treasurer may demand payment of business license taxes prior to the assessment of such taxes or filing of a tax return.

Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735 of the Code of Virginia, contains the enabling legislation for the local assessment of business license taxes.
Section 58.1-3703(A) authorizes a locality to assess a business, professional and occupational license ("BPOL") tax on the gross receipts of any person, firm and corporation operating a licensable business within the locality. Section 58.1-3700.1 defines "assessment" to include "a written assessment made pursuant to notice by the assessing official or a self-assessment made by a taxpayer upon the filing of a return or otherwise not pursuant to notice." Section 58.1-3703.1 specifies that every ordinance levying a BPOL tax shall include provisions regarding, among others, the due dates for filing returns and payment of taxes.

The duties of commissioners of the revenue are set out specifically in Article I, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2. Section 58.1-3107 provides that the local commissioner of the revenue "shall obtain ... tax returns from every taxpayer within his jurisdiction who is liable ... to file such return with him for all taxes assessed by his office." Additionally, § 58.1-3109(1) requires the commissioner to review the lists of all persons licensed by him and assess additional license taxes if necessary. Section 58.1-3127(A) requires the local treasurer to collect amounts payable into the locality's treasury. Additionally, "[t]he treasurer, after the due date of any tax or other charge collected by such treasurer," shall proceed with collection actions upon the failure or refusal of a taxpayer to pay the amounts owed.

A fundamental rule of statutory construction is that statutes relating to the same subject should be considered in pari materia. In this instance, certain statutes direct the commissioner of the revenue to assess BPOL tax. The treasurer is statutorily directed to collect the tax in accordance with the appropriate due dates. Reading these statutes together, it is my opinion that the treasurer is not authorized to collect taxes until such taxes are assessed and due. Accordingly, the treasurer may not demand payment of BPOL taxes that have not been assessed.

You also inquire whether a taxpayer may refuse to pay taxes in response to the treasurer's payment notice for taxes which have not been assessed. Although § 58.1-3920 authorizes the voluntary prepayment of some taxes in accordance with certain conditions expressed in the statute, tax payments are not due until such time as mandated by an applicable statute or ordinance. Accordingly, it is my opinion that a taxpayer is under no obligation to remit BPOL tax payments until they are assessed and due.

Lastly, you inquire whether a treasurer or bank is entitled to confidential tax information maintained by a commissioner of the revenue regarding a taxpayer prior to a tax assessment being made. As you are aware, the § 58.1-3 prohibition against divulging confidential taxpayer information is not applicable to "[a]cts performed or words spoken or published in the line of duty under the law." Thus, to the extent such information is necessary for the treasurer to fulfill his duty to collect BPOL taxes, the dissemination to him or his employees of otherwise confidential taxpayer information is allowable under § 58.1-3. To the extent such information needs to be obtained by a bank acting as a depository, this Office has previously ruled that the dissemination to the bank of otherwise confidential taxpayer information is allowable under § 58.1-3.
You pose several questions regarding the implementation of the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735 ("Chapter 37"). First, you ask whether the statutes contained in Chapter 37, authorizing localities to impose a BPOL tax, are superseded by the specific manner of taxation prescribed in §§ 13.1-554 and 13.1-1119, relating to the calculation of gross receipts, respectively, of shareholders in professional corporations and of members in professional limited liability companies, for local BPOL tax purposes. You
also ask whether § 58.1-3818.4, which relates to the payment of an excise tax on persons providing video programming or access thereto, and § 58.1-3818.5, which exempts revenues received by common carriers from video programmers for the transport of video programming to end users, supersede the BPOL tax requirements of Chapter 37. You note that, effective July 1, 2002, §§ 13.1-554 and 13.1-1119 are repealed, but inquire as to their application to the current tax year and three preceding tax years.

Second, you ask whether a 1976 opinion of the Attorney General conflicts with the 2000 BPOL Guidelines For Business, Professional and Occupational License Tax ("2000 BPOL Guidelines"). Finally, you ask about implementing the separate licensing requirements of §§ 13.1-554 and 13.1-1119. Specifically, you ask how to issue the separate revenue licenses referenced in § 13.1-554. You also ask, whether the phrase "all the licensed employees" contained § 13.1-554 refers to all employees of the company, or only those within the locality levying a revenue license. You also inquire how to apportion gross receipts among employees located in branch offices.

RESPONSE

It is my opinion that §§ 13.1-554, 13.1-1119, 58.1-3818.4 and 58.1-3818.5 supersede the general business license taxation requirements of Chapter 37 for the current and preceding three tax years. The 1976 opinion of the Attorney General is not in conflict with the 2000 BPOL Guidelines. Finally, §§ 13.1-554 and 13.1-1119 attribute gross receipts only to employees who are also shareholders of a professional corporation or members of a professional limited liability company. As such, other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation under §§ 13.1-554 and 13.1-1119.

BACKGROUND AND APPLICABLE LAW

Chapter 37 contains the legislation enabling localities to require a business license and to impose BPOL fees and taxes. The BPOL tax laws are comprehensive in describing the nature and subjects of the tax, the classifications and rates permitted, and certain administrative provisions. In particular, § 58.1-3702 provides that Chapter 37 "shall be the sole authority for counties, cities and towns" to levy BPOL taxes. Nevertheless, the statutes about which you inquire expressly refer to the BPOL tax in mandating a specific procedure or imposing another tax in lieu of the BPOL tax.

"[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails." Applying this rule of statutory construction, it is apparent that the specific provisions of §§ 13.1-554 and 13.1-1119 supersede the general business license taxation requirements in Chapter 37 for the current and preceding three tax years. Each of the statutes that conflicts with the BPOL tax laws addresses a narrow set of persons or transactions. Specifically, the BPOL tax is to be imposed on shareholders of a professional corporation and not on the professional corporation itself. Similarly, the BPOL tax is to be imposed on members
of a professional limited liability company and not on the professional limited liability company itself.  

The plain language of § 58.1-3818.4 provides for

\[\text{[t]he payment of an excise tax … in lieu of the payment of taxes or fees pursuant to (i) any local tax authorized under Chapter 37 … or any other local tax if such tax is imposed solely on the gross receipts of persons providing video programming or access to video programming to subscribers located within the local jurisdiction … [Emphasis added.]}\]

Similarly, § 58.1-3818.5 provides that “[a]ny revenues received by a common carrier from video programmers for the transport of video programming” to certain end users are “excluded from … (iii) the license tax imposed pursuant to Chapter 37.”

Sections 13.1-554 and 13.1-1119 are more specific than the general statutes authorizing and implementing the BPOL tax. Sections 58.1-3818.4 and 58.1-3818.5, by their own terms, provide for a tax in lieu of the BPOL tax or exempt the activity from the BPOL tax altogether. Each of the statutes at issue expressly refers to the BPOL tax laws or tax, clearly indicating that the General Assembly intended that the conflicting statutes would constitute an exception to, and prevail over, the general BPOL tax laws in Chapter 37.

You also ask if a 1976 opinion of the Attorney General, dealing with the application of the BPOL tax to salaried professionals, may be reconciled with provisions in the 2000 BPOL Guidelines. The 1976 opinion determines that the BPOL tax laws contain no exemption for salaried professionals, and that such professionals are subject to the BPOL tax. Please note that the opinion presumes that the city BPOL ordinance imposes a license tax on all professionals, including salaried professionals.

You believe this opinion may conflict with § 2.11 of the 2000 BPOL Guidelines, which provides that “[e]mployees are generally not engaged in a licensable business separate from that of their employer. Therefore, a license obtained by the employer generally covers the activities of any employees.” Use of the word “generally” in this context implies the existence of exceptions to the general rule. An appendix to the 2000 BPOL Guidelines refers to an exception for professional employees and provides:

\[\text{[E]mployees who practice a profession may be required to obtain their own local license. Prior to the 1982 repeal, § 58-255 required a separate license for every member of a firm practicing a profession “regulated by the laws of this state” and other sections of the code required a state license of “every architect” or “every lawyer,” etc.}^{14}\]

The language emphasized above demonstrates that the Department of Taxation interprets the BPOL tax laws as authorizing localities, if they so choose, to require a separate license from salaried professionals. As with all BPOL tax issues, the local governing
body decides whether to impose the BPOL tax on specific types of businesses, professions and occupations. If the locality chooses to tax professional businesses and occupations, the 1976 opinion merely concludes that there is no state law that exempts salaried professionals from the tax. Therefore, there is no conflict between the 2000 BPOL Guidelines and the 1976 opinion of this Office.

Finally, you ask about implementing the separate licensing requirements of §§ 13.1-554 and 13.1-1119. I assume that your local ordinance does not require salaried professional employees to obtain a license, but does impose a BPOL tax on professions affected by §§ 13.1-554 and 13.1-1119.

Former § 58-255 linked the issuance of a state revenue license to the issuance of certain state regulatory licenses. Since the repeal by the 1982 Session of the General Assembly of § 58-255 and other statutes relating to state revenue licenses, no link exists between state regulatory licenses and local revenue licenses, except as provided in §§ 13.1-554 and 13.1-1119. Both sections are similarly structured in that they exempt the professional entity and attribute the entity’s gross receipts to corporate shareholders or company members for local taxation. In the context of both sections, the reference to “licensed employees” must refer to employees to whom the statutes attribute the professional entity’s gross receipts for purposes of local license tax, i.e., the local revenue license, and not a state regulatory license. Therefore, the statutes attribute gross receipts only to employees who are also shareholders of the professional corporation or members of the professional limited liability company. Other salaried professional employees who hold state regulatory licenses, but are not shareholders or members, are not subject to local license taxation under §§ 13.1-554 and 13.1-1119.

Your remaining questions relate to the apportionment of gross receipts among employees located in branch offices. With respect to these questions, I note that the Department of Taxation is charged with promulgating guidelines for the taxes at issue, and that the Tax Commissioner is authorized to issue advisory opinions on statutes relating to the situs of gross receipts and apportionment. Therefore, I must defer to the Department of Taxation, as it is the agency responsible for these matters.

CONCLUSION

Accordingly, it is my opinion that §§ 13.1-554, 13.1-1119, 58.1-3818.4 and 58.1-3818.5 supersede the general business license taxation requirements of Chapter 37 for the current and preceding three tax years. The 1976 opinion of the Attorney General is not in conflict with the 2000 BPOL Guidelines. Finally, §§ 13.1-554 and 13.1-1119 attribute gross receipts only to employees who are also shareholders of a professional corporation or members of a professional limited liability company. As such, other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation under §§ 13.1-554 and 13.1-1119.
Section 13.1-554 provides that the licensing requirements of Chapter 37 are applicable to shareholders of professional corporations, and not to professional corporations as a prerequisite to rendering professional services in the Commonwealth or in any Virginia locality. If a locality requires a revenue license for the privilege of practicing any of the professions permitted by Chapter 7 of Title 13.1, and the license is measured by gross receipts, § 13.1-554 prescribes the method for determining the gross receipts of a corporate shareholder. Section 13.1-1119 is a similar statute, except that it applies to “a member of a professional limited liability company.”

Sections 58.1-3818.4 and 58.1-3818.5 relate to the video programming excise tax.


Parcel of real estate remaining after division of property, resulting in two or more different owners, does not have to be reassessed immediately during first year of biennial real estate assessment cycle; must be reassessed as of January 1 of second year of biennial assessment cycle, taking into consideration value of land as divided. Authority for board of equalization to hear and consider taxpayer complaints in second year of biennial assessment.

THE HONORABLE GENE R. ERGENBRIGHT  
COMMISSIONER OF THE REVENUE FOR THE CITY OF STAUNTON  
DECEMBER 11, 2002

ISSUES PRESENTED

You ask two questions related to a tax assessment of real estate that has been affected by eminent domain proceedings. First, you ask whether, as a result of the Commonwealth acquiring a portion of real estate through eminent domain proceedings in the first year of a locality’s biennial real estate assessment cycle, the remaining parcel of real estate must be reassessed during that year. You ask next whether a permanent board of equalization may adjust an assessment in the second year of a biennial assessment.

RESPONSE

It is my opinion that the parcel of real estate remaining after division of the property, resulting in two or more different owners, does not have to be reassessed immediately during the first year of the biennial real estate assessment cycle. Section 58.1-3290, however, requires that the remaining parcel be reassessed as of January 1 of the second year of the biennial assessment cycle, taking into consideration the value of the land as divided. Further, it is my opinion that, absent a local ordinance prohibiting such a determination, the board of equalization may hear and consider taxpayer complaints in the second year of a biennial assessment program.

FACTS

As a result of an eminent domain proceeding in December 2001, a taxpayer in the City of Staunton transferred to the Department of Transportation title to certain property. The local real estate assessor prorated the taxpayer’s 2001 tax assessment, which was carried forward to the 2002 tax assessment. The adjustment reflected only the land transferred and did not address whether there was a change in the per acre value of the land as a result of the transfer.

The City of Staunton has created a permanent board of equalization pursuant to § 58.1-3373. The city performs a general reassessment of real estate on a biennial basis. The last general reassessment was January 1, 2001. The assessor has indicated that the only change in assessment that should occur prior to January 1, 2003, is the pro-rata adjustment that has already taken place.

APPLICABLE LAW

The following three statutes, relating to assessments and the authority of a board of equalization, are pertinent to the questions you pose. Specifically, § 58.1-3360 provides, in part:
Any taxpayer whose lands, or any portion thereof, are in any year acquired or taken in any manner by the United States, the Commonwealth, a political subdivision, or a church or religious body, which is exempt from taxation by Article X, Section 6 of the Constitution of Virginia, shall be relieved from the payment of taxes and levies from the date of divestment of such land for that portion of the year in which the property was taken or acquired.

Next, § 58.1-3290 provides, in part:

*When a tract or lot becomes the property of different owners in two or more parcels, subsequent to any general reassessment of real estate* in the city or county in which such tract or lot is situated each of the two or more parcels shall be assessed and shown separately upon the land books, as required by law. The commissioner of the revenue, in assessing each lot or parcel, *shall assess the same at its fair market value as of January 1 of the year next succeeding the year in which the tract or lot of land becomes the property of several owners, without regard to the value at which such tract of land was assessed as a whole, but with regard to other assessments of lots, pieces or parcels of land in the city or county.* [Emphasis added.]

Finally, § 58.1-3378 provides that “[e]ach board of equalization shall sit at and for such time or times as may be necessary to discharge the duties imposed and to exercise the powers conferred by [Chapter 32 of Title 58.1].”

**DISCUSSION**

You first ask whether a pro-rata adjustment made to an assessment, due to acquisition of the taxpayer’s property by the state during the first year of a biennial assessment, may be carried forward to the second year when such assessment does not reflect the per acre change in value, if any, of the divided parcel. Section 58.1-3360 requires an abatement of real estate taxes when taxed property is acquired or taken by the state, other governmental entities or certain tax-exempt entities. The abatement is applied on a pro-rata basis for the portion of the year in which the property is acquired and belongs to the state or tax-exempt entity. In addition, § 58.1-3290 requires that, whenever a tract of land becomes the property of different owners in two or more parcels, each parcel must be reassessed and shown separately on the land books. The new assessment must be made, without regard to the value of the original tract as a whole, as of January 1 of the year following the year of the property’s division. The statute, therefore, requires a reassessment of the remaining parcel of real estate. That reassessment is not required in the first year of the biennial reassessment cycle; however, § 58.1-3290 does require the remaining parcel to be reassessed as of January 1 of the second year of the biennial assessment cycle, taking into consideration the value of the land as divided.
You next ask whether a permanent board of equalization may adjust an assessment in the second year of a biennial assessment. The City of Staunton has a permanent board of equalization. Section 58.1-3378 provides that “[e]ach board of equalization shall sit at and for such time or times as may be necessary to discharge the duties imposed and to exercise the powers conferred.” Absent ambiguity, the plain meaning of a statute must prevail. The plain language of § 58.1-3378 confers upon the city’s board of equalization the power to meet as necessary to discharge its duties and powers. Section 58.1-3290 imposes a duty to reassess, during a certain time period, a parcel that has been divided, resulting in two or more owners. Moreover, there is no statutory language prohibiting the board of equalization from meeting in the second year of a biennial cycle. A 1988 opinion of this Office concludes that a board of equalization may not meet in the second year of the biennial cycle, because the local ordinance prohibited a meeting in the second year of a biennial assessment. Absent prohibitive language in a local ordinance, the city’s board of equalization may meet in the second year of a biennial assessment cycle as authorized by § 58.1-3378.

CONCLUSION

Accordingly, it is my opinion that the parcel of real estate remaining after division of the property, resulting in two or more different owners, does not have to be reassessed immediately during the first year of the biennial real estate assessment cycle. Section 58.1-3290, however, requires that the remaining parcel be reassessed as of January 1 of the second year of the biennial assessment cycle, taking into consideration the value of the land as divided. Further, it is my opinion that, absent a local ordinance prohibiting such a determination, the board of equalization may hear and consider taxpayer complaints in the second year of a biennial assessment program.

1Chapter 32 of Title 58.1 pertains to real property taxation and encompasses §§ 58.1-3360, 58.1-3290 and 58.1-3378.
3Following the condemnation, the parcel is divided into two or more parcels resulting in two different owners, the state and the original landowner.
5Id.
8See VA. CODE ANN. § 58.1-3379 (Michie Repl. Vol. 2000) (requiring boards of equalization to hear and consider complaints and to equalize assessments made by land assessors, when necessary).
Authority for local governing body to increase minimum acreage for land classified for open-space use for purpose of special land use taxation; no statutory authority for such increase for land classified for agricultural, horticultural or forest use.

THE HONORABLE CHARLES L. CAMPBELL
COMMISSIONER OF THE REVENUE FOR PAGE COUNTY
OCTOBER 30, 2002

ISSUE PRESENTED
You ask whether a local governing body, pursuant to § 58.1-3233(2), is authorized to increase the minimum acreage of real estate classified for agricultural, horticultural, forest and open-space use for the purpose of special land use taxation.

RESPONSE
It is my opinion that § 58.1-3233(2) authorizes a local governing body to increase the minimum acreage for land classified for open-space use for the purpose of special land use taxation. Section 58.1-3233(2) does not authorize such an increase for land classified for agricultural, horticultural or forest use.

APPLICABLE AUTHORITIES AND DISCUSSION
Virginia adheres to the Dillon Rule of strict construction, which provides that "'[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.'" Any doubt as to the existence of a power must be resolved against the locality. The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth, which, in turn, rests on the foundation of Article I, § 14 of the Constitution of Virginia.

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244, sets forth the statutory framework authorizing localities to provide special tax assessments for land preservation activities and uses. Section 58.1-3231 provides that "'[a]ny county, city or town which has adopted a land-use plan may adopt an ordinance to provide for the use value assessment and taxation, in accord with the provisions of this article, of real estate classified in § 58.1-3230.'" Adoption of such an ordinance is discretionary. Real estate classified for agricultural, horticultural, forest and open-space use is eligible for special tax treatment as established in § 58.1-3233.

Section 58.1-3233 requires the "local assessing officer" to determine that the real estate being considered for a special assessment meets the criteria and standards prescribed in § 58.1-3230. Specifically, § 58.1-3233(2) requires the local assessing officer to determine that

real estate devoted solely to (i) agricultural or horticultural use consists of a minimum of five acres, (ii) forest use consists of a minimum of twenty acres and (iii) open-space use consists of a minimum of five acres or such greater minimum acreage as may be prescribed by local ordinance. [Emphasis added.]
Your inquiry concerns whether the phrase “or such greater minimum acreage as may be prescribed by local ordinance” applies solely to the immediately preceding phrase or to all the preceding clauses. If the phrase applies only to “open-space use consisting of a minimum of five acres,” a locality is authorized to increase the minimum acreage solely for that classification. If the phrase, however, applies to all three clauses, a locality is authorized to increase the minimum acreage for all four classifications of real estate.

It is well-settled that “where the language of a statute is free from ambiguity, its plain meaning is to be accepted without resort to the rules of interpretation.” The phrase “or such greater minimum acreage as may be prescribed by local ordinance” applies solely to “open-space use.”

If there were genuine ambiguity as to the meaning of a statute, it would be appropriate to apply the rules of statutory construction to determine legislative intent. “Language is ambiguous when it may be understood in more than one way, or simultaneously refers to two or more things. If the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness, an ambiguity exists.”

In that case, “[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.” “Open-space use” is the last antecedent prior to the qualifying clause in § 58.1-3233(2)(iii), and there is nothing in the grammatical construction of the sentence to indicate an intent that the qualifying clause applies to the other antecedent uses. Using this rule of statutory construction, the phrase in § 58.1-3233(2)(iii), “or such greater minimum acreage as may be prescribed by local ordinance,” applies solely to “open-space use.”

Whether you give the statute its plain meaning or resort to the rules of statutory construction, the result is the same. The General Assembly set minimum acreage requirements in all four classifications for land use taxation. In only one classification, that of open-space use, did the legislature grant localities the ability to increase the minimum acreage.

CONCLUSION

Accordingly, it is my opinion that § 58.1-3233(2) authorizes a local governing body to increase the minimum acreage for land classified for open-space use for the purpose of special land use taxation. Section 58.1-3233(2) does not authorize such an increase for land classified for agricultural, horticultural or forest use.


3“ County government ... is ... one of the instruments or agencies through which the State performs its functions of government. It is an arm of the State.” Board of Supervisors v. Cox, 155 Va. 687, 710, 156 S.E. 755, 762 (1931).
Article I, § 14 guarantees "[t]hat the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." This language is identical to Article I, § 14 of the 1902 Constitution and remains unchanged from § 14 of the Declaration of Rights, adopted June 12, 1776.


Section 58.1-3233(1) (LexisNexis Supp. 2002)


Section 58.1-3233(2)(iii).


OP. NO. 01-124

TAXATION: REAL PROPERTY TAX – SPECIAL ASSESSMENT FOR LAND PRESERVATION.

Procedure for revalidating split-off land assessed and taxed under land use assessment program.

THE HONORABLE JUDY S. CROOK
COMMISSIONER OF THE REVENUE FOR FRANKLIN COUNTY
FEBRUARY 15, 2002

You inquire regarding the revalidation procedure of certain land for special assessment.

You relate that a taxpayer timely applied for and participates in a locality’s land use assessment program. You also relate that, in 1999, the taxpayer timely filed the locality’s annual revalidation application for continued participation in the program. After filing the application but before the January 1, 2000, assessment date, the taxpayer conveyed two parcels of the qualifying property to his son, which you later discovered. You note that the son has paid rollback taxes on the two parcels.

You first inquire whether, pursuant to § 58.1-3234 of the Code of Virginia, a commissioner of the revenue may void the taxpayer’s revalidation form for land use assessment as to the remaining property. For the purposes of this opinion, I shall assume that the remaining property meets the acreage necessary to qualify for the special use assessment. I further assume that the use of such property has not changed and that the separation of the parcels in question does not constitute a subdivision of the property under a local ordinance.

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244, sets forth the provisions for the special assessment of real property for land preservation. The manifest purpose of these statutes is to create a financial incentive to encourage the preservation
and proper use of real estate devoted to agricultural, horticultural, forest, and open-space uses. Thus, Article 4 provides for favorable tax treatment of property devoted to such uses so long as such property satisfies the applicable use and acreage requirements, as established in §§ 58.1-3230 and 58.1-3233(2).

Section 58.1-3241 addresses the consequences of separating, splitting off, or subdividing lots from real estate which is being valued, assessed, and taxed under a land use assessment program. Section 58.1-3241(A) states that such actions “shall not impair the right of each subdivided parcel ... to qualify for [special use] valuation, assessment and taxation ..., provided it meets the minimum acreage requirements and such other conditions ... as may be applicable.” Importantly, § 58.1-3241(A) adds that such separation “shall not impair the right of the remaining real estate to [retain] such valuation, assessment and taxation.” Accordingly, this Office previously has concluded that § 58.1-3241 makes it clear that the split-off of a small parcel does not, in and of itself, cause an otherwise qualifying larger tract to lose its eligibility for valuation, assessment, and taxation under a land use ordinance during the year in which the split-off occurred. In the instant case, therefore, the mere splitting off of the smaller parcels from the large tract does not make such tract ineligible for land use assessment and taxation.

In order for a property owner to qualify for land use value assessment, § 58.1-3234 requires him to first “submit an application for taxation on the basis of a use assessment to the local assessing officer.” You indicate that the taxpayer in issue has properly done so. Section 58.1-3234(3) permits a locality, by ordinance, to require the owner to “revalidate annually with such locality, on or before the date on which the last installment of property tax prior to the effective date of the assessment is due, on forms prepared by the locality, any applications previously approved.” You provide that the taxpayer also has complied with this requirement. Lastly, § 58.1-3234(3) provides:

In the event of a material misstatement of facts in the application or a material change in such facts prior to the date of assessment, such application for taxation based on use assessment granted thereunder shall be void and the tax for such year extended on the basis of [fair market] value.

The facts presented do not suggest that the taxpayer has made a material misstatement of facts in the revaluation application or that a material change in facts has occurred; however, this determination is ultimately one to be made by the commissioner of the revenue based on all the relevant facts.

You next ask whether a taxpayer may file a petition under § 58.1-3984 to correct an erroneous assessment for removal of a parcel from land use designation. Section 58.1-3243 provides that the provisions of Title 58.1 “shall be applicable to assessments and taxation” under the special use provisions, including “the correction of erroneous assessments.”
Finally, you inquire whether a local governing body has the authority to determine whether a particular parcel qualifies for land use assessment and taxation. I am unaware of any statute that authorizes the local governing body to determine if property qualifies for special land use assessment and taxation in an individual case.

6See also § 58.1-3238 (Michie Repl. Vol. 2000) (providing that misstatement of number and identities of known property owners, actual use of property, or intentional misrepresentation of acreage on application shall be considered material misstatement of fact).

OP. NO. 01-125

TAXATION: REVIEW OF LOCAL TAXES.

Five-year statute of limitations for collection of local taxes, including food and beverage taxes, begins to run on December 31 of each year for which back taxes were assessed.

THE HONORABLE JAMES L. WILLIAMS
TREASURER FOR THE CITY OF PORTSMOUTH
MARCH 26, 2002

You inquire regarding the statute of limitations related to the collection of delinquent food and beverage taxes.

I respond by stating it is my opinion that a five-year statute of limitations for the collection of all local taxes under § 58.1-3940(A), including food and beverage taxes, begins to run on December 31 of the year to which the tax is attributable.

FACTS

You advise that food and beverage taxes are collected at the time of sale to the consumer as part of the sales tax imposed by city ordinance. Furthermore, you advise that the monies collected are held “in trust” on behalf of the city, and are to be transmitted to the city on the twentieth day of the month following the month of sale. Consequently, these taxes are local taxes.

APPLICABLE AUTHORITIES AND DISCUSSION

It is well-settled that “[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it.”¹ It is equally well-settled that “[a statute] which is plain needs no interpretation.”²
Section 58.1-3940(A) of the Code of Virginia provides expressly that the statute of limitations for the collection of local taxes begins to run on "December 31 of the year for which such taxes were assessed." (Emphasis added.) The plain meaning of the statutory language indicates that a five-year statute of limitations begins to run on December 31 of each year for which back taxes are assessed.

This interpretation of § 58.1-3940(A) is confirmed by the fact that, when the General Assembly revised Title 58 in 1984, it changed the applicable language in predecessor § 58-967 from "the year in which such taxes ... were assessed" to "the year for which such taxes were assessed." In its report to the General Assembly on the revision of Title 58 in the form of a new Title 58.1, the Virginia Code Commission commented regarding § 58.1-3940:

This section is an attempt to make sense out of the ambiguous and conflicting limitations found in §§ 58-967, 58-1019 and 58-1021, which have been repealed. Section 58-967 imposed a 15-year statute of limitations for collection by local officers, § 58-1021 imposed a 5-year limit for personal property taxes, and § 58-1019 provided that liens were not affected by any limitations. Section 58.1-3940 is intended to cut off all collection efforts, except enforcement of the real property tax lien and judgment liens, after 5 years. The tax lien on real estate is 20 years under § 58.1-3341.

**CONCLUSION**

It is my opinion, therefore, that the five-year statute of limitations for the collection of all local taxes under § 58.1-3940(A), including food and beverage taxes, begins to run on December 31 of the year to which the tax is attributable, i.e., the year for which the tax was assessed.

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Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of 'priority' as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale.

THE HONORABLE JOHN R. NEWHART
SHERIFF FOR THE CITY OF CHESAPEAKE
SEPTEMBER 27, 2002

ISSUES PRESENTED

You pose several questions concerning the responsibilities and duties of a sheriff regarding the enforcement of a treasurer's distress warrant. You ask whether a sheriff is required to enforce a distress warrant for delinquent taxes when such enforcement will result in the sale of property from which the proceeds will not fully satisfy a secured party with a lien on the distressed property or the delinquent taxes. You also inquire concerning the definition of "priority," as that term is used in § 58.1-3942(C), which provides that a security interest perfected prior to the distraint of the property shall have priority over the payment of certain delinquent taxes. Finally, you ask whether a secured party has any rights concerning the sale of distressed property on which he has a lien when the sale does not satisfy the secured party's lien.

RESPONSE

Under § 8.01-490, a sheriff is not required to make an unreasonable levy. It is my opinion that it is within a sheriff's discretion to determine whether the levy of a distress warrant is unreasonable; however, such discretion should not be exercised arbitrarily. In making such determination, a sheriff should consider such factors as the divisibility of the property and the quality, quantity, nature, and value of the property in relation to the amount of the levy. The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

It is also my opinion that the term "priority," as used in § 58.1-3942(C), means that a secured party whose security interest is perfected prior to any distraint for taxes shall be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distraint were specifically assessed against the distrained property. If the delinquent taxes are specifically assessed against the distrained property, the proceeds of the distress sale must be paid first toward delinquent taxes and any remainder toward secured interests.

Finally, it is my opinion that a secured party with a lien on distressed property is required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492.

BACKGROUND

You relate that a local treasurer's office has requested the sheriff to levy on and sell for taxes certain tangible personal property such as automobiles, motorcycles, and
boats. You also relate that some of the items may have a primary lien on them and that the sale of such items would not satisfy a secured party whose security interest was perfected prior to any distraint for taxes. You are concerned that such sale does not effect satisfaction of the treasurer’s distress warrant and is thus an unreasonable levy on the property.

APPLICABLE LAW AND DISCUSSION

The powers and duties of a treasurer are set out generally in Article 2, Chapters 31 and 39 of Title 58.1. The treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality served by the treasurer. Section 58.1-3919 grants local treasurers the authority to collect delinquent taxes by distress. Article 3, Chapter 39 of Title 58.1, §§ 58.1-3940 through 58.1-3964, sets forth the requirements for collection of delinquent taxes by distress. Specifically, § 58.1-3941 addresses the use of distress by the treasurer and the sheriff, among others, for collection of such taxes. Section 58.1-3941 authorizes specified tax collectors to distress property. The distress of property for the collection of delinquent taxes may be accomplished without an initial judicial proceeding. Distress for taxes is the seizure of personal property to enforce payment of taxes due, to be followed by its public sale. In acting pursuant to § 58.1-3941, a sheriff may take possession of the debtor’s property and remove it from the premises.

A sheriff is an independent constitutional officer whose duties “shall be prescribed by general law or special act.” In the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his locality. As a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.

A sheriff may use a distress letter from a treasurer to seize property. A sheriff is required to collect the delinquent taxes described in the treasurer’s distress letter. Additionally, a sheriff may not require the treasurer to provide an indemnity bond for liability arising from distress. A January 1997 opinion of this Office determined that service by the sheriff of a distress warrant is mandatory. The opinion relies on former § 15.1-79, which provided:

Every officer to whom any order, warrant, or process (including, but not limited to, any distress warrant, tax lien or administrative summons issued by a city or county treasurer) may be lawfully directed, shall execute the same within the boundaries of the political subdivision in which he serves and may execute the same in any contiguous county or city in accordance with the provisions of § 19.2-76.

Subsequent to the January 1997 opinion, § 15.1-79 was repealed as part of the recodification of Title 15.1. The drafting note pertaining to the recodification provides that “the substance of [§ 15.1-79] is found in §§ 8.01-295 and 19.2-76.” Neither § 8.01-295 nor § 19.2-76 contains the mandatory language in § 15.1-79 requiring a sheriff to execute such distress warrants. Therefore, the statutory provision upon which the determination of the 1997 opinion was based is no longer effective.
A distraint letter issued by a treasurer is a command to the sheriff to seize the specified property of the delinquent taxpayer. The sheriff levies on the specified property and conducts a sale of such property to satisfy the delinquent taxes. Section 8.01-490 provides that "officers shall in no case make an unreasonable distress or levy." It is this provision that prompts your first question.

Although there is no comparable statutory language to replace the requirement in repealed § 15.1-79 that a sheriff execute a distress warrant, it appears that § 8.01-490, standing alone, allows a sheriff to refuse to perform an unreasonable levy of a distress warrant. Under § 8.01-490, it is within the sheriff's discretion to determine whether a levy is unreasonable.

The sheriff's discretion in determining the unreasonableness of a levy, however, may not be exercised arbitrarily. Each specific levy will have different circumstances bearing on whether the action to be taken by the sheriff is unreasonable. For instance, as noted in a prior opinion of this Office, if the value of a car is less than the amount of the prior lien, it raises a question of reasonableness in levying on the property. A levy on property that does not appear to have a fair market value sufficient to fully satisfy a secured party or the delinquent taxes, however, is not per se unreasonable. The mere act of distraint may prompt a delinquent taxpayer to pay the taxes due and owing. Additionally, until the sale actually occurs, the fair market value of the distrained property is not truly known. Although there may be resources that give an indication of the fair market value of the property, it is the distress sale that determines the ultimate value of the property. If the delinquent taxes against the distrained property are specifically assessed, either per item or in bulk, the proceeds of the tax sale will be applied first to the delinquent taxes. As such, the treasurer has an interest to distrain such property even when the sale will not fully satisfy the delinquent tax amount or the secured party.

Determining whether a given levy is "unreasonable" depends on the circumstances of a particular situation.

Several factors must be considered in the determination of whether the levy in a particular case is unreasonable or excessive. These considerations include the divisibility of the property, the quality, quantity, and nature of the property, and the value of the property in relation to the amount of the levy.

For example, the distraint of substantially more property than is necessary to satisfy the delinquent taxes may be considered unreasonable if the property is divisible in such a way as to only levy against the items necessary to pay the debt owed. Additionally, the person making the levy does not necessarily know the amount of the lien of the secured party against the distrained property. As such, the person may not be able to determine whether the levy is in fact "unreasonable," since he does not know whether the sale proceeds would be available to satisfy at least part of the delinquent tax obligation. Arguably, a levy is reasonable, with regard to the economic value of
the property, as long as at least one creditor receives some payment. Conversely, an "unreasonable" levy would be one where no creditor would get anything. The determination of "unreasonable distress or levy" in these circumstances is also impacted by which creditor is paid first from the proceeds of the tax sale, as discussed below.

The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

You next ask the meaning of "priority," as that term is used in § 58.1-3942(C). Section 58.1-3942(C) provides that "[a] security interest perfected prior to any distraint for taxes shall have priority over all taxes, except those specifically assessed either per item or in bulk against the goods and chattels so assessed." The term "priority" is not defined in Title 58.1. Consequently, the term must be given its ordinary meaning within the statutory context. The term "priority" means "precedence in rank" or "an interest having prior claim to consideration."

The practical meaning of § 58.1-3942(C) is that a secured party, whose interest is secured before the distraint, will be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. For example, if a taxpayer fails to pay the personal property tax assessed against a specific vehicle and the treasurer decides to distraint the taxpayer's vehicle for payment of the delinquent taxes, the proceeds from the sale of the vehicle would be paid first to the treasurer. Any proceeds remaining after payment of the personal property taxes would be paid to the secured party, whose interest was secured prior to distraint of the property, with the remainder paid toward the delinquent taxes. In each case, any proceeds remaining after satisfaction of the delinquent taxes and any secured interests would be paid to the taxpayer.

Conversely, if taxes have not been assessed against specific property prior to its distraint, the proceeds from the sale of the distrained property would be paid first to the secured party, whose interest was secured prior to distraint of the property, with the remainder paid toward the delinquent taxes. In each case, any proceeds remaining after satisfaction of the delinquent taxes and any secured interests would be paid to the taxpayer.

Section 58.1-3942(C) does not require that the secured party's lien be totally satisfied prior to levying and selling an item to satisfy any portion of a distress warrant. In certain cases, as described above, it does mean that the secured party would be paid first; however, the statute does not provide a guarantee of full payment to the secured party before property may be distrained and sold. Said another way, whether the secured party's lien is completely satisfied from the proceeds of the tax sale is of no consequence to the authority of the treasurer to distrain the property and have it sold. Section 58.1-3942(C) merely prioritizes the circumstances under which creditors are to receive payment from a distrained property sale.
Therefore, as a general matter, the term “priority” in § 58.1-3942(C) means that the
secured party, whose interest is secured before the distraint, is paid first from the pro­
cceeds of a sale of distrained property, to the extent of his lien, before the treasurer is
paid the remainder for delinquent taxes, unless the delinquent taxes for which the
property is being distrained have been specifically assessed against the distrained
property. If the delinquent taxes for which the property is being distrained were
specifically assessed, either per item or in bulk, the proceeds of the sale of the distrained
property are paid first to the treasurer, with any remaining funds paid to the secured
party, to the extent of his lien and, finally, to the former owner of the property.

You also inquire whether a secured party with a security interest in distrained property
has any rights concerning the sale of the property when the sale will not satisfy the
amount owed to the secured party. Section 58.1-3942(B) makes applicable certain
notice requirements when distress goods are subject to a security interest and sale
by the treasurer and sheriff. Additionally, § 8.01-492 details the procedure for the sale
of distressed property by these officials. A prior opinion of this Office concludes that
the procedure set forth in § 8.01-492 should be followed in such sales. Section
8.01-492 provides that the officer conducting the sale of property

shall fix upon a time and place for the sale thereof and post notice
of the same at least ten days before the day of sale at some place
near the residence of the owner if he reside in the county or city and
at two or more public places in the officer’s county or city.

CONCLUSION

Under § 8.01-490, a sheriff is not required to make an unreasonable levy. Accordingly,
it is my opinion that it is within a sheriff’s discretion to determine whether the levy of
a distress warrant is unreasonable; however, such discretion should not be exercised
arbitrarily. In determining whether a levy is unreasonable, a sheriff should consider
such factors as the divisibility of the property and the quality, quantity, nature, and
value of the property in relation to the amount of the levy. The reasonableness of a
levy, in any given circumstance, is a determination of fact. Attorneys General consist­
tently have declined to render official opinions when the request involves determina­
tions of fact rather than questions of law. Therefore, I am unable to render an opinion
regarding whether the levy you describe is unreasonable.

It is also my opinion that the term “priority,” as used in § 58.1-3942(C), means that a
secured party whose security interest is perfected prior to any distraint for taxes shall
be paid first out of any proceeds from the sale of the distrained property, unless the
taxes for which the property was distrained were specifically assessed against the
distrained property. If the delinquent taxes are specifically assessed against the dis­
trained property, the proceeds of the distress sale must be paid first toward delinquent
taxes and any remainder to secured interests.

Finally, it is my opinion that a secured party with a lien on distrained property is
required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492.
2002 REPORT OF THE ATTORNEY GENERAL 327


5"Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector." Section 58.1-3941 (Michie Repl. Vol. 2000).


8Id. (citing repealed § 58-1001, now codified at § 58.1-3941).


13Id.

14Id.

15Id. at 204.


17See 1997 Va. Acts ch. 587, at 976 (enacting cl. 1); id. at 1401 (enacting cls. 13, 14).

18Section 8.01-295 provides:

"The sheriff may execute such process throughout the political subdivision in which he serves and in any contiguous county or city. If the process appears to be duly served, and is good in other respects, it shall be deemed valid although not directed to an officer, or if directed to any officer, though executed by some other person. This section shall not be construed to require the sheriff to serve such process in any jurisdiction other than in his own."


20Although a sheriff is responsible for determining whether a levy is unreasonable, such a decision is subject to judicial review, should the decision be challenged in court, at which point a trier of fact will determine whether the sheriff made an unreasonable levy.

21See 80 C.J.S., supra note 10, § 52, at 154.

221982-1983 Op. Att’y Gen. 71, 72, 73 n.3 (determining that, even though vehicle was not worth amount necessary to satisfy lien, once judgment creditor has satisfied indemnifying requirements and sheriff is directed to sell property, he must do so, in spite of its value).

23See § 58.1-3942(D) (LexisNexis Supp. 2002); see also 1972-1973 Op. Va. Att’y Gen., supra note 7, at 380 (if property is subject to security interest perfected prior to any distraint for taxes, only amount of taxes assessed against property subject to such interest may be paid over to treasurer, and balance must be paid to secured party to extent of debt due to him.)

24Horbach v. Traverse Technologies, Inc., 35 Va. Cir. 249, 249 (1994) (holding that sheriff’s levy on 1,000 shares of stock valued in excess of $1 million to satisfy judgment for $210,542 was unreasonable and excessive).

25See id.
You ask whether the recordation tax imposed pursuant to § 58.1-803 should be collected on deeds of trust under which the federal government is either the guarantor or beneficiary.

RESPONSE

It is my opinion that the recordation tax imposed pursuant to § 58.1-803 should be collected on deeds of trust under which the federal government is either the guarantor or beneficiary.

APPLICABLE LAW AND DISCUSSION

The recordation tax on deeds of trust is imposed pursuant to § 58.1-803 based on the value of the property secured under such deeds. This tax normally is paid by the grantor of the deed of trust, i.e., the borrower. Section 58.1-811(B) enumerates five exemptions from the recordation tax imposed by § 58.1-803, none of which applies to a deed of trust in which the federal government or agency is involved as guarantor or beneficiary.
States and localities generally are prohibited from taxing the federal government and its agencies except when Congress has expressly authorized them to do so. Under the Supremacy Clause of the Constitution of the United States, this prohibition against taxing applies regardless of whether a state has granted specific exemptions. Therefore, the absence of a statutory exception, by itself, is not dispositive.

The status of the federal government and its agencies in a recordation transaction is critical to determining whether the recordation tax should be collected. No grantor tax is charged to the federal government when it is taking title to real estate as a party. Additionally, no tax is imposed where agencies of the federal government, like the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, take title to property as receivers.

Your question concerns transactions where the federal government acts as guarantor or beneficiary under a deed of trust. The federal government, as guarantor under a deed of trust, may guarantee payment by a borrower to a third party, such as a bank, mortgage company or other lender, or it may be a beneficiary entitled to collect payment under the deed of trust from the borrower. In neither status is the federal government a "borrower" responsible for payment of the recordation tax, nor does it hold legal or equitable title under the deed of trust.

Federal agencies, such as the Federal Housing Administration and the Veterans' Administration, guarantee real estate loans. These and similar programs serve public policies that enhance home ownership, encourage certain types of development, and provide benefits to armed services members. The federal government's involvement in these programs is as a facilitator, or guarantor, for individual loans rather than as a party to the transaction. The tax imposed under § 58.1-803 in these loans is a cost borne by the grantor and borrower, and not the federal government and its agencies. The mere fact that the federal government is involved in some capacity, either as guarantor or beneficiary, does not exempt a transaction from the recordation tax.

CONCLUSION

Accordingly, it is my opinion that the recordation tax imposed pursuant to § 58.1-803 should be collected on deeds of trust under which the federal government is either the guarantor or beneficiary.

2 The Supreme Court of the United States has recognized in First Agricultural National Bank of Berkshire County v. State Tax Commission that, "if a change is to be made in state taxation of national banks, it must come from Congress" (392 U.S. 339, 346 (1968)), and ruled in that case that the Commonwealth of Massachusetts could not apply its sales and use tax to national banks as they are not among the methods of taxation by which Congress permits states to tax such banks (id. at 339). In an earlier case, the Supreme Court of Virginia held that a tax on the grantee for recording a deed to land acquired by mortgage foreclosure is unenforceable against the Federal Land Bank of Baltimore, a federal instrumentality that can only be taxed as allowed by federal law. See Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935).
OP. NO. 01-099

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC.

Boat registered in Virginia county but normally garaged, docked, or parked in North Carolina has acquired taxable situs in both states. No statute requires county to refund or reduce payment of taxes on boat.

THE HONORABLE M. KIRKLAND COX
MEMBER, HOUSE OF DELEGATES
JANUARY 11, 2002

You ask whether, pursuant to § 58.1-3511 of the Code of Virginia, a county may assess and collect personal property tax on a boat that is registered in the county but normally garaged, docked or parked in North Carolina and upon which personal property tax has been paid to North Carolina. You also ask whether, pursuant to § 58.1-3511 or the Constitution of the United States, the county is required to refund or reduce the tax.

Section 58.1-3511(A) provides that the situs for the assessment and taxation of tangible personal property "shall in all cases be the county, district, town or city in which such property may be physically located on the tax day." Section 58.1-3511(A) further provides that "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."

In a 1990 opinion of the Attorney General, the reverse situation is presented. The facts in the 1990 opinion state that a South Carolina domiciliary has paid personal property taxes to South Carolina on a boat normally docked in a Virginia locality. The question was whether the Virginia locality in which the boat was docked could assess personal property taxes on the boat. The opinion concludes that the Virginia locality could do so and notes that the authority to impose the personal property tax in Virginia is not affected by the fact that a similar tax may be imposed against the same property by South Carolina or any other jurisdiction outside the Commonwealth. Thus, the boat was susceptible to personal property taxation in both states. Accordingly, with respect to your first inquiry, it is my view that, pursuant to § 58.1-3511(A), the boat at issue is subject to taxation in Virginia.
Regarding your second inquiry, this Office has consistently held that there is no constitutional barrier to the double taxation of property that has acquired a taxable situs in more than one state. Additionally, although § 58.1-3511(A) authorizes a person who has paid 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 where such vehicle is normally garaged, docked or parked to apply to such county or city for a refund of the tax payment, I am unaware of any statute which requires the locality to refund or reduce the tax paid to it.

Accordingly, the county is not required to refund or reduce the payment of taxes on the boat at issue.

3 Id.
4 Id.
5 Id. at 265.
7 Compare § 58.1-3511(A) (providing that, “[u]pon 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”). The preceding provision in § 58.1-3511(A) applies only to nondomiciliary applicants who have paid a tax to a locality in Virginia and are seeking a refund from the locality; it does not apply to the instant situation involving a domiciliary. See 1987-1988 Op. Va. Att’y Gen. 578, 582-83. Compare § 58.1-3516(A) (providing for relief and refund of appropriate amount of tax already paid on prorated basis with respect to taxes paid on same personal property to more than one locality within Commonwealth).
8 You also inquire as to the formula the locality should use in determining the refund if one is required. Because my answer to your second inquiry is that no refund is required, it is unnecessary to address your final inquiry.

OP. NO. 99-117

TAXATION: TAX EXEMPT PROPERTY.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).

Determination whether property of Christian Aid Mission may be classified as tax exempt rests within judgment of commissioner of revenue, after careful consideration of attendant facts. Unused and undeveloped parcels are subject to real estate taxation while they remain as such. Any portion of such land used by other entities may be exempt if activities of using entities are charitable, religious or educational. Rent paid by using entity considered source of revenue or profit to Mission is taxable.

MR. LARRY W. DAVIS
COUNTY ATTORNEY FOR ALBEMARLE COUNTY
JANUARY 4, 2002

You ask whether certain property owned by an incorporated religious organization is eligible for exemption from property taxation under § 58.1-3617 or § 58.1-3606(A)(5) of the Code of Virginia.
You advise that the Christian Aid Mission is an incorporated religious organization that provides financial support for foreign missionaries. You also advise that it owns two parcels of property,¹ which were acquired after July 1, 1971. You relate that a portion of one parcel is undeveloped and used by local schools (one secular and two nonsecular) for soccer and other outdoor activities;² the other parcel consists of buildings and wooded acreage that is used by staff and visitors for exercise and retreat (quiet time) purposes.

Article X, § 6(a)(6) of the Constitution of Virginia authorizes the General Assembly to provide a tax exemption for “[p]roperty used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes.” Section 6(a)(6) authorizes the General Assembly to establish the tax exemption either by classification³ or by designation.⁴ Property is exempt by classification if it fits within a class of property which the law establishes as exempt.⁵ Property is exempt by designation when the law designates the property of a named organization as exempt.⁶ The statutory provision establishing the exemption also may prescribe restrictions and conditions on the exemption.⁷ In addition, Article X, § 6(f) provides that exemptions from taxation established or authorized by Article X, § 6 are to be strictly construed; however, all property exempt from taxation on July 1, 1971,⁸ shall continue to be exempt.

The classification statutes at issue are §§ 58.1-3606(A)(5),⁹ 58.1-3609 and 58.1-3617.¹⁰ Section 58.1-3606(A)(5) exempts from taxation the following classes of property:

Property belonging to and actually and exclusively occupied and used by the Young Men’s Christian Associations and similar religious associations, including religious mission boards and associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit but exclusively as charities (which shall include hospitals operated by nonstock corporations not organized or conducted for profit but which may charge persons able to pay in whole or in part for their care and treatment).

The Virginia Code does not define the term “associations” as used in § 58.1-3606(A)(5). While “association” usually refers to something other than a corporation, the General Assembly has used the term to include “corporations” for certain purposes.¹¹ In several instances, the General Assembly has used the term “unincorporated association” to qualify the term.¹² If the General Assembly had meant for “association” to always mean an unincorporated entity, there would be no need for such a qualification. More importantly, § 58.1-3606(A)(5) specifically refers to Young Men’s Christian Associations, which “regularly operate in corporate form.”¹³ It is characteristic of many of the other examples of “similar religious associations, including religious mission boards and associations, ... asylums, [and] hospitals,”¹⁴ to be incorporated. It is clear from § 58.1-3606(A)(5) that religious associations necessarily include religious corporations.
The Supreme Court of Virginia has not ruled specifically on your question, but the Court's understanding of § 58.1-3606 may be discerned from the manner in which the Court has applied the section. In *City of Richmond v. Virginia United Methodist Homes, Inc.*, the Court applies § 58.1-3606 to a religious corporation, taking into consideration only whether the exemptions classified in the statute should be strictly or liberally construed. In *Westminster-Canterbury v. City of Virginia Beach*, the Supreme Court disagrees with the religious corporation's argument that it meets the requirements of § 58.1-3606, but not because of its corporate status. While neither of these cases directly considers whether the term "religious associations" includes religious corporations, the Court necessarily must have answered this question affirmatively before resolving the issue whether other attributes of the religious corporations qualified them for tax exemption by classification. In these cases, therefore, the Supreme Court has consistently applied § 58.1-3606 to religious corporations.

Sections 58.1-3609 and 58.1-3617 expressly exempt from taxation certain classes of real and personal property on and after July 1, 1971. The provisions of these two statutes concerning religious associations are broader than those of § 58.1-3606. The first sentence in § 58.1-3609(A) states:

The real and personal property of an organization classified in §§ 58.1-3610 through 58.1-3621 and used by such organization for a religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purpose as set forth in Article X, Section 6 (a) (6) of the Constitution of Virginia, the particular purpose for which such organization is classified being specifically set forth within each section, shall be exempt from taxation, so long as such organization is operated not for profit and the property so exempt is used in accordance with the purpose for which the organization is classified.

Section 58.1-3617, one of the classification statutes referenced above, provides, in part:

Any church, religious association or religious denomination operated exclusively on a nonprofit basis for charitable, religious or educational purposes is hereby classified as a religious and charitable organization. Notwithstanding § 58.1-3609, only property of such association or denomination used exclusively for charitable, religious or educational purposes shall be so exempt from taxation.

Reading these two statutes together does not convey that the term "religious association," as used in § 58.1-3617, represents a different meaning of that term, as used in § 58.1-3606, to exclude otherwise qualified "religious corporations." Further, pursuant to generally accepted principles of statutory construction, sections of a comprehensive statute on a particular subject should not be read in isolation, but must be construed as parts of a coordinated whole. Since §§ 58.1-3617 and 58.1-3606 are within Chapter
36 of Title 58.1, governing "Tax Exempt Property," the term must be applied uniformly to both sections in the absence of a definitional distinction.

The legislative history of §§ 58.1-3617 and 58.1-3606 is also relevant. Originally, the provisions that became § 58.1-3617 were part of a prior statutory scheme, a portion of which became § 58.1-3606. In repealing Title 58 in 1984, the General Assembly recodified several subsections of § 58-12 as § 58.1-3606. As previously discussed, the General Assembly did not intend religious associations to exclude corporations in a statute that offers the Young Men's Christian Association as its prime example of religious associations. Professor J. Rodney Johnson, a University of Richmond law professor, explains the effect of recasting language removed in § 58-12(5) and reenacting it as § 58-12.24, which subsequently became § 58.1-3617.

It cannot be credibly maintained that the General Assembly, by merely moving the language in question, mutatis mutandis, from section 58-12(2) to section 58-12.24 in 1974 was thereby evidencing any intent to change the meaning of this language or any portion thereof. Instead, the purpose of the General Assembly was simply to validate language that the Attorney General had earlier determined to be unconstitutional because it had not been enacted by the requisite three-fourth's majority of the General Assembly.

Therefore, the legislative history indicates that the General Assembly intended the phrase "religious association" as used in §§ 58.1-3606 and 58.1-3617 to have the same meaning. Since there is no reason to believe that the phrase in § 58.1-3617 should be interpreted any differently than in § 58.1-3606(A)(5), there is no indication that the phrase excludes corporations in § 58.1-3617. Therefore, the term "religious association" in § 58.1-3617 includes "corporations."

Prior opinions of the Attorney General construe § 58.1-3617 as consistent with this statutory history and conclude that religious corporations qualify under this religious association exemption. The Virginia Supreme Court's application of § 58.1-3617 is in accord with these opinions. In Westminster-Canterbury, the Court ruled not only whether the corporation could be classified as a tax-exempt religious association under § 58.1-3606, but also whether it could be classified as a tax-exempt association pursuant to §§ 58.1-3609 and 58.1-3617. The Court would not have considered the corporation's qualification for tax exemption under these classification statutes if the term "religious association" excluded corporations.

There exist, however, at least three contrary opinions, which rely on the advice and reasoning given by the Attorney General in a 1982 opinion. In determining whether property of a religious corporation is exempt from local real property taxation under § 58-12.24, the 1982 opinion states:

The General Assembly is obviously aware of the distinction between a corporation and other non-incorporated entities. In several subsections of § 58-12, the General Assembly provided for
exemptions to corporations. Its omission of corporations from § 58-12.24 evidences its intent not to provide exceptions for corporations seeking to come within the protection afforded by that section. Rather, giving the phrase “church, religious association …” its natural meaning, it is clear that the Assembly intended to exempt a relatively narrow range of entities which may be defined, in other terms, as a body of communicants or group gathered in common membership for religious purposes.\[28]\n
The 1982 opinion assumes, therefore, that, because the term “corporation” was not mentioned specifically in the statute, corporations are not exempt entities. The opinion does not, however, analyze the term “religious association” in the statute to determine whether a corporation is to be considered as a type of association. The General Assembly is presumed to acquiesce in the Attorney General’s published interpretations of a statute where no corrective amendment is legislatively made.\[29]\n
While the General Assembly has not amended § 58.1-3617 since the 1982 opinion, the legislative history, an opinion of the Attorney General, and a Virginia Supreme Court decision issued after the 1982 opinion and those opinions following it indicate that the term “association” does include corporations. Therefore, to the extent that the 1982 opinion and those following it deny property tax exemptions because of an organization’s corporate status, they are overruled.

Although the Christian Aid Mission is a “religious association” for the purposes of both §§ 58.1-3606(A)(5) and 58.1-3617, the question remains whether the property of the Mission qualifies for an exemption under the conditions articulated in either statute. Whether such property qualifies for the § 58.1-3606(A)(5) exemption ultimately is a factual determination to be made by the commissioner of the revenue.\[30]\n
“The general rule is that an exemption from taxation is the exception and provisions exempting property from taxation must be strictly construed.”\[31]\n
If there is any doubt concerning the exemption, the doubt must be resolved against the party claiming the exemption.\[32]\n
To come within the exemption allowed by § 58.1-3606(A)(5), the Mission has the burden of showing that the property belongs to it and is “actually and exclusively occupied and used by’ the [Mission].”\[33]\n
Additionally, the property must meet the “dominant purpose test” of “whether the property in question promotes the purpose of the institution seeking the tax exemption.”\[34]\n
The property is entitled to tax exemption “if the property has ‘direct reference to the purposes for which the [institution was created,] and tends immediately and directly to promote those purposes.”\[35]\n
Pursuant to § 58.1-3617, property is exempt if it is used by the qualifying entity “exclusively … for charitable, religious or educational purposes.” This restriction allows property to be used by another organization as long as the purpose of such use is charitable, religious or educational.\[36]\n
While you have not provided enough facts for me to render a definitive opinion on whether the property in question meets the conditions set forth in either
§ 58.1-3606(A)(5) or § 58.1-3617 for exemption from taxation, I must note that, generally, under § 58.1-3606(A)(5), undeveloped and unused parcels of land are not exempt from real estate taxation as long as they remain undeveloped and unused. Yet, under § 58.1-3617, the portion of such parcel used by other entities may be exempt if the activities of the using entities are charitable, religious or educational in nature. Note, however, that if the other entities pay rent for use of the land, and their payments are large enough to be considered a source of revenue or profit to the Mission, that portion of the property used would be taxable under § 58.1-3603.

You mention that the Mission’s staff and visitors use the other parcel in question for exercise and retreat purposes. Again, whether this parcel is “actually and exclusively occupied and used” pursuant to § 58.1-3606(A)(5) by the Mission in light of its purpose, or whether it is used for “charitable, religious or educational purposes” under § 58.1-3617, rests within the judgment of the commissioner of the revenue, after careful consideration of all the attendant facts.

1 I assume that there is no dispute regarding whether the property in question belongs to the Mission.

2 I assume that there is no revenue derived from such use.


7 VA. CONST. art. X, § 6(a)(6). See, e.g., §§ 58.1-3609(A), 58.1-3650(A) (Michie Repl. Vol. 2000) (restricting tax exemptions to real and personal property of organizations that, in first statute, are classified in §§ 58.1-3610 to 58.1-3621 or, in second statute, are specifically designated in §§ 58.1-3650.1 to 58.1-3650.904 (not set out in Code)).

8 July 1, 1971, is the effective date of the 1971 Constitution. See 1970 Va. Acts chs. 763, 786, at 1595, 1698, respectively.

9 Section 58.1-3606(A)(5) exempts YMCAs and “similar religious associations, including religious mission boards and associations.”

10 Sections 58.1-3609 and 58.1-3617 exempt churches, religious associations, and religious denominations.


14 Section 58.1-3606(A)(5).


16 238 Va. 493, 385 S.E.2d 561 (1989) (demonstrating that religious corporation must meet stricter terms of classification statutes when it is unclear whether corporation is conducted exclusively as charity or for charitable purposes).


20 See supra note 19.


22 The language was moved from § 58-12(5) rather than § 58-12(2).


25 238 Va. at 498-500, 385 S.E.2d at 564-65.


28 Id. at 375.


32 See Westminster-Canterbury v. City of Virginia Beach, 238 Va. at 501, 385 S.E.2d at 565.

33 Smyth County Comm. Hospital, 259 Va. at 333, 527 S.E.2d at 403 (quoting Hospital Association v. Wise County, 203 Va. 303, 307, 124 S.E.2d 216, 219 (1962)).

34 Id. at 334, 527 S.E.2d at 404.

35 Id. at 334-35, 527 S.E.2d at 404 (quoting Com’th v. Lynchburg Y.M.C.A., 115 Va. 745, 752, 80 S.E. 589, 591 (1914)).
OP. NO. 02-126

TAXATION: TAX EXEMPT PROPERTY.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).

Meaning of 'religious association' for purpose of exempting property of Young Life from taxation by classification. Commissioner of revenue, or other local taxing official, is responsible for determining whether property owned by Young Life qualifies for tax exemption.

THE HONORABLE WILLIAM J. HOWELL
MEMBER, HOUSE OF DELEGATES
DECEMBER 10, 2002

ISSUES PRESENTED

You ask whether Young Life, a nonprofit Christian organization, may be considered a "religious association" for the purposes of §§ 58.1-3617 and 58.1-3606(A)(5), pertaining to tax exemptions for property owned by religious associations. You also ask whether the property used and occupied by Young Life qualifies for exemption from local property taxation.

RESPONSE

It is my opinion that Young Life is a "religious association," as that term is used in §§ 58.1-3617 and 58.1-3606(A)(5), and that, therefore, its property may be exempt from local real and personal property taxation. It is further my opinion that the tax status of the Young Life property is a factual determination to be made by the local commissioner of the revenue or other appropriate tax official.

FACTS

You advise that Young Life was established in 1941 as an incorporated nonprofit Christian organization, and that it qualifies as a nonprofit organization under § 501(c) of the Internal Revenue Code. You further advise that Young Life engages young people in creative activities in order to teach them the gospel of Jesus Christ. Camping is an integral part of Young Life’s approach to evangelism. Young Life currently operates fifteen national camp properties and four regional camps. In 2000, these camps served approximately 90,000 campers, 15,000 leaders, 7,000 volunteer work crew and staff, 2,100 adult guests, and 7,000 wilderness and leadership campers. You also relate that Young Life’s camping program is growing nationwide at an annual rate in excess of ten percent.

Young Life purchased property in Rockbridge County in 1992 to operate a youth camp. Like the national camp properties, the camp in Rockbridge provides an opportu-
nity for youth to hear and experience the Christian gospel. In 2000, the camp in Rockbridge served approximately 4,978 campers, 560 adult volunteer leaders, 365 volunteer work crewmembers, and 169 adult guests. By 2005, Young Life expects the camp to serve more than 7,000 campers. Young Life's camps are open to all young people on a nondiscriminatory basis.

APPLICABLE LAW AND DISCUSSION

Article X, § 6(a)(6) of the Constitution of Virginia authorizes the General Assembly to provide a tax exemption for "[p]roperty used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes." Section 6(a)(6) authorizes the General Assembly to establish the tax exemptions either by classification or by designation. Property is exempt by classification only if it fits within a class of property that the General Assembly has established as exempt. Property is exempt by designation when the law designates the property of a named organization as exempt. The statutory provision establishing the exemption also may prescribe restrictions and conditions on the exemption. In addition, Article X § 6(f) provides that "[exemptions of property from taxation] established or authorized by Article X, § 6 shall be strictly construed"; however, all property exempt from taxation on July 1, 1971, shall continue to be exempt.

Section 58.1-3617 provides that "[a]ny church, religious association or religious denomination operated exclusively on a nonprofit basis for charitable, religious or educational purposes is hereby classified as a religious and charitable organization." (Emphasis added.) Section 58.1-3609(A) provides for a tax exemption by classification for the property owned by the organizations described in § 58.1-3617, if the property is "used in accordance with the purpose for which the organization is classified."

Section 58.1-3606(A) also provides a "religious association" tax exemption based on classification:

Pursuant to the authority granted in Article X, Section 6 (a) (6) of the Constitution of Virginia to exempt property from taxation by classification, the following classes of real and personal property shall be exempt from taxation:

....

5. Property belonging to and actually and exclusively occupied and used by the Young Men's Christian Associations and similar religious associations, including religious mission boards and associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit but exclusively as charities .... [Emphasis added.]

The Virginia Code does not define "religious association." The Supreme Court has observed that an organization with religious emphasis that provides housing for the elderly could be a "religious association" entitled to tax-exempt classification.
prior opinion of this Office concludes that the Northern Virginia Jewish Community Center is a “religious association” similar to the Young Men’s Christian Association. 9 Young Life, like the Northern Virginia Jewish Community Center, operates on a nondiscriminatory basis. 10 In addition, Young Life’s goal is similar to that of the Young Men’s Christian Association. 11 This Office also has determined that a nonprofit organization providing financial support for foreign missionaries is a “religious association.” 12 Based on the foregoing, it is my opinion that Young Life is a “religious association” as described in § 58.1-3606(A)(5). The term “religious association” is broader in § 58.1-3617 than in § 58.1-3606(A)(5), and, therefore, Young Life is a “religious association” within that provision as well. 13

Although Young Life is a “religious association,” as that term is used in §§ 58.1-3617 and 58.1-3606(A)(5), that determination alone does not entitle Young Life to a property tax exemption. 14 Whether the property owned by Young Life qualifies for an exemption under § 58.1-3617 or § 58.1-3606(A)(5) is a factual determination to be made by the commissioner of the revenue or other appropriate local tax official. 15

Pursuant to § 58.1-3617, property is exempt if it is used by the qualifying entity “exclusively ... for charitable, religious or educational purposes.” 16 In addition, property classified as a tax-exempt “religious association” pursuant to § 58.1-3617 must also be “used in accordance with the purpose for which the organization is classified.” 17 To qualify for the exemption provided by § 58.1-3606(A)(5), Young Life has the burden of showing that the property belongs to it and is “actually and exclusively occupied and used by” [Young Life]. 18 Additionally, the property must meet the “dominant purpose test” of “whether the property in question promotes the purpose of the institution seeking the tax exemption.” 19 The property is entitled to a tax exemption “if the property has 'direct reference to the purposes for which [Young Life was created] and tends immediately and directly to promote those purposes.” 20

In determining whether the property owned by Young Life is tax exempt, Article X, § 6(f) requires the commissioner of the revenue, or other taxing official, to strictly construe any exemption. 21 The commissioner of the revenue, or other local tax official, must determine from the facts whether an exemption applies to the property in question. Specifically, if the camp in Rockbridge County is operated exclusively on a nonprofit basis for charitable, religious or educational purposes, and the camp property is used in accordance with the purpose for which Young Life is organized, as required by §§ 58.1-3617 and 58.1-3609, the property is exempt from taxation. Also, if the property is actually and exclusively occupied and used by Young Life and operated exclusively as a charity, as required in § 58.1-3606(A)(5), it is tax exempt. Again, the determination whether Young Life uses the property for “charitable, religious or educational purposes” under § 58.1-3617, or whether it uses the property “in accordance with the purpose for which the organization is classified” pursuant to § 58.1-3606(A)(5), rests within the judgment of the commissioner of the revenue, after careful consideration of all the attendant facts.
CONCLUSION

Accordingly, it is my opinion that Young Life is a “religious association,” as that term is used in §§ 58.1-3617 and 58.1-3606(A)(5), and that, therefore, its property may be exempt from local real and personal property taxation. It is further my opinion that the tax status of the Young Life property is a factual determination to be made by the local commissioner of the revenue or other appropriate tax official.

1The Internal Revenue Code provides an exemption for “[c]orporations ... organized and operated exclusively for religious, charitable ... purposes.” I.R.C. § 501(c)(3) (West. 2002).
6VA. CONST. art. X § 6(a)(6); see, e.g., §§ 58.1-3609(A), 58.1-3650(A) (restricting tax exemptions to real and personal property of organizations that, in first statute, are classified in §§ 58.1-3610 to 58.1-3621 or, in second statute, are specifically designated in §§ 58.1-3650.1 to 58.1-3650.904 (not set out in Code)).
8See Westminster-Canterbury v. City of Virginia Beach, 238 Va. 493, 502, 385 S.E.2d 561, 566 (1989) (finding that Westminster–Canterbury is not entitled to exemption under classification statutes, because it is not conducted exclusively for charity).
10Id. at 304.
11The mission of the Young Men’s Christian Association is “[t]o put Christian principles into practice through programs that build healthy spirit, mind and body for all.” See YMCA Mission, at http://www.ymca.net/index.jsp.
14Id.
16See also op. no. 99-117, supra note 12.
17Section 58.1-3609(A).
19Id. at 334, 527 S.E.2d 404.
20Id. at 334-35, 527 S.E.2d at 404 (quoting Com’th v. Lynchburg Y. M. C. A., 115 Va. 745, 752, 80 S.E. 589, 591 (1914)).
THE HONORABLE K. MIKE FLEENOR JR.
COMMONWEALTH'S ATTORNEY FOR PULASKI COUNTY
JANUARY 11, 2002

You ask whether a pharmacist or his assistant legally may obtain a fingerprint from a customer purchasing prescriptive medication.

Section 59.1-478 of the Code of Virginia provides, in part:

Whenever any person requires another to furnish a fingerprint or fingerprints in conjunction with any business, commercial or financial transaction, unless the parties otherwise agree, within twenty-one days of the transaction’s completion or termination the original record of such prints and all copies of such prints, including electronic or facsimile copies shall be (i) returned to the person providing such prints or (ii) destroyed by the person requiring and obtaining such prints.

Section 54.1-3303 details the prescriptions to be issued and drugs to be dispensed by a pharmacist for medical and therapeutic purposes. In particular, § 54.1-3303(B) outlines the procedure to be followed by a pharmacist who questions the validity of a prescription, including “verify[ing] the identity of the patient.” Section 54.1-3319(D) states that “[r]easonable efforts shall be made to obtain, record, and maintain the … patient information generated at the individual pharmacy.” Such patient information shall include the “name, address, telephone number, date of birth or age, and gender.”

Section 54.1-3420.1 authorizes a pharmacist, “[b]efore dispensing any drug listed on Schedules II through V, [to] require proof of identity from any patient presenting a prescription or requesting a refill of a prescription.”

Neither these statutes, nor any other statutes of which I am aware, prohibit a pharmacist, prior to filling a prescription, from obtaining a fingerprint from the customer. In
addition, pharmacists are not government agents and, therefore, are not constrained by the Fourth Amendment to the Constitution of the United States.\textsuperscript{3}

The primary purpose of statutory construction is to "ascertain and give effect to legislative intent."\textsuperscript{4} It is clear from the language of § 59.1-478 that the General Assembly intended to legislate procedures involving the use of fingerprints in conjunction with business and commercial transactions. Further, when reading §§ 54.1-3303(B), 54.1-3319(D) and 54.1-3420.1 together, it is clear that the General Assembly intended pharmacists to verify the identity of customers. A fingerprint may be used to identify an individual.

Based on the above, it is my opinion that a pharmacist, prior to filling a prescription, may obtain a fingerprint from a customer as proof of the customer's identification, provided the pharmacist complies with the twenty-one day limitation in § 59.1-478.

You next ask whether a pharmacist may provide a fingerprint to law-enforcement officials if the pharmacist suspects the customer of prescription fraud pursuant to § 18.2-258.1.

Section 18.2-258.1 states:

A. It shall be unlawful for any person to obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance ...: (i) by fraud, deceit, misrepresentation, ... or subterfuge; or (ii) by the forgery or alteration of a prescription or of any written order; ... or (iv) by the use of a false name or the giving of a false address.

B. It shall be unlawful for any person to furnish false or fraudulent information in or omit any information from, or willfully make a false statement in, any prescription ....

E. It shall be unlawful for any person to make or utter any false or forged prescription ....

Section 8.01-399 recognizes a privilege of confidentiality between physicians and patients. Even if such privilege of confidentiality existed between pharmacists and customers, the privilege would not be recognized in a criminal prosecution.\textsuperscript{5} Pursuant to § 18.2-258.1, therefore, a pharmacist may provide to law-enforcement officials the fingerprint of any customer suspected of prescription fraud.

\textsuperscript{1}Further reference in this opinion to a pharmacist shall mean a pharmacist or his assistant.


\textsuperscript{3}See Morke v. Commonwealth, 14 Va. App. 496, 503, 419 S.E.2d 410, 414 (1992) ("The constraints of the Fourth Amendment apply only to government or state action; they do not apply to searches or seizures undertaken by private individuals."); cf. Hayes v. Florida, 470 U.S. 811,
814 (1985) ("[F]ingerprinting ... represents a much less serious intrusion upon personal security 
than other types of searches and detentions.").


2See Gibson v. Commonwealth, 216 Va. 412, 414, 219 S.E.2d 845, 847 (1975) ("There exists ... 
no physician-patient privilege in a criminal prosecution in Virginia. ... While Virginia has enacted 
a statutory privilege, it is expressly confined to civil proceedings.").

OP. NO. 02-053
WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT – COMPLAINTS.
Duty of volunteer and professional Boy Scout leaders to report suspected child 
abuse or neglect to local department of social services or Department of Social 
Services’ hotline.

THE HONORABLE CLIFTON A. WOODRUM
MEMBER, HOUSE OF DELEGATES
JUNE 27, 2002

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

ISSUE PRESENTED
You ask whether volunteer and professional Boy Scout leaders must report suspected 
child abuse or neglect pursuant to § 63.1-248.3.

RESPONSE
It is my opinion that § 63.1-248.3(A)(12) imposes a duty on volunteer and professional 
Boy Scout leaders, who have reason to suspect that a child is abused or neglected, to 
report the matter to the local department of social services or the Department of Social 
Services’ hotline, as required by § 63.1-248.3(A).

FACTS
You relate that a local council of the Boy Scouts of America inquired regarding the 
applicability of § 63.1-248.3 to volunteer leaders, such as Scoutmasters or Cub Scout 
den mothers, and to professional Scouters who may learn of facts or suspicions of 
child abuse or neglect from volunteers or otherwise in the conduct of their duties for 
the organization. You note that volunteer Scout leaders are required to report suspected 
child abuse or neglect to the Council Executive who then reports the matter to the 
National Council of the Boy Scouts of America. Finally, you state that Scout volunteers 
must report to the local Scout council suspected abuse whether the abuse occurs in 
the Scout program, at home, or elsewhere.

APPLICABLE LAW AND DISCUSSION
Section 63.1-248.3(A) lists the “persons who, in their professional or official capacity, 
have reason to suspect that a child is an abused or neglected child, shall report the 
matter immediately ... to the local department of [social services] ... or to the Department 
of Social Services’ toll-free child abuse and neglect hotline.” Section 63.1-248.3(A)(12) 
requires suspected child abuse or neglect to be reported by “[a]ny person associated
with or employed by any private organization responsible for the care, custody or control of children. It is therefore necessary to determine (i) whether the Boy Scouts of America is a private organization responsible for the "care, custody or control of children," and (ii) whether volunteer Scout leaders are "associated with," and professional Scout leaders are "employed by," the Boy Scouts of America.

The Boy Scouts of America is a private organization. Boys between seven and twenty years of age may participate in scouting programs. Depending on the scout's age, he may participate in programs that emphasize leadership, community, family understanding, character development, citizenship training, personal fitness and outdoor activities. Scout meetings and activities take place under the supervision of adult scout leaders.

The terms "care," "custody" or "control," as used in § 63.1-248.3(A)(12) are not defined under Virginia law. "When a statute does not contain an express definition of a term, ... the intent of the legislature [may be inferred] from the plain meaning of the words used." The term "care" means "painstaking or watchful attention." Generally, the term "custody" has been "broadly defined as '[t]he care, control and maintenance of a child."" The Supreme Court [of Virginia] has rejected limiting the definition of 'custody' to legal custody." Finally, the word "control" means "to exercise restraining or directing influence over," and it is "synonymous with "manage.""

In order for § 63.1-248.3(A)(12) to impose a reporting duty, a volunteer Scout leader must be "associated with" the Boy Scouts. To become a volunteer Scout leader, an adult must apply to and be accepted by a local office of the Boy Scouts of America. It is, therefore, clear that a volunteer Scout leader is "associated with" the Boy Scouts of America. For the purposes of this opinion, I assume the term "professional Scout leader" refers to those individuals who are employed and paid by the Boy Scouts of America. Accordingly, professional Scout leaders clearly are subject to the reporting requirement of § 63.1-248.3(A)(12).

Section 63.1-248.3(A)(12) imposes a duty on volunteer and professional Scout leaders when those persons have the care, custody or control of a child. Given the nature of scouting activities, it is evident that volunteer and professional Scout leaders, during those activities, have either the care, custody or control of the child. Therefore, the statute imposes a reporting duty on volunteer and professional Scout leaders.

Please note that a Scout leader making a report of suspected abuse pursuant to § 63.1-248.5 "shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent."

**CONCLUSION**

Accordingly, it is my opinion that § 63.1-248.3(A)(12) imposes a duty on volunteer and professional Boy Scout leaders, who have reason to suspect that a child has been abused or neglected, to report the matter to the local department of social services or the Department of Social Services' hotline, as required by § 63.1-248.3(A).
'Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) ("The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people.").

2See the National Council of the Boy Scouts of America Web site, www.scouting.org. Boys seven-to-ten years of age may participate in scouting programs such as Tiger Cubs, Cub Scouts or Webelos Scouts, depending on their age; boys eleven-to-seventeen years of age may participate in Boy Scouts. Id.

3Id.

4Id.


9Miriam Webster’s Collegiate Dictionary, supra note 6, at 252.


11See Web site cited supra note 2.

OP. NO. 02-005

WELFARE (SOCIAL SERVICES): SERVICES FOR ABUSED SPOUSES — CHILD WELFARE, HOMES, AGENCIES, ETC.

ADMINISTRATION OF GOVERNMENT: DATA COLLECTION & DISSEMINATION.

Disclosure of identity and presence of resident(s) in spouse abuse shelter to law enforcement officials charged with serving criminal or civil warrant or subpoena, or seeking to investigate crime.

THE HONORABLE WARD L. ARMSTRONG
MEMBER, HOUSE OF DELEGATES
MAY 29, 2002

ISSUE PRESENTED

You inquire concerning the circumstances under which Citizens Against Family Violence ("CAFV") may provide law-enforcement officials with information regarding the identity and presence of residents at the spouse abuse shelter operated by CAFV. Specifically, you ask whether CAFV may disclose the referenced information in the following circumstances: (1) the police possess and wish to serve (a) a criminal warrant, (b) a civil warrant, or (c) a subpoena; and (2) the police do not have a warrant but nevertheless wish to question the resident in connection with an ongoing criminal investigation.
RESPONSE

It is my opinion that CAFV may disclose the identity and presence of a resident to a law-enforcement official under any of the circumstances described above.

FACTS

You relate that CAFV is a private, nonprofit spouse abuse shelter that receives temporary assistance for needy families funds as a portion of its operating budget. You state that the residents at the shelter have been involved in domestic violence disputes and, therefore, are frequently involved with the courts and law-enforcement officials.

APPLICABLE LAW AND DISCUSSION

Section 63.1-209(A) of the Code of Virginia provides that "[t]he records [and] information ... of the Department of Social Services ... concerning social services to or on behalf of individuals shall be confidential information, provided that ... such records [and] information ... may be disclosed to any person having a legitimate interest in accordance with state and federal law and regulation." For purposes of § 63.1-209, the term "social services" includes "domestic violence services." Under state law, a law-enforcement officer charged with serving a criminal or civil warrant or a subpoena, or seeking to investigate a crime in the course of his official duties, has a legitimate interest in locating the person to be served or interviewed, and thus has a legitimate interest in knowing whether such person is present or likely to be present at a spouse abuse shelter. Accordingly, absent some state or federal law restricting disclosure, CAFV personnel may provide law-enforcement officials, upon request, with information reasonably calculated to assist them in locating the specific individual they are seeking. Such information would include whether the individual is or was, or is likely to be, present at the shelter. This authorization would not, however, authorize the shelter to make a wholesale disclosure to law enforcement of the identity of persons located at the shelter but not specifically sought by law enforcement.

You also state that information collected about families receiving temporary assistance for needy families funded services may be protected under the Government Data Collection and Dissemination Practices Act, §§ 2.2-3800 through 2.2-3809. The Act applies to "[r]ecordkeeping agencies of the Commonwealth." CAFV is not an "agency" as that term is defined in § 2.2-3801(6). Additionally, the Supreme Court of Virginia has held that "the Act does not render personal information confidential. Indeed, the Act does not generally prohibit the dissemination of information. Instead, the enactment requires certain procedural steps ... to be taken in the collection, maintenance, use and dissemination of such data." The Act does not prevent the dissemination of information pursuant to a legitimate official request.

CONCLUSION

Accordingly, it is my opinion that CAFV may disclose the identity and presence of a resident to law-enforcement officials under the described circumstances.
Where the term "resident(s)" appears in this opinion, it shall mean former or current resident(s).

2 U.S.C.A. ch. 7, subch. IV, pt. A, §§ 601 to 619 (West Supp. 2000, 2001); see also VA. CODE ANN. § 63.1-315 (Michie Repl. Vol. 1995) (designating Department of Social Services as state agency responsible for coordinating efforts of public and private community groups seeking to assist and provide treatment to victims of spouse abuse); § 63.1-318 (Michie Repl. Vol. 1995) (authorizing Department of Social Services to receive and grant federal funds for services to victims of spouse abuse, subject to rules and regulations of Board of Social Services).

Section 63.1-209(A) (Michie Supp. 2001).


Compare 42 U.S.C.A. § 608(a)(9)(B) (West Supp. 2001). While § 608(a)(9)(B) deals with confidentiality issues, it does not impose any confidentiality requirement on the states. Instead, it provides that, "if" a state establishes a confidentiality policy, such policy may not go so far as to prevent the disclosure of a recipient's current address when sought by law enforcement in the circumstances described in the statute. The scope of the exception provided in § 63.1-209 is broader than the exception required by federal law.


These steps include "[c]ollect[ing], maintain[ing], use[ing], and disseminat[ing] only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency;" "[e]stablish[ing] categories for maintaining personal information to operate in conjunction with confidentiality requirements and access controls;" "[m]aintain[ing] information in the system with accuracy, completeness, timeliness, and pertinence as necessary to ensure fairness in determinations relating to a data subject;" "[m]aintain[ing] a list of all persons or organizations having regular access to personal information in the information system;" "[e]stablish[ing] appropriate safeguards to secure the system from any reasonably foreseeable threat to its security;" and "[t]ak[ing] affirmative action to establish rules of conduct and inform each person involved in the design, development, operation, or maintenance of the system, or the collection or use of any personal information contained therein, about all the requirements of [the Government Data Collection and Dissemination Practices Act], the rules and procedures, including penalties for noncompliance, of the agency designed to assure compliance with such requirements." Section 2.2-3803(A)(1), (3), (4), (6), (8), (9) (LexisNexis Repl. Vol. 2001).


Id. at 449, 297 S.E.2d at 689.
Name Index
The Name Index consists of an alphabetical listing of individuals to whom opinions in this report are rendered. This index will be helpful in locating opinions that are cross-referenced in this report.
# Name Index

<table>
<thead>
<tr>
<th>NAME</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Almand, James F.</td>
<td>161</td>
</tr>
<tr>
<td>Armstrong, Ward L.</td>
<td>346</td>
</tr>
<tr>
<td>Baldwin, Robert N.</td>
<td>117</td>
</tr>
<tr>
<td>Barkley, William G.</td>
<td>197</td>
</tr>
<tr>
<td>Barnett, James E.</td>
<td>43</td>
</tr>
<tr>
<td>Black, Carol W.</td>
<td>182</td>
</tr>
<tr>
<td>Black, Richard H.</td>
<td>34, 64</td>
</tr>
<tr>
<td>Bland, Fenton L. Jr.</td>
<td>79</td>
</tr>
<tr>
<td>Blevins, Harry B.</td>
<td>166, 252, 263</td>
</tr>
<tr>
<td>Bolvin, Tom</td>
<td>25</td>
</tr>
<tr>
<td>Burton, A. Paul</td>
<td>98</td>
</tr>
<tr>
<td>Bush, Michael J.</td>
<td>158</td>
</tr>
<tr>
<td>Byron, Kathy J.</td>
<td>112, 113</td>
</tr>
<tr>
<td>Callahan, Vincent F. Jr.</td>
<td>105</td>
</tr>
<tr>
<td>Campbell, Charles L.</td>
<td>315</td>
</tr>
<tr>
<td>Carraway, Barbara O.</td>
<td>6</td>
</tr>
<tr>
<td>Caudill, H.S.</td>
<td>96</td>
</tr>
<tr>
<td>Collins, Michael M.</td>
<td>302</td>
</tr>
<tr>
<td>Cox, M. Kirkland</td>
<td>57, 247, 330</td>
</tr>
<tr>
<td>Crook, Judy S.</td>
<td>318</td>
</tr>
<tr>
<td>Cunningham, Joel C.</td>
<td>148</td>
</tr>
<tr>
<td>Davenport, William W.</td>
<td>155</td>
</tr>
<tr>
<td>Davis, Larry W.</td>
<td>331</td>
</tr>
<tr>
<td>Deeds, Robert J.</td>
<td>194</td>
</tr>
<tr>
<td>Ergenbright, Gene R.</td>
<td>285, 312</td>
</tr>
<tr>
<td>Fleenor, K. Mike Jr.</td>
<td>342</td>
</tr>
<tr>
<td>Frey, John T.</td>
<td>18, 132</td>
</tr>
<tr>
<td>Fruit, J. Curtis</td>
<td>328</td>
</tr>
<tr>
<td>Garst, Marsha L.</td>
<td>16, 135</td>
</tr>
<tr>
<td>Gear, Thomas D.</td>
<td>188</td>
</tr>
<tr>
<td>Hallman, Ronald S.</td>
<td>85</td>
</tr>
<tr>
<td>Hamilton, Phillip A.</td>
<td>258</td>
</tr>
<tr>
<td>Hargrove, Frank D. Sr.</td>
<td>214</td>
</tr>
<tr>
<td>Heatwole, William D.</td>
<td>32</td>
</tr>
<tr>
<td>Horne, Thomas D.</td>
<td>173</td>
</tr>
</tbody>
</table>
# Name Index (contd.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Howell, William J</td>
<td>288, 338</td>
</tr>
<tr>
<td>Jackson, C.W.</td>
<td>244</td>
</tr>
<tr>
<td>Janis, William R</td>
<td>179</td>
</tr>
<tr>
<td>Jefferson, B. James</td>
<td>91</td>
</tr>
<tr>
<td>Katz, Phyllis C</td>
<td>58</td>
</tr>
<tr>
<td>Keister, W.B.</td>
<td>77</td>
</tr>
<tr>
<td>Kennedy, J. Jack Jr</td>
<td>9, 270</td>
</tr>
<tr>
<td>Kilduff, W. Leslie Jr</td>
<td>38</td>
</tr>
<tr>
<td>Kilgore, Frank</td>
<td>278</td>
</tr>
<tr>
<td>Landes, R. Steven</td>
<td>191</td>
</tr>
<tr>
<td>Leighty, William H</td>
<td>232</td>
</tr>
<tr>
<td>Lewis, J. Dean</td>
<td>22, 120, 124, 127</td>
</tr>
<tr>
<td>Marshall, Robert G</td>
<td>8, 266</td>
</tr>
<tr>
<td>Massengill, W. Gerald</td>
<td>142, 199</td>
</tr>
<tr>
<td>Matthews, W. Forrest Jr</td>
<td>233</td>
</tr>
<tr>
<td>McCarthy, Thomas J. Jr</td>
<td>224</td>
</tr>
<tr>
<td>McDougle, Ryan T</td>
<td>54</td>
</tr>
<tr>
<td>McGhee, William J</td>
<td>3</td>
</tr>
<tr>
<td>McWeeny, Michael P</td>
<td>47</td>
</tr>
<tr>
<td>Melvin, Kenneth R</td>
<td>292</td>
</tr>
<tr>
<td>Morrison, Norman deV.</td>
<td>210</td>
</tr>
<tr>
<td>Mugler, Ross A.</td>
<td>227, 297, 308</td>
</tr>
<tr>
<td>Newhart, John R.</td>
<td>140, 264, 265, 322</td>
</tr>
<tr>
<td>Nixon, Samuel A. Jr</td>
<td>13</td>
</tr>
<tr>
<td>O'Bannon, John M. III</td>
<td>202</td>
</tr>
<tr>
<td>O'Brien, William G.</td>
<td>281</td>
</tr>
<tr>
<td>Pandak, Sharon E.</td>
<td>83</td>
</tr>
<tr>
<td>Parrish, Harry J.</td>
<td>169</td>
</tr>
<tr>
<td>Phillips, Clarence E.</td>
<td>82, 109, 151</td>
</tr>
<tr>
<td>Plum, Kenneth R.</td>
<td>107</td>
</tr>
<tr>
<td>Poston, Charles E.</td>
<td>122</td>
</tr>
<tr>
<td>Rowan, David W.</td>
<td>70</td>
</tr>
<tr>
<td>Rupp, John A.</td>
<td>254</td>
</tr>
<tr>
<td>Rust, Thomas Davis</td>
<td>64</td>
</tr>
<tr>
<td>Saslaw, Richard L.</td>
<td>218</td>
</tr>
</tbody>
</table>
### Name Index (contd.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saunders, Gordon F.</td>
<td>144</td>
</tr>
<tr>
<td>Saxman, Christopher B.</td>
<td>186, 293</td>
</tr>
<tr>
<td>Semonian, Edward</td>
<td>164</td>
</tr>
<tr>
<td>Shelton, William C.</td>
<td>176</td>
</tr>
<tr>
<td>Suit, Terrie L.</td>
<td>30, 273</td>
</tr>
<tr>
<td>Thompson, Henry A. Sr.</td>
<td>67</td>
</tr>
<tr>
<td>Van Yahres, Mitchell</td>
<td>50</td>
</tr>
<tr>
<td>Ward, Molly Joseph</td>
<td>98, 101</td>
</tr>
<tr>
<td>Weckstein, Clifford R.</td>
<td>156</td>
</tr>
<tr>
<td>Whiting, Geraldine M.</td>
<td>306</td>
</tr>
<tr>
<td>Williams, James L.</td>
<td>320</td>
</tr>
<tr>
<td>Wilson, Marilyn L.</td>
<td>230</td>
</tr>
<tr>
<td>Woodrum, Clifton A.</td>
<td>344</td>
</tr>
<tr>
<td>Worthington, Judy L.</td>
<td>62</td>
</tr>
<tr>
<td>Wright, Thomas C. Jr.</td>
<td>138</td>
</tr>
<tr>
<td>Wyatt, Paula N.</td>
<td>242</td>
</tr>
</tbody>
</table>
Subject Index
The Subject Index consists of an alphabetical listing of main and secondary headnotes that are associated with the opinions included in this report. The headnotes are derived primarily from the Titles (topical), Chapters and Articles (descriptive) contained within the *Code of Virginia* that correspond with the particular laws about which opinions have been rendered.
ADMINISTRATION OF GOVERNMENT

Administrative Process Act. Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources .......................................... 202

Attorney General and Department of Law (official opinions of Attorney General) (see infra Department of Law – General Provisions (official opinions of Attorney General)

Boards – Design-Build/Construction Management Review Board. Industrial development authorities may use design-build contracts for construction of “authority facilities” or “facilities,” as defined in Industrial Development and Revenue Bond Act, without having to engage in competitive bidding or involve Design-Build/Construction Management Review Board .......................................... 82

Data Collection & Dissemination. Act does not prevent dissemination of information pursuant to legitimate official request .......................................................... 346

Act does not render personal information confidential; does not generally prohibit dissemination of information. Act requires certain procedural steps to be taken in collection, maintenance, use and dissemination of such data .................................................................................................................. 346

Act prohibits collection by agency of personal information that is secret; permits installation of surveillance cameras and audio monitoring equipment in and on premises of recreation center, provided notices advising of such surveillance are clearly visible .......................................................................................... 3

Collection of data is not secret when signs are clearly visible warning that surveillance cameras and audio monitoring equipment are in operation and collecting data; maintenance of information collected by such system must be pursuant to requirements of Act .......................................................... 3

Constitutional office constitutes “unit of local government,” which is designated as “agency” for purposes of Act. Act’s definition of “agency” includes local constitutional officer ..................................................................................... 6

Disclosure of identity and presence of resident(s) in spouse abuse shelter to law-enforcement officials charged with serving criminal or civil warrant or subpoena, or seeking to investigate crime .......................................................... 3

Legislative history of Act emphasizes concern to protect privacy rights of citizens and to afford means for challenging dissemination of personal data which could work economic harm or damage personal reputation ........................................... 3
ADMINISTRATION OF GOVERNMENT

Data Collection & Dissemination (contd.)
Local constitutional officers are “agencies” under Act ................................................. 6

Principles by which personal information system may be established .................... 3

Principles contained in Act guide state agencies and political subdivisions in collection and maintenance of information ............................................................ 3

Department of Law - General Provisions (official opinions of Attorney General).
Any ambiguity that exists in local ordinance is problem to be rectified by local governing body rather than by interpretation by Attorney General ............ 85, 96

Attorney General declines to comment on action community colleges may take to seek reallocation of Workforce Investment Act funds ......................... 25

Attorney General declines to comment on practicability of devising method by which marriage licenses processed and imaged since 1997 may be changed to comply with statutory requirement preventing disclosure of social security or other control numbers appearing on such licenses ......................... 182

Attorney General declines to interpret provision of Act that does not address question whether retirement community developer, which controls homeowners’ association, may establish budget for association that is not based on fact. Act requires developer to provide to potential buyers disclosure statement reflecting financial status of association. Developer may retain control of association and bill homeowners for association expenses, provided developer retains ownership of majority of development lots ......................... 266

Attorney General declines to render official opinion so as not to interfere with matters of appropriate legislative or judicial consideration, or of purely local concern; limits responses to requests for official opinions to matters that require interpretation of federal or state law, rule or regulation ......................... 266

Attorney General declines to render official opinions when request involves determinations [questions] of fact rather than questions of law .......... 64, 96, 101, ........................................................................................................... 142, 144, 214, 258, 297, 302, 321

Attorney General declines to render official opinions when request requires interpretation of matter reserved to another entity ......................... 308

Attorney General declines to render opinion regarding whether operation of Free Spin machines constitutes illegal gambling ........................................ 144

Attorney General declines to render opinions when request involves matter of purely local concern or procedure ........................................... 85, 96
Attorney General declines to respond in instances when request requires interpretation of local ordinance, [in order] to avoid becoming involved in matters solely of local concern and over which local governing body has control.......................... 85, 96, 101

Attorney General defers to interpretations of law by agency charged with administering law unless [agency] interpretation clearly is wrong........... 186, 293

Attorney General follows policy of responding to official opinion requests only when such requests concern interpretation of federal or state law, rule or regulation. Any ambiguity that exists in local ordinance is problem to be rectified by local governing body rather than by interpretation by Attorney General .................................................. 96

Attorney General limits responses to requests for official opinions to matters that concern interpretation of federal or state law, rule or regulation ........ 25, 85, ............................................................................................................. 182, 233, 266

Attorney General’s opinion-giving function is quasi-judicial one exercised to advance best interests of law and public at large rather than to ease job of state offices and agencies .......................................................... 266

Determination in 1997 opinion that service by sheriff of distress warrant is mandatory is no longer effective ........................................... 321

Duty to issue opinions is one of most significant responsibilities of Attorney General ............................................................................. 266

Interpretation of “bus” and “impractical,” as used in relation to transporting children in child restraint devices, is not appropriate issue for opinion of Attorney General ............................................................................. 214

Legislature is presumed to have [had] knowledge of Attorney General’s interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General’s view .......... 58, 112, 188, 194, 242

1976 opinion determining that BPOL tax laws contain no exemption for salaried professionals, and that such professionals are subject to BPOL tax does not conflict with Department of Taxation guidelines ........................................ 308

No authority for Retirement System to charge Department of Accounts for administrative expenses related to oversight of deferred compensation plan. Retirement System may not recover from participating employees, but may bill participating employers for, expenses related to administration of cash
match plan. No authority for Retirement System to charge and collect administrative fee from participants in optional retirement plan for political appointees or from institutions of higher education. Questions regarding method and source by which Retirement System may recover costs incurred and associated with administration of VoISAP when Fund assets are insufficient, or action Retirement System should take for optional retirement plan for school superintendents should request for general fund appropriation be denied, are not appropriate issues for comment by Attorney General ........................................ 233

Official opinions must be confined to matters of law ......................... 25, 182, 233

Opinion no. 02-074 distinguished from 2001 Op. Va. Att’y Gen. 102 concerning interpretation of § 18.2-308 as it pertains to Department of Conservation and Regulation regulations ......................................................................................... 34

Prior opinions conclude that application of various elements of criminal offense to specific set of facts is function properly reserved to Commonwealth’s attorney, grand jury, and trier of fact, and is not appropriate issue on which to render opinion ........................................................................ 144

Prior opinions of Attorney General concluding that deputies of constitutional officers are themselves officers subject to same requirements and disabilities as principal officer are expressly overruled ......................................................... 54

Question whether locality may impose $500 flat-fee license tax on out-of-state itinerant merchants and peddlers without violating Commerce Clause involves factual determination that is inappropriate for comment by Attorney General ........................................................................................................ 302

Questions regarding whether particular transaction is executed in performance of proper governmental function, and whether resulting benefits inure primarily to public and only incidentally to private interests, are to be determined from factual circumstances in each case rather than by interpretation by the Attorney General ................................................................................................. 96

To extent 1982 opinion and those following it deny property tax exemptions because of organization’s corporate status, they are overruled ............ 331

To extent opinion no. 02-007 conflicts with 2000 opinion, concluding that arrest warrant issued for driving after forfeiture of license for DUI is not sufficient to impound driver’s vehicle, 2000 opinion is overruled ...................... 210

Town may not contribute in-kind services of town employees and may not loan town-owned equipment to local business and civic association in support
ADMINISTRATION OF GOVERNMENT

Department of Law - General Provisions (official opinions of Attorney General) (contd.)

of annual Regatta. No requirement that town obtain and examine governing documents of organizations to which it contributes. Documents of association that is not “public body” are not subject Act’s disclosure requirements. Attorney General declines to comment regarding obligation of town manager to take action in response to citizen complaint regarding alleging improper action by town council or mayor. Authority of town to contribute cash to Central Accomack Little League ................................................................. 70

Whether “bus” is exempt from requirements to transport children in child restraint devices and whether interior design of vehicle or weight and size of child make it “impractical” for child to be placed in child restraint device is factual question ................................................................. 214

Whether empty or loaded shells, which have been or are susceptible of use in machine gun, are in “immediate vicinity” of weapon is determination of fact and is not appropriate issue on which to render opinion ........................................ 142

Whether specific motor vehicle falls within ordinary definitions of “bus” for purposes of vehicles entitled to exemption from child restraint laws is determination of fact rather than one of law, and is not appropriate issue on which to render opinion ................................................................. 214

Department of Planning and Budget. Governor has power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts ............................................................................ 169

Government Data Collection and Dissemination Practices Act (see supra Data Collection & Dissemination)

Governor. Broad power to control spending and sustain constitutional mandate to maintain balanced budget ................................................................. 169

Power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts ................................................ 169

Governor’s Secretaries – Secretary of Commerce and Trade. Virginia Resources Authority is political subdivision created in Commerce and Trade Secretariat for state government organizational purposes. Such inclusion does not alter independent nature of Authority to govern its affairs according to enabling statutes. Board of Directors has exclusive power over personnel issues of Authority, with exception of appointment of Executive Director ............... 281
ADMINISTRATION OF GOVERNMENT

**State Officers and Employees.** Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty ....................................... 58

**Virginia Freedom of Information Act.** Absent request pursuant to Act, commissioner of revenue is not required to disclose names and addresses of businesses licensed within his locality; is not required to create list not already in existence ............................................................................................................ 285

Act’s definition of “public body” does not apply to private corporations not supported wholly or principally by public funds .................................. 70

Circuit court clerk has duty to provide copies of digital databases of all records requested by citizen, unless sealed by court order or otherwise specifically exempted by law; applicability to court, as well as land, records ................. 9

Circuit court clerk’s affirmative duty to provide records applies to both paper and electronic records ..................................................................................... 9

Presumption of openness regarding requests for court records in digital format. Duty of circuit court clerks to furnish copies of records requested by citizens, without distinction between paper and digital formats, provided records are not sealed by court order or otherwise exempt from disclosure by law .......... 9

“Public records” includes court and land records in circuit court clerk’s office ...................................................................................................................... 9

Records’ custodian has discretion in determining whether to release to minor’s parent(s) library records for purpose of identifying overdue books checked out by minor .......................................................................................................... 8

Town may not contribute in-kind services of town employees and may not loan town-owned equipment to local business and civic association in support of annual Regatta. No requirement that town obtain and examine governing documents of organizations to which it contributes. Documents of association that is not “public body” are not subject Act’s disclosure requirements. Attorney General declines to comment regarding obligation of town manager to take action in response to citizen complaint regarding alleging improper action by town council or mayor. Authority of town to contribute cash to Central Accomack Little League .................................................................................... 70

**Virginia Public Procurement Act.** Authority for Department of Corrections to employ prisoners to perform roofing work on buildings located on prison
ADMINISTRATION OF GOVERNMENT

Virginia Public Procurement Act (contd.)

- grounds; no requirement to procure such services under Acts competitive sealed bidding procedures ................................................................. 252

- Court trying felony cases has discretion to establish procedures for choosing and contracting for private court reporting services. Court reporting services associated with criminal litigation proceedings are exempt from Act’s competitive process requirements .................................................. 156

- Industrial development authorities may use design-build contracts for construction of “authority facilities” or “facilities,” as defined in Industrial Development and Revenue Bond Act, without having to engage in competitive bidding or involve Design-Build/Construction Management Review Board ..... 82

- “Living wage” requirement is matter of general social or economic policy that is unrelated to goods or services sought to be procured under Act. Locality has no authority to require contractors to provide living wage to employees as condition to award of public contract ........................................... 13

- Policy of Act that specifications reflect procurement needs of public body and that those needs relate to products or services being procured .................. 13

- To condition award of contract on factors unrelated to goods or services being procured is inconsistent with policy of Act ........................................ 13

ALCOHOLIC BEVERAGE CONTROL ACT

Prohibited Practices: Penalties; Procedural Matters. Disposal by juvenile court of charges of unlawful possession of alcohol by juveniles ......................... 124

- Negative rulings of state courts in cases concerning whether person who has consumed alcohol possesses alcohol, reasoning that person no longer controls substance that has been taken into digestive system ........................................ 16

- Police officer may not arrest, without warrant, underage person for unlawful possession of alcoholic beverages, unless offense is committed in presence of officer within his territorial jurisdiction ........................................ 16

2002 AMENDMENTS TO THE 2000 APPROPRIATION ACT

State Board of Elections. Governor has power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts ..... 169

Virginia Employment Commission. Workforce Investment Act precludes General Assembly from directing Governor to reallocate unobligated WIA funds to community college located within same geographic area from which funds
2002 AMENDMENTS TO THE 2000 APPROPRIATION ACT

Virginia Employment Commission (contd.)
were obtained. Attorney General declines to comment on action community colleges may take to seek reallocation of such funds ........................................ 25

APPROPRIATION ACT

Adjustments and Modifications to Taxes and Fees – Assess Recordation Fee.
Circuit court clerk must collect, beginning May 1, 2002, $10 assessment fee on every deed subject to recordation tax. Fee is collected in jurisdiction where instrument is first recorded. Assessment of $10 fee for recordation of deed of easement, dedication or subdivision depends on clerk’s current treatment of such deeds for state recordation tax purposes .......................................... 18

Compensation Board. Local sheriff is not required to provide more than one deputy sheriff to general district court for courtroom security absent order stating substantial security risk exists in particular case ........................................ 242

2002 APPROPRIATION ACT

Judicial Department – Juvenile and Domestic Relations District Courts. Authority for juvenile and circuit court to require costs of guardian ad litem’s service to be reimbursed by child’s parent(s); no authority to assess costs for services of guardian ad litem against guardian of child ................................................................. 22

Requirement in Act that court order reimbursement of guardian ad litem costs from parent(s) does not include authority to order reimbursement from guardian of child. Court may order reimbursement by parent(s) when appointment of guardian ad litem is required in child abuse or neglect cases ................................. 22

State Board of Elections. Governor has power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts ..... 169

Virginia Employment Commission. Workforce Investment Act precludes General Assembly from directing Governor to reallocate unobligated WIA funds to community college located within same geographic area from which funds were obtained. Attorney General declines to comment on action community colleges may take to seek reallocation of such funds ........................................ 25

BANKING AND FINANCE

Mortgage Lender and Broker Act. Act prohibits mortgage broker and affiliated real estate broker from acting for compensation in same transaction .................. 30

Act prohibits mortgage broker from providing compensated services in same real estate sales transaction in which affiliated real estate broker is providing
Mortgage Lender and Broker Act (contd.)

such services. ‘Partner’ encompasses limited partner in mortgage broker that is organized as limited partnership ................................................................. 30

Act protects borrower by prohibiting mortgage broker from profiting by self-dealing ........................................................................................................... 30

Compensation received by standing trustee for performance of administrative duties associated with Chapter 13 bankruptcy is subject to local business license taxation ............................................................................................................. 292

(See Housing: Uniform Statewide Building Code)

(See Conservation)

Actions - Tort Claims Against the Commonwealth of Virginia. Doctrine of sovereign immunity does not serve as defense for any governmental employee with respect to loss attributable to gross negligence, intentional wrongdoing, or acts performed outside employee’s scope of employment ........................................ 258

Factors to consider in determining whether school board employee is entitled to claim sovereign immunity .............................................................................. 258

School board enjoys absolute immunity for its acts unless abrogated by statute; is entitled to sovereign immunity for failure to hire certified athletic trainer for its athletic programs ..................................................................................... 258

School division coaches and other school personnel may render first aid to students when necessary. Unless such persons are certified athletic trainers, they may not employ physical modalities or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. Certified athletic trainers are responsible for actions of noncertified individuals acting under their supervision and direction; must ensure that such individuals do not perform functions requiring professional judgment or discretion of certified athletic trainers. School board that fails to hire certified athletic trainer is entitled to absolute sovereign immunity. Absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire certified athletic trainer .................................................................................................... 258

Attachments and Bail in Civil Cases. Advanced legal fees remain property of judgment debtor. Judgment creditor may garnish unearned advance fees paid
### Civil Remedies and Procedure

#### Attachments and Bail in Civil Cases (contd.)

By judgment debtor to attorney. Potential judgment creditor may attach such funds ........................................................................................................................................... 32

#### Evidence

Pharmacist, prior to filling prescription, may obtain fingerprint from customer as proof of identification, provided pharmacist returns or destroys print within 21 days of transaction’s completion or termination; may provide to law-enforcement officials fingerprint of any customer suspected of prescription fraud ........................................................................................................................................... 342

Physician-patient privilege is expressly confined to civil proceedings; does not exist in criminal prosecutions ........................................................................................................................................... 342

#### Executions and Other Means of Recovery – Enforcement Generally

Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of “priority” as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale ........................................................................................................................................... 321

#### Garnishment

Advanced legal fees remain property of judgment debtor. Judgment creditor may garnish unearned advance fees paid by judgment debtor to attorney. Potential judgment creditor may attach such funds ........................................................................................................................................... 32

#### Judgments and Decrees Generally

Order of remittance of bond forfeiture entered upon timely appearance of defendant does not serve as satisfaction of judgment in general district court; operates as satisfaction of judgment docketed in circuit court ........................................................................................................................................... 148

#### Receivers, General and Special

Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function ........................................................................................................................................... 47

### Clean Air Act

Required use of ASM 50-15 testing equipment for tailpipe exhaust emissions tests performed under Federal Clean Air Act; authorized use of other equipment or software for nontailpipe tests or checks that are part of federal motor vehicle inspection and maintenance program. Virginia’s enhanced emissions inspections program is limited to testing procedures necessary to comply with Clean Air Act, including nontailpipe exhaust tests. Exclusion of tailpipe exhaust tests no longer required by Act ........................................................................................................................................... 217
CLERKS

(See also COURTS OF RECORD: Clerks, Clerks' Offices and Records)

Ability to refuse to record instrument that meets statutory requirements for recordation is limited. Presence of social security number on instrument is not sufficient reason for refusing to record instrument ................................................... 270

Absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at judge’s direction ........................................ 278

Absolute immunity when acting in obedience of judicial order or under court’s direction .............................................................................................................. 270

Assuming document meets statutory parameters, clerk may not inquire as to its legal sufficiency or add requirements for recording ........................................ 270

Circuit court clerk, as employer, is bound by confidentiality provisions of Social Security Act with respect to social security numbers of his employees .............. 270

Circuit court clerk is responsible for integrity of all records maintained by clerk’s office ............................................................................................................. 62

Circuit court clerk may be held personally liable for damages resulting from omission or neglect in performance of duties imposed on him by law ........................... 270

Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function ......................................................... 47

Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability ................................................................. 270

Circuit court clerk must collect, beginning May 1, 2002, $10 assessment fee on every deed subject to recordation tax. Fee is collected in jurisdiction where instrument is first recorded. Assessment of $10 fee for recordation of deed of easement, dedication or subdivision depends on clerk’s current treatment of such deeds for state recordation tax purposes ................................................. 18

Circuit court clerk should base recordation taxes for Security Instrument on original acquisition balance as defined in instrument and assess separate fees for recording Assignment Agreement containing two instruments of equal dignity that serve independent purposes at law ................................................................. 132

Circuit court clerk who records deed of trust containing grantor’s social security number is not bound by confidentiality provisions of federal law when recording such instrument .................................................................................... 270
<table>
<thead>
<tr>
<th>CLERKS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circuit court clerk who removes social security number upon recordation of instrument does so at risk of liability</td>
<td>270</td>
</tr>
<tr>
<td>Circuit court clerk’s issuance of order authorizing minister to perform marriages, upon production of proof of ordination or licensure, is discretionary. No requirement that minister appear personally before clerk, although clerk may compel such appearance as condition for issuing order</td>
<td>164</td>
</tr>
<tr>
<td>Clerk is custodian of records maintained on automated case management system, whether stored on or off premises. Access to such system lies within sound discretion of clerk</td>
<td>62</td>
</tr>
<tr>
<td>Clerk may establish case management system that satisfies statutory purpose for maintaining records, in absence of legislative mandate specifying particular method</td>
<td>62</td>
</tr>
<tr>
<td>Clerk must determine if deed submitted for recordation is subject to state recordation tax for purposes of assessing $10 assessment fee</td>
<td>18</td>
</tr>
<tr>
<td>Clerks have no inherent powers; scope of powers must be determined by reference to applicable statutes</td>
<td>62</td>
</tr>
<tr>
<td>Clerk’s office is central repository of land records established in public domain to protect those whose interests may be affected by those writings, and duties of clerk to record and index writings run from him to them</td>
<td>270</td>
</tr>
<tr>
<td>Considerable deference should be paid to decisions made by clerk, unless such decisions are contrary to law</td>
<td>62</td>
</tr>
<tr>
<td>Doctrine of respondeat superior applies to clerk of court for acts of deputy</td>
<td>278</td>
</tr>
<tr>
<td>Grant of remote access to clerk’s records maintained in electronic format does not imply custody or control over such records</td>
<td>62</td>
</tr>
<tr>
<td>Liability of clerk is predicated on proof of damages resulting from alteration or modification of document presented for recordation</td>
<td>270</td>
</tr>
<tr>
<td>Malfeasance of clerk’s ministerial duty is not entitled to protection of sovereign immunity</td>
<td>270</td>
</tr>
<tr>
<td>Notary public commissioned by State of Maryland is not authorized by that state to notarize documents in Commonwealth for recordation in Virginia circuit court clerk’s office</td>
<td>230</td>
</tr>
<tr>
<td>Order of remittance of bond forfeiture entered upon timely appearance of defendant does not serve as satisfaction of judgment in general district court; operates as satisfaction of judgment docketed in circuit court</td>
<td>148</td>
</tr>
</tbody>
</table>
CLERKS

Presumption of openness regarding requests for court records in digital format. Duty of circuit court clerks to furnish copies of records requested by citizens, without distinction between paper and digital formats, provided records are not sealed by court order or otherwise exempt from disclosure by law ........................................... 9

Processing fee authorized by ordinance to be collected by clerk on convicted individuals admitted into county, city, or regional jails is reserved solely for use by local sheriff's office, even though county or city may participate in regional jail ............................................................................................................................ 83

Recordation of deeds by circuit court clerk is considered ministerial act. Accurate and permanent retention of all such writings is basic function of clerk ....................... 270

State recordation tax should be collected on deeds of trust where federal government is guarantor or beneficiary ............................................................ 328

Statutory requirement preventing disclosure of social security or other control numbers appearing on marriage licenses applies retroactively to licenses filed on and after July 1, 1997. Attorney General declines to comment on practicability of devising method by which marriage licenses processed and imaged since 1997 may be changed to comply with nondisclosure requirements ...................... 182

COALFIELD ECONOMIC DEVELOPMENT AUTHORITY, VIRGINIA
(See COUNTIES, CITIES AND TOWNS: Virginia Coalfield Economic Development Authority)

COMMISSIONERS OF ACCOUNTS
(See generally FIDUCIARIES GENERALLY: Inventories and Accounts)

COMMISSIONERS OF THE REVENUE

Absent request pursuant to Act, commissioner of revenue is not required to disclose names and addresses of businesses licensed within locality of commissioner; is not required to create list not already in existence ............................................ 285

Authority for local governing body to increase minimum acreage for land classified for open-space use for purpose of special land use taxation; no statutory authority for such increase for land classified for agricultural, horticultural or forest use .............................................................................................................. 315

Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may be tax exempt. Determination depends on question of fact reserved for local commissioner of revenue or other appropriate taxing official ............................................................... 64

Commissioner is authorized to release names, addresses, and telephone numbers of businesses licensed within his locality ......................................................... 285
Commissioner is responsible for making factual determinations in BPOL taxation matters; factors to consider in determining whether “visit” becomes “definite place of business” .......................................................... 297

Commissioner may release names and addresses of businesses licensed within his locality for purposes of solicitation. Business is considered trading under assumed or fictitious name when assumed or fictitious name certificate is filed in appropriate clerk’s office .......................................................... 285

Constitutional office constitutes “unit of local government,” which is designated as “agency” for purposes of Act. Act’s definition of “agency” includes local constitutional officer ........................................................................................................ 6

Department of Taxation may add language in guideline definition of “contractor” to clarify and explain which businesses are included in “contractor” classification for purpose of determining maximum BPOL tax rate, provided language is consistent with license tax laws .......................................................... 293

Determination whether property is used exclusively for charitable, religious or educational purposes is factual matter reserved for commissioner of revenue ...... 64

Determination whether property of Christian Aid Mission may be classified as tax exempt rests within judgment of commissioner of revenue, after careful consideration of attendant facts. Unused and undeveloped parcels are subject to real estate taxation while they remain as such. Any portion of such land used by other entities may be exempt if activities of using entities are charitable, religious or educational. Rent paid by using entity considered source of revenue or profit to Mission is taxable .................................................................. 331

Locality that adopts ordinance to enforce payment of local motor vehicle license fee must issue some form of license upon payment of fee; may prescribe form of license to be displayed on vehicle. Refusal of DMV Commissioner, per agreement with local treasurer or director of finance, to issue or renew vehicle registration for individual whose local license fee is unpaid ........................................ 227

Meaning of “religious association” for purpose of exempting property of Young Life from taxation by classification. Commissioner of revenue, or other local taxing official, is responsible for determining whether property owned by Young Life qualifies for tax exemption ........................................................................ 338

No conflict between statutory and regulatory definitions of “definite place of business” for purposes of administering BPOL tax. Determination whether business activity at particular location is sufficient for it to become definite place of business, rather than visit, is question of fact for local taxing official. Consistent administration of local tax assessments. Criteria for establishing definite place
of business should be same for taxing jurisdictions located in or outside Commonwealth. Application of internal and external consistency tests for purposes of avoiding double taxation and fairly apportioning BPOL tax assessment .............. 297

Parcel of real estate remaining after division of property, resulting in two or more different owners, does not have to be reassessed immediately during first year of biennial real estate assessment cycle; must be reassessed as of January 1 of second year of biennial assessment cycle, taking into consideration value of land as divided. Authority for board of equalization to hear and consider taxpayer complaints in second year of biennial assessment .................................................. 312

Procedure for revalidating split-off land assessed and taxed under land use assessment program .................................................. 318

Reliance on statutory and regulatory definitions of “definite place of business” for purposes of administering local BPOL taxes .................................................. 297

Responsibility for determining whether taxpayer has made material misstatement of facts in revalidation application or that material change in facts has occurred ........................................................................................................ 318

Specific statutes requiring imposition of BPOL tax on gross receipts of licensed employees who are shareholders of professional corporation and members of professional limited liability company supersede general business license tax requirements for current and preceding three tax years. Other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation. Imposition of video programming excise tax in lieu of, and exemption of video programming activity from, BPOL tax. No conflict between Department of Taxation guidelines, interpreting BPOL tax laws as authorizing localities to require separate license from salaried professionals, and 1976 opinion, concluding that salaried professions are not exempt from BPOL taxation. Authority to issue advisory opinions relating to situs and apportionment of gross receipts attributable to employees located in branch offices is reserved to Tax Commissioner ...... 308

To extent confidential tax information maintained by commissioner of revenue is necessary for treasurer to fulfill his duty to collect business, professional and occupational license taxes, dissemination to him or his employees of such information is allowable .................................................. 306

Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable .................. 306
COMMISSIONERS OF THE REVENUE

Whether organization is required to secure local business license is determination of fact that is responsibility of commissioner .......................................................... 293

COMMISSIONS, BOARDS AND INSTITUTIONS

Department of Criminal Justice Services. Commissioner of accounts is not "criminal justice agency" entitled to access criminal history records of delinquent fiduciaries through Virginia Criminal Information Network. Circuit court may release such records to commissioner pursuant to court order or rule .......... 173

COMMONWEALTH OF VIRGINIA FEDERAL HIGHWAY REIMBURSEMENT ANTICIPATION NOTES ACT OF 2000
(See HIGHWAYS, BRIDGES AND FERRIES: Ferries, Bridges and Turnpikes – State Revenue Bond Act)

COMMONWEALTH'S ATTORNEYS

Attorney General declines to render opinion regarding whether operation of Free Spin machines constitutes illegal gambling .................................................. 144

Law-enforcement agencies are not required to enter into Virginia Criminal Information Network information contained in indictments and capiases ordered sealed by court prior to arrest of individual named in such indictments and capiases ...... 155

Law-enforcement officer conducting lawful stop to investigate alleged criminal activity may not arrest for obstruction of justice suspect who refuses to identify himself to officer. Depending on circumstances, suspect may be detained for purpose of determining his identity ................................................................. 135

Pharmacist, prior to filling prescription, may obtain fingerprint from customer as proof of identification, provided pharmacist returns or destroys print within 21 days of transaction's completion or termination; may provide to law-enforcement officials fingerprint of any customer suspected of prescription fraud ................. 342

Police officer may not arrest, without warrant, underage person for unlawful possession of alcoholic beverages, unless offense is committed in presence of officer within his territorial jurisdiction ................................................. 16

Statute governing admissibility into evidence at trial of written results of hospital-taken blood alcohol tests is procedural. Commonwealth may introduce such test results into evidence at trial conducted after effective date of statute, even though motor vehicle accident giving rise to charge of involuntary manslaughter as result of driving while intoxicated occurred before effective date of statute ...... 158
CONSERVATION

Activities Administered by the Department of Conservation and Recreation.
Department has no authority to issue regulation prohibiting, within state parks, carrying of concealed handguns by valid permit holders .................. 34

Chesapeake Bay Preservation Act. Amendments to Chesapeake Bay Preservation Area Designation and Management Regulations, limiting encroachment upon 100-foot resource protection area for development purposes, but allowing encroachment for agricultural and silvicultural activities, do not violate Equal Protection Clause ................................................................. 38

Virginia Waste Management Act. Responsibility for governance of biosolids activities within Commonwealth resides with Department of Health ............... 67

State occupies field of sewage sludge disposal, treatment and management; state program regulating biosolids use preempts local ordinance requiring applicant to obtain conditional use permit before applying or storing biosolids in locality ................................................................. 67

CONSTITUTION OF THE UNITED STATES

Amendment I. Access to court records is preserved at common law and is subject to applicable statutes and other constitutional provisions .................. 9

Cases permitting localities to impose reasonable time restrictions on political signs. Cases defining date within which political signs may be displayed have been struck down; other cases have upheld restrictions on total time for display of temporary signs that made no specific reference to election dates .... 43

Circumstances under which press and public can be barred from criminal trial are limited; state’s justification in denying access must be weighty one .......... 9

Consideration of aesthetics, public safety concerns, and nature and character of zoning classification in determining constitutionality of local ordinance limiting time period within which political signs may be displayed on private property, before and after primary or general election ........................................ 43

Denial of access to press and general public from testimony by victims under age 18 regarding sexual offenses must be necessitated by compelling governmental interest and narrowly tailored to serve that interest .................. 9

Exclusions from criminal proceedings are not unconstitutional; must meet compelling governmental interests and narrow tailoring tests to be sustained........ 9

 Freedoms of speech and press are fundamental rights protected by due process clause of Fourteenth Amendment ........................................... 9
CONSTITUTION OF THE UNITED STATES

Amendment I (contd.)
Guarantees qualified right of access to criminal trials; right of access to such trials is not absolute ................................................................. 9

Presumption of openness inheres in very nature of criminal trial under our system of justice ................................................................. 9

Protects explicit, guaranteed rights to speak and publish concerning what takes place at trial; such right would lose meaning if access to observe trial could be forced arbitrarily ............................................................. 9

Purpose of Amendment is to protect free discussion of governmental affairs. Speech concerning public affairs is more than self-expression; it is essence of self-government .................................................. 43

Regulation of political signs is regulation of speech protected by Constitution ...... 43

Right to inspect and copy public records and documents, including judicial records, is of common law origin ......................................................... 9

Singling out political speech for regulation is not per se unconstitutional ....... 43

Amendment IV. Constraints of Fourth Amendment apply only to government or state action; do not apply to searches or seizures undertaken by private individuals ................................................................. 342

Fingerprinting represents much less serious intrusion upon personal security than other types of searches and detentions ........................................ 342

Amendment V (Due Process Clause). Due process is satisfied if revocation hearing is conducted within reasonable amount of time after defendant is taken into custody under capias and show cause order ....................... 161

Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant .......... 161

Amendment VI (right to speedy trial). "Fundamental fairness" requires that warrant be executed with reasonable dispatch and revocation hearing be held within reasonable time. Whether defendant is prejudiced by delay in executing warrant, turns on facts of specific case ................................................................. 161

Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant .......... 161
CONSTITUTION OF THE UNITED STATES

Amendment XIV. Freedoms of speech and press are fundamental rights protected by due process clause ........................................................................................................................ 9

Guarantees qualified right of access to criminal trials; right of access to such trials is not absolute ........................................................................................................ 9

Incorporation process makes First and Sixth Amendments applicable to state action through Fourteenth Amendment ........................................................................ 9

Amendment XIV (Due Process Clause). Due process is satisfied if revocation hearing is conducted within reasonable amount of time after defendant is taken into custody under capias and show cause order ....................................... 161

Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant .................. 161

Amendment XIV (Equal Protection Clause). Classification having some reasonable basis does not offend against clause merely because it is not made with mathematical nicety or because in practice it results in some inequality; party challenging classification carries burden of showing that it is not reasonable, but is essentially arbitrary ............................................................................... 38

Does not require that government refrain from making classifications ........... 38

Does not require things which are different in fact or opinion to be treated in law as though they are same ................................................................. 38

Intended as restriction on state legislative action inconsistent with elemental constitutional premises ............................................................................................ 38

Statutory classification that neither employs inherently suspect distinctions nor burdens exercise of fundamental constitutional right will be upheld if classification is rationally related to legitimate state interest .................. 38

Article I (Commerce Clause). Classification of itinerant and fixed merchants for purposes of analyzing Commerce Clause implications ........................................... 302

Clause construed as restraint on state and local power ........................................ 302

Discriminatory tax may be upheld if it advances legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives .... 302

Flat tax analysis .................................................................................................. 302

Four-pronged test to assess validity of local tax under Commerce Clause: Tax must be (1) applied to activity with substantial nexus with taxing authority,
CONSTITUTION OF THE UNITED STATES

Article I (Commerce Clause) (contd.)
(2) fairly apportioned, (3) nondiscriminatory to interstate commerce, and
(4) fairly related to services provided by state or locality ........................................ 302

Question whether locality may impose $500 flat-fee license tax on out-of-state itinerant merchants and peddlers without violating Commerce Clause involves factual determination that is inappropriate for comment by Attorney General .............................................................. 302

Substantial nexus test .......................................................................................... 302

Commerce Clause (see also supra Article I)

Commerce Clause. No constitutional barrier to double taxation of property that has acquired taxable situs in more than one state ................................................. 330

Constitutional rights. Where there is no deprivation of individual’s constitutional rights, lawful restraint in compliance with procedural statute that is purely directory in nature is permissible ............................................................................ 155

Due process (see supra Amendments V, XIV (Due Process Clause))

Equal Protection Clause (see supra Amendment XIV)

Free speech (see supra Amendment I)

Speedy trial (see supra Amendment VI (right to speedy trial))

CONSTITUTION OF VIRGINIA

Bill of Rights. Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function .................................. 47

Court trying felony cases has discretion to establish procedures for choosing and contracting for private court reporting services. Court reporting services associated with criminal litigation proceedings are exempt from competitive process requirements of Virginia Public Procurement Act ........................................ 156

Fairfax County School Board has no authority to add sexual orientation as category in its nondiscrimination policy, absent enabling legislation .............. 105

Legislator’s employment by VMI Foundation, Inc., as major gifts officer, does not constitute impermissible conflict of interest. Legislator is not restricted in his ability to participate in transactions of the General Assembly affecting Virginia Military Institute as part of group of educational institutions .......... 179
CONSTITUTION OF VIRGINIA

Bill of Rights (due process). Due process clause protects substantive property interests that may ripen into vested rights .......................................................... 182

Retroactive application of statute impairing substantive right violates due process and is unconstitutional ................................................................. 182

Statutory requirement preventing disclosure of social security or other control numbers appearing on marriage licenses applies retroactively to licenses filed on and after July 1, 1997. Attorney General declines to comment on practicability of devising method by which marriage licenses processed and imaged since 1997 may be changed to comply with nondisclosure requirements ....... 182

Bill of Rights (laws should not be suspended). Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources ............ 202

Governor’s suspension of state law during declaration of emergency must last only as long as absolutely necessary and may be suspended only in area affected by emergency. Court is final arbitrator of how balance is struck between individual rights and abridgement of those rights in times of emergency, disaster or war ................................................................. 202

Bill of Rights (taking of private property). Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources ............ 202

Bill of Rights (uniformity of government). General Assembly must enact legislation enabling Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation or Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation ................................................................. 107

Constitutional provisions are self-executing, mandatory or directory ............... 50

Constitutional rights. Where there is no deprivation of individual’s constitutional rights, lawful restraint in compliance with procedural statute that is purely directory in nature is permissible ................................................................. 155

Division of Powers. Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function ......................... 47
CONSTITUTION OF VIRGINIA

PAGE

Division of Powers (contd.)
Courts shall not assume legislative functions, unless legislative branch, without improperly breaching separation of powers, expressly delegates such authority .......................................................... 47

Issues involving separation of powers are not absolute ......................... 47

Education. Transference of authority for teacher licensure from Board of Education to independent licensure board is inconsistent with constitutional mandate charging Board with general supervision of Commonwealth’s school system ............................................................................... 50

Executive (Attorney General). Official opinions of Attorney General must be confined to matters of law .................................................. 25

Workforce Investment Act precludes General Assembly from directing Governor to reallocate unobligated WIA funds to community college located within same geographic area from which funds were obtained. Attorney General declines to comment on action community colleges may take to seek reallocation of such funds .......................................................... 25

Executive (executive and administrative powers). Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources ...... 202

Franchise and Officers. No constitutional prohibition against member of House of Delegates serving as temporary assistant Commonwealth’s attorney when General Assembly is not in session .................................................. 54

Franchise and Officers (qualifications to hold elective office). Legislator’s employment by VMI Foundation, Inc., as major gifts officer, does not constitute impermissible conflict of interest. Legislator is not restricted in his ability to participate in transactions of the General Assembly affecting Virginia Military Institute as part of group of educational institutions .......................... 179

Judiciary. Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function ........................................ 47

Courts shall not assume legislative functions, unless legislative branch, without improperly breaching separation of powers, expressly delegates such authority .......................................................... 47
CONSTITUTION OF VIRGINIA

Judiciary (contd.)
Judicial branch may not expend unappropriated funds; has broad discretion to spend money for public purposes, once appropriated by legislature ............... 47

Jurisdiction of courts in Commonwealth is granted by statute or Constitution; jurisdiction granted by statute may be modified by legislature ......................... 161

Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant .................. 161

Legislature. Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function ........................................ 47

Constitutional prohibition against special legislation does not prohibit classifications that are not purely arbitrary. Classification must be natural, reasonable, and appropriate to occasion. There must be some such difference in situation of subjects of different classes as to reasonably justify some variety of rule in respect thereto ................................................................. 57

Courts shall not assume legislative functions, unless legislative branch, without improperly breaching separation of powers, expressly delegates such authority ........................................................................................................ 47

Law may apply to small class of persons, or single locality, without being prohibited Constitution if it applies to all parts of Commonwealth where similar conditions exist ............................................................................ 57

No constitutional prohibition against member of House of Delegates serving as temporary assistant Commonwealth’s attorney when General Assembly is not in session ............................................................................. 54

Prohibition against holding multiple offices does not restrict ability of assistants to principal officer to hold office ................................................................. 54

Prohibitions against multiple officeholding applicable to constitutional officers do not apply to their assistants ........................................................... 54

Proposed amendment requesting increase in appropriation for secure confinement does not constitute special legislation and favors no specific organization that provides enhanced faith-based services to inmates or is controlled by church or sectarian society ................................................................. 57

2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and
CONSTITUTION OF VIRGINIA

Legislature (contd.)

that tangible personal property of association shall be entitled to exemption
from personal property tax on household goods is not declaratory of law
existing prior to July 1, 2002, effective date of legislation, and is not retroactive
in its application ................................................................................................ 273

Legislature (appropriations to religious or charitable bodies). Town may not
contribute in-kind services of town employees and may not loan town-owned
equipment to local business and civic association in support of annual Regatta.
No requirement that town obtain and examine governing documents of organi-
izations to which it contributes. Documents of association that is not “public
body” are not subject Act’s disclosure requirements. Attorney General
decides to comment regarding obligation of town manager to take action in
response to citizen complaint regarding alleging improper action by town
council or mayor. Authority of town to contribute cash to Central Accomack
Little League ........................................................................................................ 70

Legislature (effective date of laws). Statutory requirement preventing disclosure
of social security or other control numbers appearing on marriage licenses
applies retroactively to licenses filed on and after July 1, 1997. Attorney General
decides to comment on practicability of devising method by which marriage
licenses processed and imaged since 1997 may be changed to comply with
nondisclosure requirements .............................................................................. 182

Legislature (qualifications of senators and delegates). Legislator’s employment
by VMI Foundation, Inc., as major gifts officer, does not constitute imper-
missible conflict of interest. Legislator is not restricted in his ability to partici-
pate in transactions of the General Assembly affecting Virginia Military Insti-
tute as part of group of educational institutions ............................................... 179

Legislature, within constitutional limits, is judge of how its own appropriations
shall be applied .................................................................................................. 47

Local Government. Circuit court clerk may not accept and hold equity interest
in Virginia stock corporation operated by commissioner of accounts, subject
to direction of court, when transfer is not part of case or controversy properly
before court, without improperly assuming legislative function ................. 47

No constitutional prohibition against member of House of Delegates serving
as temporary assistant Commonwealth’s attorney when General Assembly is
not in session ..................................................................................................... 54

Prohibition against holding multiple offices does not restrict ability of assis-
tants to principal officer to hold office ............................................................. 54
Local Government (contd.)

Prohibition against holding multiple public offices is limited to persons who hold more than one of various offices expressly mentioned. Proscription against multiple public officeholding does not extend beyond officeholders described or referenced therein ................................................................. 54

Prohibitions against multiple officeholding applicable to constitutional officers do not also apply to their assistants ................................................................. 54

Local Government (county and city officers). Actions of sheriff’s office regarding disposal of personal property removed from residential premises pursuant to unlawful detainer or ejectment ................................................................. 264

Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability ................................................................. 270

Clerk is custodian of records maintained on automated case management system, whether stored on or off premises. Access to such system lies within sound discretion of clerk ................................................................. 62

Constitutional office constitutes “unit of local government,” which is designated as “agency” for purposes of Act. Act’s definition of “agency” includes local constitutional officer ................................................................. 6

Constitutional officer is independent of control of local governing body and, except as abrogated by statute, retains complete discretion in day-to-day operations of office, personnel matters, and manner in which duties of office are performed. Independence derives from constitutional status of office and popular election of individual filling office ................................................................. 58

Constitutional officers are independent of their respective localities’ management and control ................................................................. 58

County has no authority unilaterally to place constitutional officer on leave of absence ................................................................. 58

E-911 personnel may access criminal justice information generated by VCIN/NCIC terminals per statutorily authorized agreement with local sheriff’s office, subject to requirements of State Police. Absent specific statutory authorization, sheriff may not enter into agreement binding his successors in office ...... 151

Establishment and maintenance of working hours of constitutional officers is direct responsibility of officers themselves, subject to any controlling statute dealing directly with matter ................................................................. 58
Local Government (county and city officers) (contd.)
Local governing bodies have no authority to supervise or intervene in management and control of constitutional officer's duties .......................................................... 58

Powers and duties of constitutional officers are prescribed by statute, except as limited by law; such officers are free to discharge prescribed powers and duties in manner deemed appropriate .................................................. 151

Responsibility of Colonial Heights police department to transport arrestee to regional jail. Jail superintendent has responsibility to convey prisoners to and from court. Sheriff maintains control of prisoners awaiting further criminal proceedings at courthouse; is responsible for returning them to jail superintendent for transport to regional jail at conclusion of day's hearings. Any prisoner remaining for further court proceedings within same day should be kept in courthouse holding cell until conclusion of proceedings and released to jail superintendent for transport to regional jail. City council may adopt ordinance requiring sheriff to perform extra transport duties and compensate sheriff accordingly ........................................................................................................ 247

Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of "priority" as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale ................................................................................................... 321

Sheriff is not required to remain for screening of individual transported to medical facility for evaluation and treatment under temporary detention order unless order requires transport of individual to another facility to obtain emergency medical evaluation or treatment prior to placement. Sheriff maintains custody of individual until individual is delivered to temporary detention facility ........................................................................................................ 194

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty .......................................................... 58

While powers and duties of constitutional officer are those prescribed by statute, except as limited by law, constitutional officer is free to discharge his prescribed powers and duties in manner he deems appropriate .................. 6
CONSTITUTION OF VIRGINIA

Local Government (debt). Amended ordinance establishing Elizabeth Lake Estates Service District does not specify Elizabeth Lake Estates Civic Association as entity to develop plan for services to be rendered in service district, receive funds, or provide services; provides for tax levy to be set annually as part of budget process with other tax rates. Amended ordinance does not create long-term unconditional debt obligation, in violation of Constitution, and does not delegate legislative authority of city council .................................................. 96

Long-term contract for services is permissible only if payment is required as services are performed ........................................................................................................... 101

Ordinance relating to expenditure of tax revenue by Elizabeth Lake Estates Civic Association is inconsistent with constitutional debt limitations, contrary to state laws governing service districts, and unenforceable ......................... 101

Requirement in ordinance that service district tax revenues be turned over to Elizabeth Lake Estates Civic Association creates debt obligation ..................... 101

Revenue-sharing agreement between localities creates debt obligation ........... 101

Local Government (multiple offices). Legislator’s employment by VMI Foundation, Inc., as major gifts officer, does not constitute impermissible conflict of interest. Legislator is not restricted in his ability to participate in transactions of the General Assembly affecting Virginia Military Institute as part of group of educational institutions ........................................................................................................... 179

Taxation and Finance. No constitutional barrier to double taxation of property that has acquired taxable situs in more than one state ................................................................. 330

Taxation and Finance (exempt property). Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may be tax exempt. Determination depends on question of fact reserved for local commissioner of revenue or other appropriate taxing official .................................................................................................................. 64

Determination whether property of Christian Aid Mission may be classified as tax exempt rests within judgment of commissioner of revenue, after careful consideration of attendant facts. Unused and undeveloped parcels are subject to real estate taxation while they remain as such. Any portion of such land used by other entities may be exempt if activities of using entities are charitable, religious or educational. Rent paid by using entity considered source of revenue or profit to Mission is taxable ................................................................. 331

Meaning of “religious association” for purpose of exempting property of Young Life from taxation by classification. Commissioner of revenue, or other
Constitution of Virginia

Taxation and Finance (exempt property) (contd.)

Local taxing official, is responsible for determining whether property owned by Young Life qualifies for tax exemption .......................................................... 338

Constitutional Officers

Freedom to discharge prescribed powers and duties in manner deemed appropriate, except as limited by law .......................................................... 194

Corporations

Professional Corporations. Specific statutes requiring imposition of BPOL tax on gross receipts of licensed employees who are shareholders of professional corporation and members of professional limited liability company supersede general business license tax requirements for current and preceding three tax years. Other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation. Imposition of video programming excise tax in lieu of, and exemption of video programming activity from, BPOL tax. No conflict between Department of Taxation guidelines, interpreting BPOL tax laws as authorizing localities to require separate license from salaried professionals, and 1976 opinion, concluding that salaried professions are not exempt from BPOL taxation. Authority to issue advisory opinions relating to situs and apportionment of gross receipts attributable to employees located in branch offices is reserved to Tax Commissioner ............................................ 308

Professional Limited Liability Company Act. Specific statutes requiring imposition of BPOL tax on gross receipts of licensed employees who are shareholders of professional corporation and members of professional limited liability company supersede general business license tax requirements for current and preceding three tax years. Other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation. Imposition of video programming excise tax in lieu of, and exemption of video programming activity from, BPOL tax. No conflict between Department of Taxation guidelines, interpreting BPOL tax laws as authorizing localities to require separate license from salaried professionals, and 1976 opinion, concluding that salaried professions are not exempt from BPOL taxation. Authority to issue advisory opinions relating to situs and apportionment of gross receipts attributable to employees located in branch offices is reserved to Tax Commissioner ............................................ 308

Virginia Nonstock Corporation Act. Hospital authority, organized as political subdivision, may sell its assets to for-profit corporation following dissolution of authority .......................................................... 79
COUNTIES, CITIES AND TOWNS

Board for Contractors Regulations do not supplant locality’s ability, under its general police powers, to require licensed plumbers to install backflow prevention devices when such requirement is related directly to protection of locality’s water supply system. .................................................................................................................. 254

Budgets, Audits and Reports. Budgets adopted by local governing bodies are for planning and informative purposes. .................................................................................................................. 70

Northern Neck Regional Jail Board has no independent authority to pay employee bonuses; has authority to request localities participating in regional jail to fund employee bonuses. Participating localities must adopt ordinances authorizing such bonuses. .................................................................................................................. 244

Town may not contribute in-kind services of town employees and may not loan town-owned equipment to local business and civic association in support of annual Regatta. No requirement that town obtain and examine governing documents of organizations to which it contributes. Documents of association that is not “public body” are not subject Act’s disclosure requirements. Attorney General declines to comment regarding obligation of town manager to take action in response to citizen complaint regarding alleging improper action by town council or mayor. Authority of town to contribute cash to Central Accomack Little League. .................................................................................................................. 70

Certain Local Government Officers. Northern Neck Regional Jail Board has no independent authority to pay employee bonuses; has authority to request localities participating in regional jail to fund employee bonuses. Participating localities must adopt ordinances authorizing such bonuses. .................................................................................................................. 244

Certain Local Government Officers – Bonds. Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability. .................................................................................................................. 270

County Executive Form of Government. Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may be tax exempt. Determination depends on question of fact reserved for local commissioner of revenue or other appropriate taxing official. .................................................................................................................. 64

County government. Arm of state; agency through which state performs its functions of government. .................................................................................................................. 105

County government is arm of State. .................................................................................................................. 83

County Manager Form of Government. Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may be tax exempt. Determination depends on question of
Counties, Cities and Towns

County Manager Form of Government (contd.)

Fact reserved for local commissioner of revenue or other appropriate taxing official .......................................................... 64

Dillon Rule. Fairfax County School Board is subject to rule; may exercise no greater authority than that authorized by statute ......................... 105

Local governing bodies [municipal corporations] have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. [Any doubt as to existence of power must be resolved against locality] [Local ordinance that exceeds scope of this authority is invalid] .......... 67, 70, 83, 85, 105, 107, 176, ......................................................... 188, 315

Local public [governing] bodies may exercise only those powers conferred expressly or by necessary implication ......................... 151, 194, 224

Localities are political subdivisions of Commonwealth ........... 83, 105, 107, 315

Municipalities have only such legislative and fiscal powers as are expressly or impliedly delegated to them by statute. When doubtful, question whether municipality has particular power is to be answered in negative. Rule requires narrow interpretation of all powers conferred on local governments .......... 77

Narrow construction of all powers conferred upon and exercised by local government in Virginia, because such powers are delegated powers .......... 176

Political subdivisions have only those powers expressly granted or necessarily implied from express powers ........................................... 77

School boards constitute public quasi-corporations that exercise limited powers and functions of public nature granted to them expressly or by necessary implication, and none other ........................................... 105

Franchises, Public Property, Utilities — General Provisions for Public Utilities.

Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law ................. 254

Franchises, Public Property, Utilities — Water Supply Systems Generally. Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law ......... 254
COUNTIES, CITIES AND TOWNS

General Powers and Procedures of Counties. State occupies field of sewage sludge disposal, treatment and management; state program regulating biosolids use preempts local ordinance requiring applicant to obtain conditional use permit before applying or storing biosolids in locality ........................................... 67

Where state and county share jurisdiction for biosolids activity, powers of respective state boards are paramount, and local ordinance must not operate in conflicting manner ........................................................................................... 67

General Powers of Local Governments. Delegation of legislative authority to private entity may not be made constitutional by attaching standards .... 101

Power of governing body to expend funds is limited to those granted in express words, and those necessarily or fairly implied in powers expressly granted ................................................................. 70

Power to exercise legislative authority may not be removed from control of local legislative representatives of people. If allowed by statute, local governing bodies may delegate exercise of legislative functions to subordinate bodies, officers, or employees, whose exercise of such functions continues to be considered legislative action. Delegation of authority must be accompanied by standards to guide exercise of delegated function ........................................... 101

Town may not contribute in-kind services of town employees and may not loan town-owned equipment to local business and civic association in support of annual Regatta. No requirement that town obtain and examine governing documents of organizations to which it contributes. Documents of association that is not “public body” are not subject Act’s disclosure requirements. Attorney General declines to comment regarding obligation of town manager to take action in response to citizen complaint regarding alleging improper action by town council or mayor. Authority of town to contribute cash to Central Accomack Little League ................................................................................. 70

Governing Bodies of Localities. Authority for City of Radford to amend its Code to provide for $200 fine for violation of permit parking ordinance .......... 77

Northern Neck Regional Jail Board has no independent authority to pay employee bonuses; has authority to request localities participating in regional jail to fund employee bonuses. Participating localities must adopt ordinances authorizing such bonuses ................................................................. 244

Governing Bodies of Localities – Salaries. Authority for Chesapeake School Board, based on population count, to increase annual salary of its members to maximum paid to city council members, and annual salary of its chairman to maximum paid to city mayor, upon passage of motion in 2003 approving specific
COUNTIES, CITIES AND TOWNS

Governing Bodies of Localities – Salaries (contd.)

Salaries of $25,000 and $27,000, respectively. July 1, 2004, is earliest date that such salary increases may be effective .............................................................. 166

Elected school board members and chairman may be paid same maximum salary as council members and mayor, respectively, based on population. School board must pass motion to increase member salaries. Timing of votes and effective dates for increasing salaries of elected school board members ........ 166

Hospital Authorities. Authority, organized as political subdivision, may sell its assets to for-profit corporation following dissolution of authority .............. 79

Authority’s power to dispose of its assets is broad ............................................ 79

Explicit provision setting forth procedure for dissolution of hospital authority is indication that General Assembly contemplated need for such dissolution ...... 79

Industrial Development and Revenue Bond Act. Industrial development authorities may use design-build contracts for construction of “authority facilities” or “facilities,” as defined in Industrial Development and Revenue Bond Act, without having to engage in competitive bidding or involve Design-Build/Construction Management Review Board ........................................................... 82

Virginia Coalfield Economic Development Authority may pledge funds as collateral for line of credit or loan or grant funds to Dickenson County Industrial Development Authority for purchase of machinery and tools or real estate of medical facility, which qualifies as “authority facility” under Act, provided contemplated use of funds furthers public purpose of Authority; may not make pledge, loan or grant to IDA to fund operating expenses of medical facility .......................................................... 109

Local Constitutional Officers, etc. Actions of sheriff’s office regarding disposal of personal property removed from residential premises pursuant to unlawful detainer or ejectment ......................................................................... 264

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty .............................................................. 58

Local Constitutional Officers, etc. – Clerks of Circuit Courts. Clerk is custodian of records maintained on automated case management system, whether stored on or off premises. Access to such system lies within sound discretion of clerk .......................................................... 62
Local Constitutional Officers, etc. – Sheriff. Creation of separate police force does not relieve sheriff of his duty to enforce criminal laws ........................................ 247

Processing fee authorized by ordinance to be collected by clerk on convicted individuals admitted into county, city, or regional jails is reserved solely for use by local sheriff’s office, even though county or city may participate in regional jail ................................................................. 83

Responsibility of Colonial Heights police department to transport arrestee to regional jail. Jail superintendent has responsibility to convey prisoners to and from court. Sheriff maintains control of prisoners awaiting further criminal proceedings at courthouse; is responsible for returning them to jail superintendent for transport to regional jail at conclusion of day’s hearings. Any prisoner remaining for further court proceedings within same day should be kept in courthouse holding cell until conclusion of proceedings and released to jail superintendent for transport to regional jail. City council may adopt ordinance requiring sheriff to perform extra transport duties and compensate sheriff accordingly ........................................ 247

Ordinances. Absent severability provision, ordinance is presumed to be nonseverable .................................................. 101

Dillon Rule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. Local ordinance that exceeds scope of this authority is invalid ........................................ 188

Local ordinance must not provide restrictions more stringent than those proposed by state ................................................................. 67

Ordinance is inconsistent with state law if state law preempts local regulation in area, either by expressly prohibiting local regulation or by enacting state regulations so comprehensive that state may be considered to occupy entire field ...................................................................................... 67

Ordinances adopted pursuant to locality’s police power must have clear, reasonable, and substantial relation to public health, safety, morals, or welfare, and must be reasonably appropriate for police power objective sought to be obtained; must not be inconsistent with state law ........................................ 254

Planning, Subdivision of Land and Zoning. Comprehensive plan, by itself, generally does not act as instrument of land use control, but serves as guideline for development and implementation of zoning ordinance. Feature not shown on adopted comprehensive plan must not be constructed without approval of local governing body ........................................................................ 91
**COUNTIES, CITIES AND TOWNS**

**Planning, Subdivision of Land and Zoning (contd.)**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive plan explained</td>
<td>85</td>
</tr>
<tr>
<td>Conditional zoning addresses effects of changing land use patterns within communities. Purpose is to permit differing land uses within those communities while protecting community as whole</td>
<td>85</td>
</tr>
<tr>
<td>Criteria to be considered by locality reviewing zoning applications for new development</td>
<td>85</td>
</tr>
<tr>
<td>Locality may adopt, as part of its comprehensive plan, proffer policy that considers certain criteria in adequate public facilities requirement before approval of rezoning applications</td>
<td>85</td>
</tr>
<tr>
<td>Planning commission has no authority beyond that granted by statute; governing body may not delegate its legislative power to planning commission</td>
<td>91</td>
</tr>
<tr>
<td>Planning commission of Franklin County may not review for compliance with comprehensive plan existing locations of telecommunications towers in areas of county not subject to zoning. Such review may be undertaken only when application for telecommunications is made with county</td>
<td>91</td>
</tr>
<tr>
<td>Zoning and rezoning constitute legislative acts which may be performed only by local governing body, by ordinance</td>
<td>91</td>
</tr>
</tbody>
</table>

**Police and Public Order.** Duty of county and city police officers to investigate all violations of law and serve criminal warrants | 247 |

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty of police department of locality issuing warrant to retrieve and return to court fugitive held in another locality</td>
<td>94</td>
</tr>
<tr>
<td>Responsibility of Colonial Heights police department to transport arrestee to regional jail. Jail superintendent has responsibility to convey prisoners to and from court. Sheriff maintains control of prisoners awaiting further criminal proceedings at courthouse; is responsible for returning them to jail superintendent for transport to regional jail at conclusion of day’s hearings. Any prisoner remaining for further court proceedings within same day should be kept in courthouse holding cell until conclusion of proceedings and released to jail superintendent for transport to regional jail. City council may adopt ordinance requiring sheriff to perform extra transport duties and compensate sheriff accordingly</td>
<td>247</td>
</tr>
<tr>
<td>Responsibility of police department authorized to investigate crimes to retrieve fugitive located in another jurisdiction</td>
<td>94</td>
</tr>
</tbody>
</table>
COUNTIES, CITIES AND TOWNS

Police and Public Order (contd.)
Responsibility of police department of town issuing warrant for fugitive’s arrest to retrieve and return to court fugitive held in another locality. Governor’s discretionary selection of agent to retrieve and return to court fugitive located in another state is final and binding .......................................................... 94

Service of criminal process is mandatory duty of police department ............... 247

Police power. Ordinances adopted pursuant to locality’s police power must have clear, reasonable, and substantial relation to public health, safety, morals, or welfare, and must be reasonably appropriate for police power objective sought to be obtained .......................................................... 254

Regulation of plumbing and reasonable standards to protect integrity of locally operated water supply is proper exercise of locality’s police power ............... 254

Political subdivision may be considered state agency for limited purposes .......... 281

Power to exercise legislative authority may not be removed from control of local legislative representatives of people. If allowed by statute, local governing bodies may delegate exercise of legislative functions to subordinate bodies, officers, or employees, but subordinate body’s exercise of these functions continues to be considered legislative action .............................................................. 96

Powers of Cities and Towns. Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law .......................................................... 254

Powers of Local Government. Legislative branch of local governments is vested with wide discretion in enactment and amendment of zoning ordinances .......... 85

Powers of county boards of supervisors are limited to those conferred expressly or by necessary implication. Any doubt as to existence of power must be resolved against locality. Local governments are subordinate creatures of Commonwealth, possessing only those powers conferred upon them by General Assembly .......................................................... 85

Service Districts (see infra Taxes & Assessments for Local Improvements)

Taxes & Assessments for Local Improvements. Water authority is not locality authorized to impose special tax assessment ................................................ 112

Taxes & Assessments for Local Improvements – Service Districts. Amended ordinance establishing Elizabeth Lake Estates Service District does not specify
Taxes & Assessments for Local Improvements – Service Districts (contd.)

Elizabeth Lake Estates Civic Association as entity to develop plan for services to be rendered in service district, receive funds, or provide services; provides for tax levy to be set annually as part of budget process with other tax rates. Amended ordinance does not create long-term unconditional debt obligation, in violation of Constitution, and does not delegate legislative authority of city council ................................................................. 96

City of Hampton may not delegate its legislative authority to Elizabeth Lake Estates Civic Association ................................................................. 101

Determination as to provision of services and appropriation of funds to pay for them is legislative function ..................................................... 101

Ordinance relating to expenditure of tax revenue by Elizabeth Lake Estates Civic Association is inconsistent with constitutional debt limitations, contrary to state laws governing service districts, and unenforceable ......................... 101

Private benefit conferred upon Elizabeth Lake Estates Civic Association as result of creation of Elizabeth Lake Estates Service District is permissible if it is merely incidental to public benefit .................................................... 96

Urban County Executive Form of Government. Authority of Fairfax County to prohibit discrimination based on sexual orientation cannot be fairly or necessarily implied from discrimination based on sex ..................................................... 105

Fairfax County School Board has no authority to add sexual orientation as category in its nondiscrimination policy, absent enabling legislation .......... 105

Fairfax County School Board is subject to Dillon Rule; may exercise no greater authority than that authorized by statute. Absent enabling legislation, school board has no authority to add sexual orientation as category in its nondiscrimination policy ................................................................. 105

Urban County Executive Form of Government – Human Rights. General Assembly must enact legislation enabling Fairfax County to amend its human rights ordinance to prohibit discrimination based on sexual orientation or Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation ..................................................... 107

Prohibition against discrimination based on sex relates to one’s gender. Biological condition of sex, whether one is male or female, rather than any sexual manifestation, is object of prohibited discrimination. Authority to prohibit or investigate alleged discrimination based on sexual orientation may not be implied from discrimination based on sex .................................................... 107
Virginia Coalfield Economic Development Authority. Authority may pledge funds as collateral for line of credit or loan or grant funds to Dickenson County Industrial Development Authority for purchase of machinery and tools or real estate of medical facility, which qualifies as "authority facility" under Act, provided contemplated use of funds furthers public purpose of Authority; may not make pledge, loan or grant to IDA to fund operating expenses of medical facility ................................................................. 109

Chapter is remedial in nature and is intended to address long-standing and intractable problems related to economic development and absence of diverse economic base in coalfield region of Virginia ................................................. 109

Virginia Water and Waste Authorities Act. Water authority may assess connection fee as proportionate part of costs of constructing water system; may review periodically and adjust amount of connection fee as necessary ............... 112

Water and Waste Authorities Act, Virginia (see supra Virginia Water and Waste Authorities Act)

COURTS NOT OF RECORD

District Courts. Substitute judge is not sitting judge without specific appointment by chief district judge and should not be called upon by hospital seeking judicial consent for medical treatment of minor ......................................................... 122

Substitute judge may be designated to serve as district judge only when chief district judge has determined that another full-time district judge or retired judge is not reasonably available. Powers and duties of substitute judge are effected only upon being designated by chief district judge to serve ........................................................................................................... 122

Substitute judge may only sit when and if general district court judge is absent and/or unable to serve ............................................................................... 122

Immunity. Doctrine of judicial immunity provides judges with absolute immunity from civil liability. Court personnel share absolute judicial immunity when carrying out order of court ................................................................. 278

Doctrine of sovereign immunity would not apply to court personnel carrying out ministerial tasks ....................................................................................... 278

Liability of court personnel depends on nature of function they perform. If carrying out order of court, they would likely be entitled to judicial immunity; if acting on their own authority, they may be protected by doctrine of sovereign immunity for discretionary acts ........................................................................ 278
COURTS NOT OF RECORD

Jurisdiction and Procedure. Civil Matters. Order of remittance of bond forfeiture entered upon timely appearance of defendant does not serve as satisfaction of judgment in general district court; operates as satisfaction of judgment docketed in circuit court ................................................................. 148

Juvenile and Domestic Relations Courts. Discretionary authority of juvenile court judge to appoint guardian ad litem or counsel is not applicable where court appointment of counsel is mandated for hearings involving allegedly abused or neglected child; child in need of services or supervision, or delinquent child; parent, guardian or adult. Judge may appoint counsel or guardian ad litem, but not both, to represent child(ren), parent or guardian in all other cases ................................................................. 117

Disposal by juvenile court of charges of unlawful possession of alcohol by juveniles ............................................................................. 124

Jurisdiction, practice, and procedure of juvenile courts are entirely [wholly] statutory ........................................................................ 117, 120, 122, 124

Juvenile adjudicated delinquent for unlawful possession of alcohol is subject to restricted driving penalties prescribed by Juvenile Law; person at least 18 who is found guilty of unlawful possession of alcohol is subject to adult penalties ................................................................................. 124

Juvenile court is creature of statute ........................................................................ 120

Juvenile court laws do not allow juvenile court judge to temporarily detain juvenile, pending disposition hearing, who was not detained prior to adjudication hearing at which he was determined delinquent ........................................ 120

Liberal construction of juvenile court laws ........................................................................ 120

Necessary and incidental powers of court must be in relation to specific grant of statutory authority ........................................................................ 120

Power of court to require that costs of guardian ad litem’s service be reimbursed by child’s parent(s) does not include authority to assess costs of guardian ad litem on child’s guardian ........................................................................ 22

Requirement in 2002 Appropriation Act that court order reimbursement of guardian ad litem costs from parent(s) does not include authority to order reimbursement from guardian of child. Court may order reimbursement by parent(s) when appointment of guardian ad litem is required in child abuse or neglect cases ........................................................................ 22

Subject to certain exceptions, juveniles are charged with delinquent acts, rather than crimes, and are not subject to adult penalties ................. 124
2002 REPORT OF THE ATTORNEY GENERAL 395

COURTS NOT OF RECORD

Juvenile and Domestic Relations Courts (contd.)

Substitute judge is not sitting judge without specific appointment by chief district judge and should not be called upon by hospital seeking judicial consent for medical treatment of minor ................................................................. 122

Virginia Supreme Court cases striking down decrees inconsistent with juvenile court laws ................................................................. 120

Juvenile and Domestic Relations Courts – Appeal. Cases involving civil contempt actions for nonpayment of child support ........................................ 127

Court rulings in Commonwealth ex rel. May v. Walker and Mahoney v. Mahoney overrule Avery v. Commonwealth, Department of Social Services, which allows bifurcated appeal in case of father found guilty of civil contempt for failure to pay court-ordered child support. Requirement that, within 30 days of juvenile court civil contempt ruling, party post appeal bond based on amount of support arrearage to perfect appeal to circuit court for trial de novo ..... 127

COURTS OF RECORD

Circuit Courts. Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function ......................... 47

Clerk’s issuance of order authorizing minister to perform marriages, upon production of proof of ordination or licensure, is discretionary. No requirement that minister appear personally before clerk, although clerk may compel such appearance as condition for issuing order ....................................................... 164

Court may look at preamble of statute if issue before court is ambiguous; may use statute setting forth policy considerations for enactment of statutory scheme in considering case ............................................................... 79

Court must approve plan of dissolution that provides for transfer of hospital authority’s assets ................................................................. 79

In determining whether to approve dissolution of hospital authority, court will consider sufficiency of evidence presented by authority’s commissioners ..... 79

Jurisdiction of courts in Commonwealth is granted by statute or Constitution; jurisdiction granted by statute may be modified by legislature ......................... 161

Order of remittance of bond forfeiture entered upon timely appearance of defendant does not serve as satisfaction of judgment in general district court; operates as satisfaction of judgment docketed in circuit court ......................... 148
<table>
<thead>
<tr>
<th>COURT OF RECORD</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Circuit Courts (contd.)</strong></td>
<td></td>
</tr>
<tr>
<td>Power of court to require that costs of guardian ad litem’s service be reimbursed by child’s parent(s) does not include authority to assess costs of guardian ad litem on child’s guardian</td>
<td>22</td>
</tr>
<tr>
<td>Requirement in 2002 Appropriation Act that court order reimbursement of guardian ad litem costs from parent(s) does not include authority to order reimbursement from guardian of child. Court may order reimbursement by parent(s) when appointment of guardian ad litem is required in child abuse or neglect cases</td>
<td>22</td>
</tr>
<tr>
<td>Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant</td>
<td>161</td>
</tr>
</tbody>
</table>

**Clerks, Clerks’ Offices and Records (see also Clerks)**

Clerks, Clerks’ Offices and Records. Circuit court clerk has duty to provide copies of digital databases of all records requested by citizen, unless sealed by court order or otherwise specifically exempted by law; applicability to court, as well as land, records | 9 |

Circuit court clerk is responsible for integrity of all records maintained by clerk’s office | 62 |

Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability | 270 |

Clerk is custodian of records maintained on automated case management system, whether stored on or off premises. Access to such system lies within sound discretion of clerk | 62 |

Clerk’s affirmative duty to provide court records applies to both paper and electronic records | 9 |

Definition of “public records” in Virginia Freedom of Information Act includes court and land records in circuit court clerk’s office | 9 |

Every court has supervisory power over its records and files; may deny access to court files that have become vehicle for improper purposes | 9 |

Exceptions to presumption of openness concerning court records | 9 |

Presumption of openness regarding requests for court records in digital format. Duty of circuit court clerks to furnish copies of records requested by citizens,
### COURTS OF RECORD

<table>
<thead>
<tr>
<th>Clerk's, Clerk's Offices and Records (contd.)</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>without distinction between paper and digital formats, provided records are not sealed by court order or otherwise exempt from disclosure by law</td>
<td>9</td>
</tr>
<tr>
<td>Public access to court records is preserved at common law and is subject to applicable statutes and constitutional provisions</td>
<td>9</td>
</tr>
<tr>
<td>Rebuttable presumption of public access in civil proceedings to judicial records</td>
<td>9</td>
</tr>
<tr>
<td>Clerk's, Clerk's Offices and Records - Fees. Circuit court clerk should base recordation taxes for Security Instrument on original acquisition balance as defined in instrument and assess separate fees for recording Assignment Agreement containing two instruments of equal dignity that serve independent purposes at law</td>
<td>132</td>
</tr>
<tr>
<td>Clerk's, Clerk's Offices and Records - Records, Recordation and Indexing Generally. Circuit court clerk should base recordation taxes for Security Instrument on original acquisition balance as defined in instrument and assess separate fees for recording Assignment Agreement containing two instruments of equal dignity that serve independent purposes at law</td>
<td>132</td>
</tr>
<tr>
<td>Evidence. No vested right in rules of evidence</td>
<td>158</td>
</tr>
<tr>
<td>Rules of evidence are procedural, rather than substantive rights or claims. Rules in effect on date of trial control conduct of trial</td>
<td>158</td>
</tr>
<tr>
<td>General Provisions. Responsibility of Colonial Heights police department to transport arrestee to regional jail. Jail superintendent has responsibility to convey prisoners to and from court. Sheriff maintains control of prisoners awaiting further criminal proceedings at courthouse; is responsible for returning them to jail superintendent for transport to regional jail at conclusion of day’s hearings. Any prisoner remaining for further court proceedings within same day should be kept in courthouse holding cell until conclusion of proceedings and released to jail superintendent for transport to regional jail. City council may adopt ordinance requiring sheriff to perform extra transport duties and compensate sheriff accordingly</td>
<td>247</td>
</tr>
<tr>
<td>Immunity. Doctrine of judicial immunity provides judges with absolute immunity from civil liability. Court personnel share absolute judicial immunity when carrying out order of court</td>
<td>278</td>
</tr>
<tr>
<td>Doctrine of sovereign immunity would not apply to court personnel carrying out ministerial tasks</td>
<td>278</td>
</tr>
<tr>
<td>Liability of court personnel depends on nature of function they perform. If carrying out order of court, they would likely be entitled to judicial immunity;</td>
<td></td>
</tr>
</tbody>
</table>
## COURTS OF RECORD

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immunity (contd.)</td>
<td>278</td>
</tr>
<tr>
<td>if acting on their own authority, they may be protected by doctrine of sovereign immunity for discretionary acts</td>
<td></td>
</tr>
</tbody>
</table>

## CRIMES AND OFFENSES GENERALLY

### Crimes Against the Administration of Justice

Law-enforcement officer conducting lawful stop to investigate alleged criminal activity may not arrest for obstruction of justice suspect who refuses to identify himself to officer. Depending on circumstances, suspect may be detained for purpose of determining his identity, immunity for discretionary acts

### Crimes Against the Person – Homicide

Statute governing admissibility into evidence at trial of written results of hospital-taken blood alcohol tests is procedural. Commonwealth may introduce such test results into evidence at trial conducted after effective date of statute, even though motor vehicle accident giving rise to charge of involuntary manslaughter as result of driving while intoxicated occurred before effective date of statute

### Crimes Involving Fraud

Cigarette manufacturer’s sweepstakes promotion at retail establishment is prohibited

### Crimes Involving Health and Safety

- Authority of Department of State Police to provide mental health information maintained in Central Criminal Records Exchange to Federal Bureau of Investigation for use in National Instant Criminal Background Check System Index
- Department of Conservation and Recreation has no authority to issue regulation prohibiting, within state parks, carrying of concealed handguns by valid permit holders
- Purpose of §§ 18.2-308.1:2 and 18.2-308.1:3 is to regulate and restrict possession of firearms by individuals who may not possess requisite mental condition to safely possess such firearms and could potentially harm public

### Crimes Involving Health and Safety – Driving Motor Vehicle, etc., While Intoxicated

- Applicability of administrative impoundment provisions where individual is charged with or arrested for driving during license suspension period resulting from DUI conviction
- Disposal by juvenile court of charges of unlawful possession of alcohol by juveniles
- Historical derivations of §§ 18.2-272 and 46.2-301 indicate that driving during suspension period may be charged under either statute where suspension or revocation resulted from DUI conviction
CRIMES AND OFFENSES GENERALLY

<table>
<thead>
<tr>
<th>Crimes Involving Health and Safety – Driving Motor Vehicle, etc., While Intoxicated (contd.)</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute governing admissibility into evidence at trial of written results of hospital-taken blood alcohol tests is procedural. Commonwealth may introduce such test results into evidence at trial conducted after effective date of statute, even though motor vehicle accident giving rise to charge of involuntary manslaughter as result of driving while intoxicated occurred before effective date of statute</td>
<td>158</td>
</tr>
</tbody>
</table>

| Crimes Involving Health and Safety – Drugs. In considering cases involving possession of narcotics, Commonwealth has burden of proving defendant exercised dominion and control over drugs | 16 |
| No physician-patient privilege exists in criminal prosecutions; such privilege is expressly confined to civil proceedings | 342 |
| Pharmacist, prior to filling prescription, may obtain fingerprint from customer as proof of identification, provided pharmacist returns or destroys print within 21 days of transaction’s completion or termination; may provide to law-enforcement officials fingerprint of any customer suspected of prescription fraud | 342 |

| Crimes Involving Health and Safety – Other Illegal Weapons. Sheriff is chief law-enforcement officer of office of sheriff for purposes of issuing concealed weapons permits to retired deputies | 140 |
| Crimes Involving Health and Safety – Uniform Machine Gun Act. Act does not prevent discharge or firing of machine gun by nonexempt person. Such person may transport machine gun away from registered bona fide permanent residence or business address. Determination whether definition of “immediate vicinity” includes storage of ammunition in same vehicle, room, house or building as machine gun is question of fact rather than one of law, and is not appropriate issue on which to render an opinion | 142 |
| Act does not prevent transportation of machine gun away from person’s registered bona fide permanent residence or business address. Transportation of machine gun could create presumption that possession of machine gun in certain circumstances is for aggressive purpose | 142 |
| Discharge or firing of machine gun for nonaggressive or nonoffensive purposes is not criminal act; person that discharges or fires machine gun must rebut presumption of offensive or aggressive purpose, or face conviction if charged with violation of Act | 142 |
| Guidance in determining interpretation of phrase “in immediate vicinity” in Act | 142 |
CRIMES AND OFFENSES GENERALLY

Crimes Involving Morals and Decency – Gambling. Activity constitutes illegal gambling when elements of prize, chance and consideration are present together .............................................................................................................. 144

Application of various tests to determine if element of consideration is present ...... 144

Attorney General declines to render opinion regarding whether operation of Free Spin machines constitutes illegal gambling ............................................... 144

Element of consideration is missing when no purchase is required to enter into drawing or other game of chance; is present when eligibility to receive prize is limited to those who make purchase ..................................................... 144

Primary purpose test is used to determine whether consumer is buying chance to win rather than associated product or service ........................................................... 144

Term “consideration” is construed liberally for purpose of determining whether particular scheme or game constitutes illegal gambling ..................................... 144

Driving Under Influence (DUI) (see supra Crimes Involving Health and Safety – Driving Motor Vehicle, etc., While Intoxicated)

Drugs (see supra Crimes Involving Health and Safety)

In General – Classification of Criminal Offenses and Punishment Therefor. Authority for City of Radford to amend its Code to provide for $200 fine for violation of permit parking ordinance .................................................................. 77

CRIMINAL EXTRADITION ACT, UNIFORM
(See CRIMINAL PROCEDURE: Extradition of Criminals – Uniform Criminal Extradition Act)

CRIMINAL PROCEDURE

Arrest. Common-law rule that no arrest may lawfully be made until warrant has been issued, except where gravity of offense justifies warrantless arrest or where crime is committed in presence of arresting officer. Change or alteration to rule in statute must be plainly manifested by legislature; enactment that does not encompass entire subject covered by common law abrogates rule only to extent its terms are directly and irreconcilably opposed to rule .......... 16

Police officer may not arrest, without warrant, underage person for unlawful possession of alcoholic beverages, unless offense is committed in presence of officer within his territorial jurisdiction ......................................................... 16

Bail and Recognizances. Order of remittance of bond forfeiture entered upon timely appearance of defendant does not serve as satisfaction of judgment in
CRIMINAL PROCEDURE

Bail and Recognizances (contd.)

general district court; operates as satisfaction of judgment docketed in circuit court................................................................................................................... 148

Central Criminal Records Exchange. Authority of Department of State Police to provide mental health information maintained in Central Criminal Records Exchange to Federal Bureau of Investigation for use in National Instant Criminal Background Check System Index ........................................................................................................... 199

Commissioner of accounts is not “criminal justice agency” entitled to access criminal history records of delinquent fiduciaries through Virginia Criminal Information Network. Circuit court may release such records to commissioner pursuant to court order or rule ................................................................................................................................. 173

E-911 personnel may access criminal justice information generated by VCIN/NCIC terminals per statutorily authorized agreement with local sheriff’s office, subject to requirements of State Police. Absent specific statutory authorization, sheriff may not enter into agreement binding his successors in office ........................................ 151

Law-enforcement agencies are not required to enter into Virginia Criminal Information Network information contained in indictments and capiases ordered sealed by court prior to arrest of individual named in such indictments and capiases ........................................................................................................... 155

Requirement that law-enforcement agency enter into Virginia Criminal Information Network certain information contained on warrant or capias received by agency is directory in nature and does not otherwise violate affected individual’s constitutional rights ........................................................................................................... 155

Disability of Judge; Appointed Counsel, etc. – Recording Evidence and Incidents of Trial. Court trying felony cases has discretion to establish procedures for choosing and contracting for private court reporting services. Court reporting services associated with criminal litigation proceedings are exempt from competitive process requirements of Virginia Public Procurement Act ........................................... 156

Extradition of Criminals – Uniform Criminal Extradition Act. Responsibility of police department of town issuing warrant for fugitive’s arrest to retrieve and return to court fugitive held in another locality. Governor’s discretionary selection of agent to retrieve and return to court fugitive located in another state is final and binding ........................................................................................................... 94

Preliminary Hearing. Statute governing admissibility into evidence at trial of written results of hospital-taken blood alcohol tests is procedural. Commonwealth may introduce such test results into evidence at trial conducted after effective date of statute, even though motor vehicle accident giving rise
CRIMINAL PROCEDURE

Preliminary Hearing (contd.)
to charge of involuntary manslaughter as result of driving while intoxicated occurred before effective date of statute ........................................................... 158

Sentence; Judgment; Execution of Sentence. Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant ........................................................... 161

Trial and Its Incidents. Timely issuance of process invokes jurisdiction of circuit court to conduct probation revocation hearing; lack of statutory time period within which to conduct hearing does not violate due process rights of defendant ........................................................... 161

DATA COLLECTION AND DISSEMINATION PRACTICES ACT, GOVERNMENT
(See ADMINISTRATION OF GOVERNMENT: Data Collection & Dissemination)

DEFERRED COMPENSATION
(See PENSIONS, BENEFITS AND RETIREMENT: Government Employees Deferred Compensation Plan Act)

DEFINITIONS

Above the line ................................................................. 169
Additional governmental services .............................................. 101
Administration of criminal justice ............................................. 173, 199
Advanced legal fees ............................................................... 32
Affiliated person of a mortgage broker ...................................... 30
Agency ............................................................................. 3, 6
All matters therewith ............................................................ 132
Allotment ........................................................................ 169
Appearance ...................................................................... 164
ASM 50-15 ......................................................................... 217
Assessment ....................................................................... 306
Athletic trainer (see infra “certified athletic trainer”) .................. 258
Authorized person ................................................................ 270
Before ............................................................................ 164
Best management practice ...................................................... 38
Best value .......................................................................... 13
<table>
<thead>
<tr>
<th>DEFINITIONS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bifurcated trial</td>
<td>127</td>
</tr>
<tr>
<td>Biosolids</td>
<td>67</td>
</tr>
<tr>
<td>Bus</td>
<td>214</td>
</tr>
<tr>
<td>Business</td>
<td>293</td>
</tr>
<tr>
<td>Bypass</td>
<td>186</td>
</tr>
<tr>
<td>Capias</td>
<td>247</td>
</tr>
<tr>
<td>Care</td>
<td>344</td>
</tr>
<tr>
<td>Certified athletic trainer</td>
<td>258</td>
</tr>
<tr>
<td>Child</td>
<td>124</td>
</tr>
<tr>
<td>Civil contempt</td>
<td>127</td>
</tr>
<tr>
<td>Commercial motor vehicle</td>
<td>214</td>
</tr>
<tr>
<td>Commissioner of accounts</td>
<td>173</td>
</tr>
<tr>
<td>“Compensatory” tax doctrine</td>
<td>302</td>
</tr>
<tr>
<td>Comprehensive plan</td>
<td>91</td>
</tr>
<tr>
<td>Comprehensive plan (explanation)</td>
<td>85</td>
</tr>
<tr>
<td>Constitutional provision (directory)</td>
<td>50</td>
</tr>
<tr>
<td>Constitutional provision (mandatory)</td>
<td>50</td>
</tr>
<tr>
<td>Constitutional provision (self-executing)</td>
<td>50</td>
</tr>
<tr>
<td>Control</td>
<td>344</td>
</tr>
<tr>
<td>Cost</td>
<td>82</td>
</tr>
<tr>
<td>Custody</td>
<td>344</td>
</tr>
<tr>
<td>Criminal contempt</td>
<td>127</td>
</tr>
<tr>
<td>Criminal history record information</td>
<td>151, 199</td>
</tr>
<tr>
<td>Criminal justice activities</td>
<td>173</td>
</tr>
<tr>
<td>Criminal justice agency</td>
<td>151, 173, 199</td>
</tr>
<tr>
<td>Custody</td>
<td>194</td>
</tr>
<tr>
<td>Debt</td>
<td>96, 101</td>
</tr>
<tr>
<td>Deed</td>
<td>18</td>
</tr>
<tr>
<td>Definite place of business</td>
<td>297</td>
</tr>
<tr>
<td>Design-build contract</td>
<td>82</td>
</tr>
<tr>
<td>Distress for taxes</td>
<td>321</td>
</tr>
<tr>
<td>Division (for purposes of Waterworks Regulations)</td>
<td>254</td>
</tr>
<tr>
<td>Definition</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Doctrine of sovereign, or governmental, immunity</td>
<td>278</td>
</tr>
<tr>
<td><em>Ejusdem generis</em></td>
<td>6</td>
</tr>
<tr>
<td>Emergency</td>
<td>202</td>
</tr>
<tr>
<td>Emergency services</td>
<td>202</td>
</tr>
<tr>
<td>Employ</td>
<td>232</td>
</tr>
<tr>
<td>Employee</td>
<td>232, 244</td>
</tr>
<tr>
<td>Employment</td>
<td>232, 244</td>
</tr>
<tr>
<td>Enhanced emissions inspection program</td>
<td>217</td>
</tr>
<tr>
<td>External consistency (tax assessments)</td>
<td>297</td>
</tr>
<tr>
<td>Federal test procedure</td>
<td>217</td>
</tr>
<tr>
<td>Fire sprinkler contracting</td>
<td>254</td>
</tr>
<tr>
<td>Garnishment</td>
<td>32, 244</td>
</tr>
<tr>
<td>General law</td>
<td>57</td>
</tr>
<tr>
<td>Governmental agency</td>
<td>179</td>
</tr>
<tr>
<td>Gross negligence</td>
<td>258</td>
</tr>
<tr>
<td>Illegal gambling</td>
<td>144</td>
</tr>
<tr>
<td>IM240 test</td>
<td>217</td>
</tr>
<tr>
<td>Impractical</td>
<td>214</td>
</tr>
<tr>
<td>Industrial development authority</td>
<td>82</td>
</tr>
<tr>
<td><em>In pari materia</em></td>
<td>30, 199, 233</td>
</tr>
<tr>
<td>Internal consistency (tax assessments)</td>
<td>297</td>
</tr>
<tr>
<td>Itinerant merchant</td>
<td>302</td>
</tr>
<tr>
<td>Judge</td>
<td>197</td>
</tr>
<tr>
<td>Judicial immunity</td>
<td>278</td>
</tr>
<tr>
<td>Landscape irrigation contracting</td>
<td>254</td>
</tr>
<tr>
<td>Landscape irrigation contractor</td>
<td>254</td>
</tr>
<tr>
<td>Law-enforcement officers</td>
<td>34</td>
</tr>
<tr>
<td>Local employees</td>
<td>244</td>
</tr>
<tr>
<td>Local officer</td>
<td>232</td>
</tr>
<tr>
<td>Local planning commission</td>
<td>91</td>
</tr>
<tr>
<td>Locality</td>
<td>94</td>
</tr>
<tr>
<td>Man-made disaster</td>
<td>202</td>
</tr>
<tr>
<td>DEFINITIONS</td>
<td>PAGE</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>May – discretionary</td>
<td>83</td>
</tr>
<tr>
<td>May – permission, importing discretion</td>
<td>83</td>
</tr>
<tr>
<td>May – permissive</td>
<td>83</td>
</tr>
<tr>
<td>Multiple party account</td>
<td>331</td>
</tr>
<tr>
<td>Nonattainment</td>
<td>217</td>
</tr>
<tr>
<td>Noscitur a sociis</td>
<td>6</td>
</tr>
<tr>
<td>OBD system <em>(see infra “on-board diagnostic system”)</em></td>
<td>217</td>
</tr>
<tr>
<td>OBD vehicle</td>
<td>217</td>
</tr>
<tr>
<td>Obstruction of justice</td>
<td>135</td>
</tr>
<tr>
<td>On-board diagnostic system</td>
<td>217</td>
</tr>
<tr>
<td>Or - disjunctive</td>
<td>117</td>
</tr>
<tr>
<td>Parent – not synonymous with “guardian”</td>
<td>22</td>
</tr>
<tr>
<td>Participating employer</td>
<td>233</td>
</tr>
<tr>
<td>Person</td>
<td>142,331</td>
</tr>
<tr>
<td>Personal information</td>
<td>3</td>
</tr>
<tr>
<td>Personal interest in a transaction</td>
<td>179</td>
</tr>
<tr>
<td>Plumber</td>
<td>254</td>
</tr>
<tr>
<td>Plumbing contractors</td>
<td>254</td>
</tr>
<tr>
<td>Plumbing work</td>
<td>254</td>
</tr>
<tr>
<td>Political sign</td>
<td>43</td>
</tr>
<tr>
<td>Political subdivision</td>
<td>281</td>
</tr>
<tr>
<td>Practice of athletic training</td>
<td>258</td>
</tr>
<tr>
<td>Priority</td>
<td>321</td>
</tr>
<tr>
<td>Produce</td>
<td>164</td>
</tr>
<tr>
<td>Public body</td>
<td>82</td>
</tr>
<tr>
<td>Public records</td>
<td>9,70</td>
</tr>
<tr>
<td>Purge</td>
<td>127</td>
</tr>
<tr>
<td>Recognizance</td>
<td>148</td>
</tr>
<tr>
<td>Record</td>
<td>199</td>
</tr>
<tr>
<td>Reenacted</td>
<td>273</td>
</tr>
<tr>
<td>Related record</td>
<td>270</td>
</tr>
<tr>
<td>Religious association</td>
<td>331,338</td>
</tr>
</tbody>
</table>
**DEFINITIONS**

<table>
<thead>
<tr>
<th>Term</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remedial right</td>
<td>182</td>
</tr>
<tr>
<td>Remote access users</td>
<td>62</td>
</tr>
<tr>
<td>Residential cooperative associations</td>
<td>273</td>
</tr>
<tr>
<td>Resource Protection Area</td>
<td>38</td>
</tr>
<tr>
<td>Retainer</td>
<td>32</td>
</tr>
<tr>
<td>Self-dealing</td>
<td>30</td>
</tr>
<tr>
<td>Sex</td>
<td>107</td>
</tr>
<tr>
<td>Sexual orientation</td>
<td>107</td>
</tr>
<tr>
<td>Shall - advisory and directory</td>
<td>112</td>
</tr>
<tr>
<td>Shall - advisory or directory</td>
<td>264</td>
</tr>
<tr>
<td>Shall - directory, not mandatory</td>
<td>112, 155, 264</td>
</tr>
<tr>
<td>Shall - mandatory</td>
<td>83, 112</td>
</tr>
<tr>
<td>Shall - mandatory, rather than permissive or directive</td>
<td>58, 199, 230, 266</td>
</tr>
<tr>
<td>Social services</td>
<td>346</td>
</tr>
<tr>
<td>Special laws</td>
<td>57</td>
</tr>
<tr>
<td>State agency</td>
<td>281</td>
</tr>
<tr>
<td>Substance abuse</td>
<td>262</td>
</tr>
<tr>
<td>Substantive right(s)</td>
<td>182</td>
</tr>
<tr>
<td>Taxpayer</td>
<td>288</td>
</tr>
<tr>
<td>Trial de novo</td>
<td>127</td>
</tr>
<tr>
<td>Unit of local government</td>
<td>6</td>
</tr>
<tr>
<td>Use</td>
<td>138, 288</td>
</tr>
<tr>
<td>Visit</td>
<td>297</td>
</tr>
<tr>
<td>Water purveyor</td>
<td>254</td>
</tr>
<tr>
<td>Writing</td>
<td>132</td>
</tr>
</tbody>
</table>

**DOMESTIC RELATIONS**

**Marriage Generally.** Circuit court clerk’s issuance of order authorizing minister to perform marriages, upon production of proof of ordination or licensure, is discretionary. No requirement that minister appear personally before clerk, although clerk may compel such appearance as condition for issuing order ....... 164

**EDUCATION**

**Board of Education.** Transference of authority for teacher licensure from Board of Education to independent licensure board is inconsistent with constitutional
mandate charging Board with general supervision of Commonwealth’s school system ................................................................. 50

School Boards. Boards constitute public quasi-corporations that exercise limited powers and functions of public nature granted to them expressly or by necessary implication, and none other .......................................................... 105

Factors to consider in determining whether school board employee is entitled to claim sovereign immunity ........................................ 258

School board enjoys absolute immunity for its acts unless abrogated by statute .......... 258

School board is entitled to sovereign immunity for failure to hire certified athletic trainer for its athletic programs ........................................ 258

School Boards; Selection, Qualification & Salaries. Authority for Chesapeake School Board, based on population count, to increase annual salary of its members to maximum paid to city council members, and annual salary of its chairman to maximum paid to city mayor, upon passage of motion in 2003 approving specific salaries of $25,000 and $27,000, respectively. July 1, 2004, is earliest date that such salary increases may be effective .................. 166

Elected school board members and chairman may be paid same maximum salary as council members and mayor, respectively, based on population. School board must pass motion to increase member salaries. Timing of votes and effective dates for increasing salaries of elected school board members ........ 166

School division coaches and other school personnel may render first aid to students when necessary. Unless such persons are certified athletic trainers, they may not employ physical modalities or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. Certified athletic trainers are responsible for actions of noncertified individuals acting under their supervision and direction; must ensure that such individuals do not perform functions requiring professional judgment or discretion of certified athletic trainers. School board that fails to hire certified athletic trainer is entitled to absolute sovereign immunity. Absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire certified athletic trainer ............................. 258

School division serves as agent of state in performance of duties imposed by state constitution and laws ........................................ 258

Teachers, Officers and Employees. Transference of authority for teacher licensure from Board of Education to independent licensure board is inconsistent with constitutional mandate charging Board with general supervision of Commonwealth’s school system ................................................................. 50
**EDUCATIONAL INSTITUTIONS**

Virginia Military Institute. Legislator’s employment by VMI Foundation, Inc., as major gifts officer, does not constitute impermissible conflict of interest. Legislator is not restricted in his ability to participate in transactions of the General Assembly affecting Virginia Military Institute as part of group of educational institutions ................................................................. 179

**ELECTIONS**

Advertisement. Consideration of aesthetics, public safety concerns, and nature and character of zoning classification in determining constitutionality of local ordinance limiting time period within which political signs may be displayed on private property, before and after primary or general election ...................... 43

General Provisions and Administration - Local Electoral Boards. Governor has power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts ................................................................. 169

General Provisions and Administration - Registrars. Governor has power to direct State Board of Elections to reduce amounts it reimburses localities for salaries of electoral board members and general registrars, to achieve legislatively mandated budget cuts ............................................................................. 169

**EMINENT DOMAIN**

Public/private use. Private benefit is permissible when it is merely incidental to public benefit. Private and public benefits that are blended will be approved if they further public use and private benefit is merely incidental ................... 101

**EXTRADITION ACT, UNIFORM CRIMINAL**

(See CRIMINAL PROCEDURE: Extradition of Criminals - Uniform Criminal Extradition Act)

**FAIR HOUSING LAW, VIRGINIA**

(See HOUSING: Virginia Fair Housing Law)

**FEDERAL FAIR HOUSING ACT**

Federal and state fair housing laws seek to prevent denial of housing opportunities based on, among other classifications, familial status; housing for older persons is exempt from compliance with Act’s familial status provisions .......... 191

**FEDERAL/STATE LAW**

Act of Congress is supreme. State law must yield to it and not interfere with or be contrary to laws enacted pursuant to U.S. Constitution ....................... 328
<table>
<thead>
<tr>
<th>FEDERAL/STATE LAW</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circuit court clerk who records deed of trust containing grantor’s social security number is not bound by confidentiality provisions of federal law when recording such instrument</td>
<td>270</td>
</tr>
<tr>
<td>States and localities generally are prohibited from taxing federal government and its agencies except when Congress has expressly authorized them to do so. Prohibition against taxing applies regardless of whether state has granted specific exemptions</td>
<td>328</td>
</tr>
<tr>
<td>Status of federal government and its agencies in recordation transaction determines whether recordation tax should be collected. Grantor tax is not charged when federal government takes title to real estate as party; no tax is imposed where federal government agencies take title to property as receivers</td>
<td>328</td>
</tr>
</tbody>
</table>

**FIDUCIARIES GENERALLY**

**Inventories and Accounts.** Circuit court clerk may not accept and hold equity interest in Virginia stock corporation operated by commissioner of accounts, subject to direction of court, when transfer is not part of case or controversy properly before court, without improperly assuming legislative function | 47 |

Commissioner of accounts is not “criminal justice agency” entitled to access criminal history records of delinquent fiduciaries through Virginia Criminal Information Network. Circuit court may release such records to commissioner pursuant to court order or rule | 173 |

Commissioner of accounts is not employee of circuit court but is independent, quasi-judicial officer of court subject to statutory authority | 47 |

Commissioner of accounts is quasi-judicial character who acts in judicial capacity and is charged with responsibility for review and approval of inventories and fiduciary accountings, and making appropriate reports to circuit court. Reports are subject to review by court pursuant to same standards applicable to commissioners in chancery | 47 |

Commissioner of accounts provides inexpensive and efficient method of administering estates | 47 |

Commissioners of accounts are subject to BPOL taxation on fees charged and received by them for administration of fiduciary accounts | 292 |

**FIRE PROTECTION**

**Statewide Fire Prevention Code Act.** Municipality has no authority to enforce Statewide Fire Prevention Code on state property, absent agreement with State Fire Marshall or Director of Department of Housing and Community Development for Code’s enforcement. Localities have no authority to enforce
FIRE PROTECTION

Statewide Fire Prevention Code Act (contd.)
Uniform Statewide Building Code on state property, absent delegation of such authority by state building official ................................................................. 176

FREEDOM OF INFORMATION
(See ADMINISTRATION OF GOVERNMENT: Virginia Freedom of Information Act)

GENERAL ASSEMBLY

Amendment. General Assembly, in passing new law or amending old one, is presumed to act with full knowledge of law as it stands ......................... 182

General Assembly is presumed to have had knowledge of Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General's view ................. 188

Legislature did not intend to do vain and useless thing in enacting or amending statute ............................................................................................. 217

Presumption that legislature acted purposefully intent to change existing law ...... 188

When new provisions are added to existing legislation by amendment, presumption arises that, in making amendment, legislature acted with full knowledge of, and in reference to, existing law on same subject and construction placed on it by courts[; and purposefully intended to change existing law] ............................................................................. 62, 182, 188

Declaration. Explicit provision setting forth procedure for dissolution of hospital authority is indication that General Assembly contemplated need for such dissolution ........................................................................................................... 79

Definition. If General Assembly intends definition to apply to term used in statute, it can include such definition ................................................................. 214

Does not intend religious associations to exclude corporations ...................... 331

Enactment. General Assembly, in passing new law or amending old one, is presumed to act with full knowledge of law as it stands ........................................ 182

Legislature did not intend to do vain and useless thing in enacting or amending statute ..................................................................................................... 217

Presumption that General Assembly did not intend to enact inconsistent legislation ....................................................................................................... 217

Exemption. If General Assembly had intended "bus" exemption from child restraint devices to be based solely on number of passengers vehicle could carry, it could have established specific numeric limitation ......................... 214
## General Assembly

### General Assembly Conflicts of Interests Act

Interests of citizen-legislators are conflict only if substantially different from other members of recognizable group or class affected by transaction, even if it is reasonably foreseeable that those interests may be affected by action of General Assembly. Disqualification is required whenever transaction is specifically applicable to employer rather than applicable to public in general.  

Legislator bears initial burden of determining whether business opportunity is being offered to influence him in his official capacity, and if so, legislator must decline such opportunity to avoid impermissible conflict of interest.  

Legislator's employment by VMI Foundation, Inc., as major gifts officer, does not constitute impermissible conflict of interest. Legislator is not restricted in his ability to participate in transactions of the General Assembly affecting Virginia Military Institute as part of group of educational institutions.  

General Assembly may modify jurisdiction of court granted by statute.  

Presumed to acquiesce in Attorney General’s published interpretations of statute where no corrective amendment is legislatively made.  

Presumed to have had knowledge of Attorney General’s interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General’s view.  

**Retroactive statute.** Legislature should evidence its intent that statute have retroactive effect.  

**Specificity.** Had General Assembly intended to impose reimbursement requirement for costs of guardian ad litem on guardians of juveniles, it could have done so by including word “guardian” in that portion of legislation.  

If General Assembly had intended “bus” exemption from child restrain devices to be based solely on number of passengers vehicle could carry, it could have established specific numeric limitation.  

When General Assembly expressly bestows certain powers in statute, it intends to exclude those powers which have been omitted.  

When General Assembly intends statute to impose requirements, it knows how to express its intention.  

When subject matter jurisdiction is statutorily created, General Assembly is entitled to alter rules governing judicial exercise of that jurisdiction.  

### General Provisions

(See also **Statutory Construction**)
GENERAL PROVISIONS

Common Law, Statutes and Rules of Construction. Local ordinances adopted under broad police power authority must not be inconsistent with state law. Ordinance is inconsistent with state law if state law preempts local regulation in area, either by expressly prohibiting local regulation or by enacting state regulations so comprehensive that state may be considered to occupy entire field ...................................................................................................................... 67

Ordinances adopted pursuant to locality’s police power must have clear, reasonable, and substantial relation to public health, safety, morals, or welfare, and must be reasonably appropriate for police power objective sought to be obtained; must not be inconsistent with state law ............................................. 254

Procedural provisions of statute in effect on date of trial control conduct of trial insofar as practicable ................................................................. 158

Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law ......................... 254

Rules of evidence are procedural, rather than substantive rights or claims. Rules in effect on date of trial control conduct of trial ............................... 158

State occupies field of sewage sludge disposal, treatment and management; state program regulating biosolids use preempts local ordinance requiring applicant to obtain conditional use permit before applying or storing biosolids in locality ............................................................................................................. 67

Statutory requirement preventing disclosure of social security or other control numbers appearing on marriage licenses applies retroactively to licenses filed on and after July 1, 1997. Attorney General declines to comment on practicability of devising method by which marriage licenses processed and imaged since 1997 may be changed to comply with nondisclosure requirements ......... 182

2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and that tangible personal property of association shall be entitled to exemption from personal property tax on household goods is not declaratory of law existing prior to July 1, 2002, effective date of legislation, and is not retroactive in its application ........................................................................................................... 273

GOVERNMENT DATA COLLECTION AND DISSEMINATION PRACTICES ACT
(See ADMINISTRATION OF GOVERNMENT: Data Collection & Dissemination)

GOVERNMENT EMPLOYEES DEFERRED COMPENSATION PLAN ACT
(See PENSIONS, BENEFITS AND RETIREMENT)
HEALTH

Administration Generally – Department of Health and State Health Commissioner.
Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources .......................................................... 202

Authority of State Health Commissioner and Board of Health in public health emergency to issue regulations enforcing quarantine .............................................. 202

Disease Prevention and Control. Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources ............................................. 202

Environmental Health Services – Public Water Supplies. Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law ........................................................................ 254

Environmental Health Services – Sewage Disposal. State occupies field of sewage sludge disposal, treatment and management; state program regulating biosolids use preempts local ordinance requiring applicant to obtain conditional use permit before applying or storing biosolids in locality ....................... 67

State Board of Health. Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law ........................................................................ 254

Vital Records – Marriage Records and Divorce and Annulment Reports. Statutory requirement preventing disclosure of social security or other control numbers appearing on marriage licenses applies retroactively to licenses filed on and after July 1, 1997. Attorney General declines to comment on practicability of devising method by which marriage licenses processed and imaged since 1997 may be changed to comply with nondisclosure requirements .......... 182

HIGHWAYS, BRIDGES AND FERRIES

Commonwealth Transportation Board, etc. Attorney General defers to determination by Commonwealth Transportation Board that funds set aside in Virginia Transportation Act for Southeast Bypass project are to be spent solely on
HIGHWAYS, BRIDGES AND FERRIES

Commonwealth Transportation Board, etc. (contd.)
planning, engineering and construction of bypass and not on improving roads along bypass corridor and alternatives to bypass................................. 186

Ferries, Bridges and Turnpikes – State Revenue Bond Act. Attorney General defers to determination by Commonwealth Transportation Board that funds set aside in Virginia Transportation Act for Southeast Bypass project are to be spent solely on planning, engineering and construction of bypass and not on improving roads along bypass corridor and alternatives to bypass .............. 186

HOUSING

Dept. of Housing and Community Development. Municipality has no authority to enforce Statewide Fire Prevention Code on state property, absent agreement with State Fire Marshall or Director of Department of Housing and Community Development for Code’s enforcement. Localities have no authority to enforce Uniform Statewide Building Code on state property, absent delegation of such authority by state building official............................................................. 176

Housing Authorities Law. Hampton housing ordinance is unauthorized to extent it applies in areas other than conservation and rehabilitation districts designated by city’s local governing body or in nonblighted areas ..................... 188

Uniform Statewide Building Code. Hampton housing ordinance is unauthorized to extent it applies in areas other than conservation and rehabilitation districts designated by city’s local governing body or in nonblighted areas .............. 188

Municipality has no authority to enforce Statewide Fire Prevention Code on state property, absent agreement with State Fire Marshall or Director of Department of Housing and Community Development for Code’s enforcement. Localities have no authority to enforce Uniform Statewide Building Code on state property, absent delegation of such authority by state building official .......... 176

Virginia Fair Housing Law. Federal and state fair housing laws seek to prevent denial of housing opportunities based on, among other classifications, familial status ................................................................. 191

Law is modeled after Federal Fair Housing Act ........................................... 191

Mobile home park, with 80% senior occupancy rate, may operate and advertise as housing for seniors and rent or sell only to seniors without violating state and federal laws that prohibit discrimination in housing based on familial status ......................................................................................... 191

Reserving existing or future vacancies in established mobile home park solely for seniors, to satisfy federal and state 80% senior occupancy rate requirement,
HOUSING

Virginia Fair Housing Law (contd.)

could be interpreted to discriminate against families with children, in violation of state and federal fair housing laws. If mobile home park eventually reaches senior occupancy rate requirement and does not otherwise violate state and federal fair housing laws based on familial status, it may become eligible to operate and advertise as housing for seniors ...................................................... 191

IMMUNITY

(See also CIVIL REMEDIES AND PROCEDURE: Actions – Tort Claims Against the Commonwealth of Virginia)

Absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire certified athletic trainer ....................................................... 258

Circuit court clerk is accorded absolute immunity when acting in obedience of judicial order or under court’s direction ........................................................................ 270

City employees generally are not entitled to sovereign immunity for commission of intentional torts, whether acting within or without scope of employment ...... 270

Doctrine of judicial immunity provides judges with absolute immunity from civil liability. Court personnel share absolute judicial immunity when carrying out order of court. Probation officers and other public officials enjoy sovereign immunity for activities requiring exercise of judgment and discretion and are liable, as are court personnel, for negligent performance of simple ministerial tasks and claims of gross negligence ................................................................. 278

Doctrine of sovereign immunity would not apply to court personnel carrying out ministerial tasks .............................................................................................. 278

Factors to consider in determining entitlement to immunity include (a) nature of function performed; (b) extent of state’s interest and involvement in function; (c) state’s degree of control and direction over employee; and (d) whether act involved use of judgment and discretion .............................................................. 270

Factors to consider in determining whether governmental employees are entitled to sovereign immunity ...................................................................................... 278

Government employee is liable for negligence in performing ministerial act; use of judgment and discretion is element in determining immunity ..................... 270

Government official normally is entitled to sovereign immunity in exercise of official duties ......................................................................................................... 270

Judge is entitled to judicial immunity when performing official acts within scope of his jurisdiction .................................................................................................. 278
Judge who sentences criminal defendant to litter cleanup, as condition of probation or to avoid conviction, is performing official act within scope of his jurisdiction and is immune from civil liability .......................................................... 278

Judges enjoy absolute judicial immunity when entering order assigning criminal probationer or defendant to litter cleanup program as condition of probation or to avoid conviction; court personnel would enjoy judicial or sovereign immunity, and probation officers and other public officials would enjoy sovereign immunity, for most activities connected with program .................................................. 278

Liability of court personnel depends on nature of function they perform. If carrying out order of court, they would likely be entitled to judicial immunity; if acting on their own authority, they may be protected by doctrine of sovereign immunity for discretionary acts .......................................................... 278

Malfeasance of clerk’s ministerial duty is not entitled to protection of sovereign immunity .......................................................... 270

Probation officers are entitled to protection of sovereign immunity when performing discretionary activities; would be liable for acts of gross negligence and negligent performance of simple ministerial tasks .......................................................... 278

School board is entitled to sovereign immunity for failure to hire certified athletic trainer for its athletic programs .......................................................... 258

School board that fails to hire certified athletic trainer is entitled to absolute sovereign immunity .......................................................... 258

INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT
(See COUNTIES, CITIES AND TOWNS)

LABOR AND EMPLOYMENT

Employer/employee relationship. Common law test for determining existence of such relationship .......................................................... 232

LAND CONSERVATION INCENTIVES ACT OF 1999, VIRGINIA

MENTAL HEALTH GENERALLY

Admissions and Dispositions In General. Authority of Department of State Police to provide mental health information maintained in Central Criminal Records Exchange to Federal Bureau of Investigation for use in National Instant Criminal Background Check System Index .......................................................... 199
MENTAL HEALTH GENERALLY

Admissions and Dispositions in General (contd.)

Sheriff has specific statutory responsibility to provide transportation of prisoners in his custody to courts, hospitals and medical appointments; has custody of such person during period of transport unless and until such custody is transferred to another ................................................................. 194

Sheriff is not required to remain for screening of individual transported to medical facility for evaluation and treatment under temporary detention order unless order requires transport of individual to another facility to obtain emergency medical evaluation or treatment prior to placement. Sheriff maintains custody of individual transported under temporary detention order until execution of order ....................................................................................................... 194

Sheriff maintains custody of individual transported under temporary detention order until execution of order ............................................................................................................ 194

Special justice, appointed to preside over commitment proceedings involving persons alleged to mentally retarded or mentally ill and in need of hospitalization, may represent individuals in commitment hearings held within judicial circuit of such justice ........................................................................................................ 197

Committees and Trustees. Authority of Department of State Police to provide mental health information maintained in Central Criminal Records Exchange to Federal Bureau of Investigation for use in National Instant Criminal Background Check System Index .............................................................................. 199

Substance Abuse Services. Parent may request and consent to drug testing for minor child; is not precluded from obtaining results of nondiagnostic drug testing performed on minor child not receiving treatment for substance abuse .......... 262

MILITARY AND EMERGENCY LAWS

Emergency Services and Disaster Law. Authority of Governor in public health emergency to issue orders enforcing quarantine ................................................. 202

Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources ........................................................................................................ 202

Governor has authority to declare emergency and waive state law when safety and welfare of people require exercise of emergency measures .................................. 202

Governor may direct medically trained state employees, privately employed medical personnel, National Guard, unorganized militia, and volunteers to
Emergency Services and Disaster Law (contd.)
participate in emergency response activities; use of military assets in such situation is subject to federal laws and regulations governing such use .......... 202

Purpose of Emergency Operations Plan; availability of funds to cover cost of emergency operations ................................................................. 202

Military Laws of Virginia. Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources .................................... 202

Governor may direct medically trained state employees, privately employed medical personnel, National Guard, unorganized militia, and volunteers to participate in emergency response activities; use of military assets in such situation is subject to federal laws and regulations governing such use .......... 202

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty ................................................................. 58

MOTOR VEHICLES

Department of Motor Vehicles. Commissioner of accounts is not "criminal justice agency" entitled to access criminal history records of delinquent fiduciaries through Virginia Criminal Information Network. Circuit court may release such records to commissioner pursuant to court order or rule ......................... 173

Licensure of Drivers – Unlicensed Driving Prohibited. Applicability of administrative impoundment provisions where individual is charged with or arrested for driving during license suspension period resulting from DUI conviction ...... 210

Historical derivations of §§ 18.2-272 and 46.2-301 indicate that driving during suspension period may be charged under either statute where suspension or revocation resulted from DUI conviction .................................................. 210

Placement of impoundment provisions under motor vehicles laws does not constrain their application to charges made or convictions obtained pursuant to those laws ................................................................. 210

Motor Vehicle and Equipment Safety – Child Restraints. Interpretation of "bus" and "impractical," as used in relation to transporting children in child restraint
Motor Vehicle and Equipment Safety – Child Restraints (contd.)

devices, is not appropriate issue for opinion of Attorney General. Purpose of child restraint laws—to protect children from injury—should be foremost in determining whether vehicle transporting child is “bus” entitled to exemption from child restraint laws or whether it is “impractical” to put child restraint device in vehicle. Vehicles exempt from requirements for age specific child restraints before July 1, 2002, remain exempt ..................................................... 214

Whether “bus” is exempt from requirements to transport children in child restraint devices and whether interior design of vehicle or weight and size of child make it “impractical” for child to be placed in child restraint device is factual question ................................................................................................. 214

Whether specific motor vehicle falls within ordinary definitions of “bus” for purposes of vehicles entitled to exemption from child restraint laws is determination of fact rather than one of law .............................................................. 214

Motor Vehicle and Equipment Safety – Emissions Inspections. Required use of ASM 50-15 testing equipment for tailpipe exhaust emissions tests performed under Federal Clean Air Act; authorized use of other equipment or software for nontailpipe tests or checks that are part of federal motor vehicle inspection and maintenance program. Virginia’s enhanced emissions inspections program is limited to testing procedures necessary to comply with Clean Air Act, including nontailpipe exhaust tests. Exclusion of tailpipe exhaust tests no longer required by Act ....................................................................................... 217

Tilting, Registration of Motor Vehicles – State and Local Motor Vehicle Registration. Local motor vehicle fee is imposed on privilege of operating motor vehicle and is not property tax ......................................................... 227

Locality is prohibited from providing more than one vehicle license to active members of its volunteer rescue squads and fire departments ........................................ 224

Locality may issue more than one vehicle license free of charge to former volunteer rescue squad and fire department members meeting statutory length-of-service requirements ......................................................... 224

Locality that adopts ordinance to enforce payment of local motor vehicle license fee must issue some form of license upon payment of fee; may prescribe form of license to be displayed on vehicle. Refusal of DMV Commissioner, per agreement with local treasurer or director of finance, to issue or renew vehicle registration for individual whose local license fee is unpaid ................ 227

Offense proscribed by ordinance adopted pursuant to § 46.2-752(B) is not failure to purchase license decal but is operation of vehicle on public highway without obtaining and displaying appropriate decal on motor vehicle ............. 227
MOTOR VEHICLES

Titling, Registration of Motor Vehicles - State and Local Motor Vehicle Registration (contd.)

Person may own motor vehicle and keep it garaged without being subject to local motor vehicle fee ................................................................. 227

NOTARIES AND OUT-OF-STATE COMMISSIONERS

Powers and Duties. Notary public commissioned by State of Maryland is not authorized by that state to notarize documents in Commonwealth for recordation in Virginia circuit court clerk's office ................................................. 230

Notary public must possess threshold jurisdictional authority to perform notarial acts in such jurisdiction ......................................................... 230

OATHS, AFFIRMATIONS AND BONDS

Bonds Taken by Courts and Officers. Circuit court clerk may not decline to record deed of trust containing grantor's social security number. Modification of deed of trust offered for recordation may expose clerk to liability ............. 270

PENSIONS, BENEFITS, AND RETIREMENT

Government Employees Deferred Compensation Plan Act. No authority for Retirement System to charge Department of Accounts for administrative expenses related to oversight of deferred compensation plan. Retirement System may not recover from participating employees, but may bill participating employers for, expenses related to administration of cash match plan. No authority for Retirement System to charge and collect administrative fee from participants in optional retirement plan for political appointees or from institutions of higher education. Questions regarding method and source by which Retirement System may recover costs incurred and associated with administration of VolSAP when Fund assets are insufficient, or action Retirement System should take for optional retirement plan for school superintendents should request for general fund appropriation be denied, are not appropriate issues for comment by Attorney General ......................................................... 233

Virginia Retirement System. No authority for Retirement System to charge Department of Accounts for administrative expenses related to oversight of deferred compensation plan. Retirement System may not recover from participating employees, but may bill participating employers for, expenses related to administration of cash match plan. No authority for Retirement System to charge and collect administrative fee from participants in optional retirement plan for political appointees or from institutions of higher education. Questions regarding method and source by which Retirement System may recover costs incurred and associated with administration of VolSAP when Fund assets are insuffi-
PENSIONS, BENEFITS, AND RETIREMENT

Virginia Retirement System (cont’d.)

cient, or action Retirement System should take for optional retirement plan for school superintendents should request for general fund appropriation be denied, are not appropriate issues for comment by Attorney General .......................... 233

Time spent as local elected official does not constitute time spent employed by locality and is not time purchasable as prior service credit ........................................ 232

Volunteer Firefighters’ and Rescue Squad Workers’ Service Award Fund. No authority for Retirement System to charge Department of Accounts for administrative expenses related to oversight of deferred compensation plan. Retirement System may not recover from participating employees, but may bill participating employers for, expenses related to administration of cash match plan. No authority for Retirement System to charge and collect administrative fee from participants in optional retirement plan for political appointees or from institutions of higher education. Questions regarding method and source by which Retirement System may recover costs incurred and associated with administration of VolSAP when Fund assets are insufficient, or action Retirement System should take for optional retirement plan for school superintendents should request for general fund appropriation be denied, are not appropriate issues for comment by Attorney General ............................................................... 233

POLICE (STATE)

Basic State Police Communication System. Commissioner of accounts is not “criminal justice agency” entitled to access criminal history records of delinquent fiduciaries through Virginia Criminal Information Network. Circuit court may release such records to commissioner pursuant to court order or rule ...... 173

E-911 personnel may access criminal justice information generated by VCIN/NCIC terminals per statutorily authorized agreement with local sheriff’s office, subject to requirements of State Police. Absent specific statutory authorization, sheriff may not enter into agreement binding his successors in office ...... 151

Department of State Police. Law-enforcement agencies are not required to enter into Virginia Criminal Information Network information contained in indictments and capiases ordered sealed by court prior to arrest of individual named in such indictments and capiases .................................................................................. 155

Requirement that law-enforcement agency enter into Virginia Criminal Information Network certain information contained on warrant or capias received by agency is directory in nature and does not otherwise violate affected individual’s constitutional rights .............................................................................................. 155
Local Correctional Facilities - Duties of Sheriffs. Local sheriff is not required to
provide more than one deputy sheriff to general district court for courtroom
security absent order stating substantial security risk exists in particular case ...... 242

Local Correctional Facilities - Regional Jails and Jail Farms. Employees of
regional jails are local employees eligible for payment of monetary bonuses
authorized by ordinance .................................................................................... 244

Northern Neck Regional Jail Board has no independent authority to pay em­
ployee bonuses; has authority to request localities participating in regional
jail to fund employee bonuses. Participating localities must adopt ordinances
authorizing such bonuses .................................................................................. 244

Processing fee authorized by ordinance to be collected by clerk on convicted
individuals admitted into county, city, or regional jails is reserved solely for
use by local sheriff’s office, even though county or city may participate in re­
geonal jail ............................................................................................................. 83

Regional jails are not independent political subdivisions ....................... 244

Responsibility of Colonial Heights police department to transport arrestee to
regional jail. Jail superintendent has responsibility to convey prisoners to
and from court. Sheriff maintains control of prisoners awaiting further criminal
proceedings at courthouse; is responsible for returning them to jail superinten­
dent for transport to regional jail at conclusion of day’s hearings. Any prisoner
remaining for further court proceedings within same day should be kept in
courthouse holding cell until conclusion of proceedings and released to jail
superintendent for transport to regional jail. City council may adopt ordinance
requiring sheriff to perform extra transport duties and compensate sheriff
accordingly ........................................................................................................ 247

Local Correctional Facilities - Utilization of Jails. Responsibility of Colonial
Heights police department to transport arrestee to regional jail. Jail superinten­
dent has responsibility to convey prisoners to and from court. Sheriff maintains
control of prisoners awaiting further criminal proceedings at courthouse; is
responsible for returning them to jail superintendent for transport to regional
jail at conclusion of day’s hearings. Any prisoner remaining for further court
proceedings within same day should be kept in courthouse holding cell until
conclusion of proceedings and released to jail superintendent for transport
to regional jail. City council may adopt ordinance requiring sheriff to perform
extra transport duties and compensate sheriff accordingly ............................... 247

Regional Jails (see supra Local Correctional Facilities - Regional Jails and Jail
Farms)
PRISONS AND OTHER METHODS OF CORRECTION

State Correctional Facilities – Employment and Training of Prisoners. Authority for Department of Corrections to employ prisoners to perform roofing work on buildings located on prison grounds; no requirement to procure such services under competitive sealed bidding procedures of Virginia Public Procurement Act ............................................................................................................ 252

State Correctional Facilities – Treatment and Privileges Of Prisoners. Authority for Department of Corrections to employ prisoners to perform roofing work on buildings located on prison grounds; no requirement to procure such services under competitive sealed bidding procedures of Virginia Public Procurement Act ............................................................................................................ 252

PRIVACY PROTECTION ACT OF 1976 (repealed effective October 1, 2001)
(See ADMINISTRATION OF GOVERNMENT: Data Collection & Dissemination)

PROCUREMENT
(See ADMINISTRATION OF GOVERNMENT: Virginia Public Procurement Act)

PROFESSIONAL LIMITED LIABILITY COMPANY ACT, VIRGINIA
(See CORPORATIONS)

PROFESSIONS AND OCCUPATIONS

Contractors. Board for Contractors Regulations do not supplant locality’s ability, under its general police powers, to require licensed plumbers to install backflow prevention devices when such requirement is related directly to protection of locality’s water supply system ........................................................................ 254

Requirement by City of Richmond that only licensed plumbing contractors or licensed master plumbers shall install backflow prevention devices to prevent contamination of city’s potable water supply appears to be appropriate exercise of city’s police power and is not inconsistent with state law ......................... 254

Drug Control Act. Pharmacist, prior to filling prescription, may obtain fingerprint from customer as proof of identification, provided pharmacist returns or destroys print within 21 days of transaction’s completion or termination; may provide to law-enforcement officials fingerprint of any customer suspected of prescription fraud ............................................................................................................ 342

Medicine and Other Healing Arts. Parent may request and consent to drug testing for minor child; is not precluded from obtaining results of nondiagnostic drug testing performed on minor child not receiving treatment for substance abuse ................................................................................................................ 262

School board enjoys absolute immunity for its acts unless abrogated by statute .......................................................................................................................... 258
**PROFESSIONS AND OCCUPATIONS**

**Medicine and Other Healing Arts (contd.)**

School board is entitled to sovereign immunity for failure to hire certified athletic trainer for its athletic programs ................................................................. 258

School division coaches and other school personnel may render first aid to students when necessary. Unless such persons are certified athletic trainers, they may not employ physical modalities or tape students’ ankles or wrists in order to prevent or treat injuries or other physical conditions. Certified athletic trainers are responsible for actions of noncertified individuals acting under their supervision and direction; must ensure that such individuals do not perform functions requiring professional judgment or discretion of certified athletic trainers. School board that fails to hire certified athletic trainer is entitled to absolute sovereign immunity. Absent gross negligence, school board employees may be entitled to sovereign immunity for failure to hire certified athletic trainer ................................................................. 258

School division serves as agent of state in performance of duties imposed by state constitution and laws ................................................................. 258

**Pharmacy.** Pharmacist may use fingerprint for customer identification .......... 342

Pharmacist, prior to filling prescription, may obtain fingerprint from customer as proof of identification, provided pharmacist returns or destroys print within 21 days of transaction’s completion or termination; may provide to law-enforcement officials fingerprint of any customer suspected of prescription fraud ...... 342

**PROPERTY AND CONVEYANCES**

**Form and Effect of Deeds and Covenants; Liens.** Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability ........................................................................................................... 270

**Landlord and Tenant.** Actions of sheriff’s office regarding disposal of personal property removed from residential premises pursuant to unlawful detainer or ejectment ........................................................................................................... 264

**Property Owners’ Association Act.** Attorney General declines to interpret provision of Act that does not address question whether retirement community developer, which controls homeowners’ association, may establish budget for association that is not based on fact. Act requires developer to provide to potential buyers disclosure statement reflecting financial status of association. Developer may retain control of association and bill homeowners for association expenses, provided developer retains ownership of majority of development lots ........................................................................................................... 266
PROPERTY AND CONVEYANCES

Recordation of Documents. Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability ........................................ 270

Constructive notice is associated with clerk’s act of recording ...................... 270

Recordation of deeds by circuit court clerk is considered ministerial act ......... 270

Recordation of Documents – Uniform Recognition of Acknowledgments Act. Notary public commissioned by State of Maryland is not authorized by that state to notarize documents in Commonwealth for recordation in Virginia circuit court clerk’s office ...................................................................................... 230

Residential Landlord and Tenant Act. Actions of sheriff’s office regarding disposal of personal property removed from residential premises pursuant to unlawful detainer or ejectment ........................................................................... 264

Virginia Real Estate Cooperative Act. 2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and that tangible personal property of association shall be entitled to exemption from personal property tax on household goods is not declaratory of law existing prior to July 1, 2002, effective date of legislation, and is not retroactive in its application .............................................................. 273

Virginia Residential Landlord and Tenant Act (see supra Residential Landlord and Tenant Act)

PROPERTY OWNERS’ ASSOCIATION ACT
(See PROPERTY AND CONVEYANCES)

PUBLIC PROCUREMENT ACT, VIRGINIA
(See ADMINISTRATION OF GOVERNMENT: Virginia Public Procurement Act)

REAL ESTATE COOPERATIVE ACT, VIRGINIA
(See PROPERTY AND CONVEYANCES: Virginia Real Estate Cooperative Act)

RETIREMENT SYSTEM, VIRGINIA
(See PENSIONS, BENEFITS, AND RETIREMENT: Virginia Retirement System)

RULES OF PROFESSIONAL CONDUCT, VIRGINIA
(See RULES OF SUPREME COURT OF VIRGINIA: Integration of the State Bar)

RULES OF SUPREME COURT OF VIRGINIA

Integration of the State Bar – Canons of Judicial Conduct for the State of Virginia. Doctrine of judicial immunity provides judges with absolute immunity from civil liability. Court personnel share absolute judicial immunity when
Integration of the State Bar – Canons of Judicial Conduct for the State of Virginia (contd.)
carrying out order of court. Probation officers and other public officials enjoy sovereign immunity for activities requiring exercise of judgment and discretion and are liable, as are court personnel, for negligent performance of simple ministerial tasks and claims of gross negligence .......................................................... 278

Doctrine of sovereign immunity would not apply to court personnel carrying out ministerial tasks .......................................................... 278

Judge is entitled to judicial immunity when performing official acts within scope of his jurisdiction .......................................................... 278

Judge who sentences criminal defendant to litter cleanup, as condition of probation or to avoid conviction, is performing official act within scope of his jurisdiction and is immune from civil liability .......................................................... 278

Judges enjoy absolute judicial immunity when entering order assigning criminal probationer or defendant to litter cleanup program as condition of probation or to avoid conviction; court personnel would enjoy judicial or sovereign immunity, and probation officers and other public officials would enjoy sovereign immunity, for most activities connected with program .......................................................... 278

Liability of court personnel depends on nature of function they perform. If carrying out order of court, they would likely be entitled to judicial immunity; if acting on their own authority, they may be protected by doctrine of sovereign immunity for discretionary acts .......................................................... 278

Special justice, appointed to preside over commitment proceedings involving persons alleged to mentally retarded or mentally ill and in need of hospitalization, may represent individuals in commitment hearings held within judicial circuit of such justice ........................................................................................................... 197

Integration of the State Bar – Virginia Rules of Professional Conduct (Client Lawyer Relationship). Advanced legal fees remain property of judgment debtor. Judgment creditor may garnish unearned advance fees paid by judgment debtor to attorney. Potential judgment creditor may attach such funds .................. 32

SHERIFFS

Actions of sheriff’s office regarding disposal of personal property removed from residential premises pursuant to unlawful detainer or ejectment .................. 264

Although sheriff’s powers and duties are limited to those prescribed by statute, he is free to discharge those powers and duties in manner he deems appropriate ..... 264
<table>
<thead>
<tr>
<th>SHERIFFS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief law-enforcement officer of sheriff’s office is sheriff</td>
<td>140</td>
</tr>
<tr>
<td>Creation of separate police force does not relieve sheriff of his duty to enforce criminal laws</td>
<td>247</td>
</tr>
<tr>
<td>Dillon Rule of strict construction is applicable to constitutional officers</td>
<td>194</td>
</tr>
<tr>
<td>Duties of sheriff and his deputies are regulated and defined by statute</td>
<td>264, 321</td>
</tr>
<tr>
<td>Duty of sheriff to investigate all violations of law and serve criminal warrants</td>
<td>247</td>
</tr>
<tr>
<td>E-911 personnel may access criminal justice information generated by VCIN/NCIC terminals per statutorily authorized agreement with local sheriff’s office, subject to requirements of State Police. Absent specific statutory authorization, sheriff may not enter into agreement binding his successors in office</td>
<td>151</td>
</tr>
<tr>
<td>Freedom to discharge prescribed powers and duties in manner deemed appropriate, except as limited by law</td>
<td>194</td>
</tr>
<tr>
<td>In absence of statute providing otherwise, authority of sheriff is coextensive with his locality</td>
<td>321</td>
</tr>
<tr>
<td>Local sheriff is not required to provide more than one deputy sheriff to general district court for courtroom security absent order stating substantial security risk exists in particular case</td>
<td>242</td>
</tr>
<tr>
<td>Mandatory duty of sheriff to serve process</td>
<td>247</td>
</tr>
<tr>
<td>Northern Neck Regional Jail Board has no independent authority to pay employee bonuses; has authority to request localities participating in regional jail to fund employee bonuses. Participating localities must adopt ordinances authorizing such bonuses</td>
<td>244</td>
</tr>
<tr>
<td>Powers and duties of constitutional officers are prescribed by statute, except as limited by law; such officers are free to discharge prescribed powers and duties in manner deemed appropriate</td>
<td>151</td>
</tr>
<tr>
<td>Processing fee authorized by ordinance to be collected by clerk on convicted individuals admitted into county, city, or regional jails is reserved solely for use by local sheriff’s office, even though county or city may participate in regional jail</td>
<td>83</td>
</tr>
<tr>
<td>Responsibility of Colonial Heights police department to transport arrestee to regional jail. Jail superintendent has responsibility to convey prisoners to and from court. Sheriff maintains control of prisoners awaiting further criminal proceedings at courthouse; is responsible for returning them to jail superintendent for transport to regional jail at conclusion of day’s hearings. Any prisoner</td>
<td></td>
</tr>
<tr>
<td>SHERIFFS</td>
<td>PAGE</td>
</tr>
<tr>
<td>----------</td>
<td>------</td>
</tr>
<tr>
<td>remaining for further court proceedings within same day should be kept in courthouse holding cell until conclusion of proceedings and released to jail superintendent for transport to regional jail. City council may adopt ordinance requiring sheriff to perform extra transport duties and compensate sheriff accordingly .......................................................... 247</td>
<td></td>
</tr>
<tr>
<td>Responsibility of police department of town issuing warrant for fugitive’s arrest to retrieve and return to court fugitive held in another locality. Governor’s discretionary selection of agent to retrieve and return to court fugitive located in another state is final and binding .......................................................... 94</td>
<td></td>
</tr>
<tr>
<td>Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of “priority” as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale ............................................................................................................... 321</td>
<td></td>
</tr>
<tr>
<td>Sheriff is chief law-enforcement officer of office of sheriff for purposes of issuing concealed weapons permits to retired deputies .......................................................... 140</td>
<td></td>
</tr>
<tr>
<td>Sheriff is conservator of peace, charged with enforcement of all criminal laws within his jurisdiction .................................................................................................................. 247</td>
<td></td>
</tr>
<tr>
<td>Sheriff is officer of court, subject to its orders and directions .......................................................... 247</td>
<td></td>
</tr>
<tr>
<td>Sheriff is not required to remain for screening of individual transported to medical facility for evaluation and treatment under temporary detention order unless order requires transport of individual to another facility to obtain emergency medical evaluation or treatment prior to placement. Sheriff maintains custody of individual until individual is delivered to temporary detention facility ................................ 194</td>
<td></td>
</tr>
<tr>
<td>Sheriff may use distress letter from treasurer to seize property; is required to collect delinquent taxes described in treasurer’s distress letter. Sheriff may not require treasurer to provide indemnity bond for liability arising from distress ................................ 321</td>
<td></td>
</tr>
<tr>
<td>Sheriff’s discretion in determining unreasonableness of distress levy may not be exercised arbitrarily ............................................................................................................... 321</td>
<td></td>
</tr>
</tbody>
</table>
SOCIAL SECURITY ACT

Act does not prohibit social security number from appearing on instrument offered for recordation ......................................................... 270

Circuit court clerk may not decline to record deed of trust containing grantor’s social security number. Modification of deed of trust offered for recordation may expose clerk to liability ....................................... 270

Circuit court clerk who records deed of trust containing grantor’s social security number is not bound by confidentiality provisions of federal law when recording such instrument ............................................... 270

STATE WATER CONTROL LAW
(See STATE WATERS, PORTS AND HARBORS)

STATE WATERS, PORTS AND HARBORS

State Water Control Law – Regulation of Sewage Discharges. Locality may adopt ordinances that pertain only to testing and monitoring of land application of biosolids within its political boundaries ............................................... 67

State occupies field of sewage sludge disposal, treatment and management; state program regulating biosolids use preempts local ordinance requiring applicant to obtain conditional use permit before applying or storing biosolids in locality ................................................................. 67

Virginia Resources Authority. Authority distinguished as political subdivision from executive branch state agency .............................................. 281

Authority is political subdivision created in Commerce and Trade Secretariat for state government organizational purposes. Such inclusion does not alter independent nature of Authority to govern its affairs according to enabling statutes. Board of Directors has exclusive power over personnel issues of Authority, with exception of appointment of Executive Director ................. 281

Authority is unique state-created entity included within Commerce and Trade Secretariat due to its role in economic development throughout Commonwealth, operating independently of Secretary of Commerce and Trade through its Board of Directors ................................................................. 281

STATEWIDE BUILDING CODE, UNIFORM
(See HOUSING: Uniform Statewide Building Code)

STATEWIDE FIRE PREVENTION CODE ACT
(See FIRE PROTECTION)
### Absurdity

Every part of statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary ........................................ 227

Examine language of statute in its entirety and determine intent of General Assembly from words contained in statute, unless literal construction of statute would yield absurd result .............................................................. 124

Statutes [and regulations] should not be interpreted in ways that produce absurd or irrational consequences ........................................................................ 199, 233

### Administrative Authority

Every power expressly granted, or fairly implied from language used, or which is necessary to enable agency to exercise powers expressly granted, should and must be accorded; in considering whether authority is implied from powers expressly granted by statute; look to purpose and objective of provision ................................................................. 217

### Administrative Interpretation

Construction of statutes by agencies charged with administration of those statutes is entitled to great weight ......................... 34, 293

Decision of agency charged by General Assembly with statewide administration, unless it is clearly wrong, carries great weight and is entitled to deference ................................................................. 34

Great deference should be given to administrative interpretation of statutes by agency charged with responsibility for carrying out legislation ................. 186

### Ambiguity

Absent ambiguity, plain meaning of statute must prevail ...... 83, 288, 312

In reviewing statute for ambiguity, words or expressions in statute are given their commonly understood meaning, unless contrary intent is expressed ...... 18

Language is ambiguous when it may be understood in more than one way or simultaneously refers to two or more things ........................................ 315

Notwithstanding phrase indicates legislative intent to override any potential conflicts with statute ........................................................................ 242

Province of statutory construction lies wholly within domain of ambiguity, and that which is plain needs no interpretation ........................................ 242

Resort to rules of statutory construction is necessary only when there is ambiguity; otherwise, clear and unambiguous words of statute must be accorded their plain meaning .................................................. 142

When interpreting statute or legislative enactment, look at plain meaning to determine if there is any ambiguity in its meaning. No cause to resort to rules
Ambiguity (contd.)

of statutory construction if meaning is clear and unambiguous. Resort to such rules to determine legislative intent if there is genuine ambiguity as to meaning of statute or legislative enactment .......................................................... 18

When language is difficult to comprehend, is doubtful of import, or lacks clearness and definiteness, ambiguity exists ................................................................. 315

Where language of statute is free from ambiguity, its plain meaning should be accepted [will control] .............................................................................................. 77, 117

Where statutory language is free from ambiguity, plain meaning is accepted without resorting to rules of construction; rules must be applied to determine legislative intent where there is genuine ambiguity ........................................... 315

Where there is no ambiguity in statute, statute is not to be construed but is to be given effect in accordance with its plain meaning and intent .................. 82, 140

Words of instrument should be given their commonly accepted meaning; if no ambiguity exists, accept plain meaning of instrument and give effect accordingly ................................................................. 140

Amendment. Every part of statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary ....................... 217

Antecedent. Referential or qualifying words, where no contrary intention appears, refer solely to last antecedent ................................................................. 315

Clarity. Language of statute that is plain and unambiguous, and its meaning perfectly clear and definite, must be given effect. [It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In such situations, statute’s plain meaning and intent govern] ...... 173, 320

Manifest intention of legislature, clearly disclosed by its language, must be applied .............................................................................................................. 169

Resort to rules of statutory construction is necessary only when there is ambiguity; otherwise, clear and unambiguous words of statute must be accorded their plain meaning ...................................................................... 142

Statute that is clear and unambiguous should be given its plain meaning[, without resort to rules of statutory interpretation] ...... 3, 22, 107, 122, 217, 224, 252

When enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply ...................................................... 169
STATUTORY CONSTRUCTION

Clarity (contd.)
When statute is clear and unambiguous, its plain meaning must be accepted without resort to extrinsic evidence or rules of construction .................................................. 18

Common-law rule. Change or alteration to rule in statute must be plainly manifested by legislature; enactment that does not encompass entire subject covered by common law abrogates rule only to extent its terms are directly and irreconcilably opposed to rule ............................................................................. 16

Common-law rule of arrest prohibits warrantless arrests, except where gravity of offense justifies warrantless arrest or where crime is committed in presence of arresting officer ................................................................. 16

Common meaning. Absent statutory definition, common, ordinary meaning of term must apply ................................................................. 186, 214, 232, 244
Specific legislative definition of certain words is not necessary when those words have commonly accepted meaning .................................................. 18
Words in statute should be given their usual, commonly understood meaning ...... 138
Words or expressions in statute are given their commonly understood meaning, unless contrary intent is expressed ................................................................. 18

Conflict. Statutes dealing with same subject matter should be construed together to achieve harmonious result, resolving conflicts to give effect to legislative intent .................................................................................................... 30

When one statute speaks to subject in general way and another deals with part of same subject in more specific manner[, two should be harmonized, if possible, and] where they conflict, latter prevails ........................................ 124, 308

Conjunctive vs. disjunctive words. Only when necessary to effectuate obvious intention of legislature may disjunctive words be construed as conjunctive, and vice versa ................................................................. 117

Consistency. Ordinances must be consistent with state law ................................ 254

Court Interpretation. Courts are not permitted to add language to statute or accord words meaning that legislature did not intend when legislature has used words of plain and definite meaning ........................................ 293

Court Jurisdiction. Jurisdiction, practice, and procedure of juvenile courts are entirely statutory ................................................................. 124

Declaratory statutes. Such statutes are declaratory of common law or declaratory of prior statute and prior legislative intent ........................................ 273
## STATUTORY CONSTRUCTION

**Definition.** Absent statutory definition, words and phrases used in statute should be given their ordinary and usually accepted meaning unless different intention is fairly manifest ................................................................. 164

Absent statutory definition, words [terms] are given their [common,] [plain and] ordinary meaning [within statutory context] .......... 186, 214, 232, 244, 297, 321

Additional language in Tax Department guidelines’ definition of “definite place of business” amplifies and clarifies statutory definition ................................ 297

Specific legislative definition of certain words is not necessary when those words have commonly accepted meaning ........................................ 18

When statute does not contain express definition of term, intent of legislature may be inferred from plain meaning of words used ........................................ 344

**Dillon Rule.** Applicability to constitutional officers ........................................ 194

Local governing bodies [municipal corporations] have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. [Any doubt as to existence of power must be resolved against locality] ............. 67, 70, 83, 85, ................................. 107, 176, 188, 315

Local governing powers must be expressly granted by legislature, or must be fairly or necessarily implied from express powers, and must be essential and indispensable. Any doubt as to existence of power must be resolved against locality ................................................................. 105

Local public [governing] bodies may exercise only those powers conferred expressly or by necessary implication ........................................ 151, 194, 224

Localities are political subdivisions of Commonwealth ............................. 107

Municipalities have only such legislative and fiscal powers as are expressly or impliedly delegated to them by statute. When doubtful, question whether municipality has particular power is to be answered in negative. Rule requires narrow interpretation of all powers conferred on local governments .......... 77

Narrow construction of all powers conferred upon and exercised by local government in Virginia, because such powers are delegated powers .......... 176

Political subdivisions have only those powers expressly granted or necessarily implied from express powers ........................................ 77

Strict construction of powers of local governing bodies ............................ 105
STATUTORY CONSTRUCTION

Disjunctive vs. conjunctive words. Only when necessary to effectuate obvious intention of legislature may disjunctive words be construed as conjunctive, and vice versa ....................................................................................................................... 117

Doubtful meaning. [Where language of enactment is plain and unambiguous, its plain meaning must be applied.] Words must be taken as written and history of particular enactment, extrinsic facts, or general rules of construction of enactments that have doubtful meaning are not used ............... 6, 266

Ejusdem generis. Where particular class of persons or things is enumerated in statute and general words follow, general words are to be restricted in their meaning to sense analogous to less general, particular words ................................. 6

Enactment. Every part of statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary ............................... 217

Exclusion. Expressio unius est exclusio alterius .................. 34, 67, 70, 83, 91, 109, 117, ........................................................................................................ 122, 188, 233

Expression [mention] of one thing in statute [implies] means exclusion of [another] others .................................................................................. 34, 70, 224, 233

Mention of specific item in statute implies that omitted items were not intended to be included within its scope ................................................................. 117

When General Assembly expressly bestows certain powers in statute, it intends to exclude those powers which have been omitted .................................. 67

When statute creates specific grant of authority, authority exists only to extent specifically granted in statute ................................................................. 188

Expressio unius est exclusio alterius ........... 34, 67, 70, 83, 91, 109, 117, 122, 188, 233

General v. specific statute. When one statute speaks to subject in general way and another deals with part of same subject in more specific manner[, two should be harmonized, if possible, and] where they conflict, latter prevails ...... 124, 308

"Generally." Use of word implies existence of exceptions to general rule ........... 308

Harmony. Statutes dealing with same subject matter should be construed together to achieve harmonious result, resolving conflicts to give effect to legislative intent ........................................................................................................ 30

When one statute speaks to subject in general way and another deals with part of same subject in more specific manner, two should be harmonized, if possible, and where they conflict, latter prevails ................................. 308
### STATUTORY CONSTRUCTION

<table>
<thead>
<tr>
<th><strong>Implication.</strong> Every power expressly granted, or fairly implied from language used, or which is necessary to enable agency to exercise powers expressly granted, should and must be accorded; in considering whether authority is implied from powers expressly granted by statute, look to purpose and objective of provision</th>
<th>217</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxing statutes must be construed strongly in taxpayer’s favor, and will not be extended by implication beyond clear import of statutory language</td>
<td>18</td>
</tr>
<tr>
<td><strong>In pari materia.</strong> Statutes relating to same subject [or thing] should be considered <em>in pari materia</em></td>
<td>30, 82, 199, 214, 233, 306</td>
</tr>
<tr>
<td><strong>Intent.</strong> Where there is no ambiguity in statute, statute is not to be construed but is to be given effect in accordance with its plain meaning and intent</td>
<td>140</td>
</tr>
<tr>
<td><strong>Isolation.</strong> Sections of comprehensive statute on particular subject should not be read in isolation, but must be construed as parts of coordinated whole</td>
<td>331</td>
</tr>
<tr>
<td>Statutes are read to give every word meaning and effect. Statute is examined in its entirety, rather than isolating particular words or phrases</td>
<td>18</td>
</tr>
<tr>
<td>Statutes are to be read as whole rather than in isolated parts[; every provision in or part of statute shall be given effect if possible]</td>
<td>233, 285</td>
</tr>
<tr>
<td><strong>Juvenile courts.</strong> Jurisdiction, practice and procedure of juvenile courts are wholly statutory</td>
<td>117</td>
</tr>
<tr>
<td>Liberal construction of juvenile court laws</td>
<td>120</td>
</tr>
<tr>
<td><strong>Legislation.</strong> Statute speaks as of time it takes effect and not of time it was passed</td>
<td>182</td>
</tr>
<tr>
<td><strong>Legislative intent.</strong> Ascertainment of legislative intention involves appraisal of subject matter, purposes, objects and effects of statute, in addition to its express terms</td>
<td>70</td>
</tr>
<tr>
<td>Courts are not permitted to add language to statute or accord words meaning that legislature did not intend when legislature has used words of plain and definite meaning</td>
<td>293</td>
</tr>
<tr>
<td>Enactment should be interpreted, if possible, in manner which gives meaning to every word; word or clause in statute that appears to have been inserted through inadvertence or mistake may be rejected as surplusage</td>
<td>22</td>
</tr>
<tr>
<td>Examine language of statute in its entirety and determine intent of General Assembly from words contained in statute, unless literal construction of statute would yield absurd result</td>
<td>124</td>
</tr>
</tbody>
</table>
STATUTORY CONSTRUCTION

Legislative Intent (contd.)

Fullest possible effect must be given to legislative intent embodied in entire statutory enactment ................................................................. 199

Give effect, if possible, to every word used by legislature ......................................... 18

Manifest intention of legislature, clearly disclosed by its language, must be applied. [Give words as written their plain meaning.] [When enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply] ............................................................. 58, 70, 91, 122, 169, 297

Overriding goal of statutory interpretation is to discern and give effect to legislative intent ........................................................................................................... 67

Plain and unambiguous terms expressed in statute, whether general or limited, should be intended to mean what they have plainly expressed, and no room is left for construction .......................................................................................... 70

Primary objective [goal] [purpose] of statutory construction is to ascertain and give effect to legislative intent. [Ascertainment of legislative intention involves appraisal of subject matter, purposes, objects and effects of statute, in addition to its express terms. Every part of statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary] .............................................................................. 30, 138, 233, 285, 342

Purpose underlying statute’s enactment is particularly significant in construing it ................................................................................................................... 199

Rules of statutory construction must be applied to determine legislative intent where statutory meaning is genuinely ambiguous ............................................ 315

Statute specifying method by which something shall be done evinces legislative intent that it not be done otherwise ................................................................. 224

Statutes dealing with same subject matter should be construed together to achieve harmonious result, resolving conflicts to give effect to legislative intent ........................................................................................................... 30

Statutory provisions setting forth General Assembly’s reasons for enacting legislation are akin to preamble in certain legislation ............................................ 79

When General Assembly expressly bestows certain powers in statute, it intends to exclude those powers which have been omitted ............................................. 67

When interpreting statute or legislative enactment, look at plain meaning to determine if there is any ambiguity in its meaning. No cause to resort to rules
### STATUTORY CONSTRUCTION

#### Legislative intent (contd.)

- Of statutory construction if meaning is clear and unambiguous. Resort to such rules to determine legislative intent if there is genuine ambiguity as to meaning of statute or legislative enactment ........................................ 18
- When statute does not contain express definition of term, intent of legislature may be inferred from plain meaning of words used ................................. 344
- Where there is no ambiguity in statute, statute is not to be construed but is to be given effect in accordance with its plain meaning and intent ....................... 176

#### Liberal construction

- Liberal construction of juvenile court laws .......................... 120
- Remedial statute should be liberally construed to accomplish underlying legislative intent ................................................................. 109
- Rule of construction cannot be expanded to create law where there is none ...... 120
- Rule of liberal construction of tax exemptions exists only where property was actually owned on July 1, 1971 ......................................................... 338

#### Literal construction

- Examine language of statute in its entirety and determine intent of General Assembly from words contained in statute, unless literal construction of statute would yield absurd result ............................................. 124
- "May." Word indicates procedure is permissive ........................................ 83
- Word is discretionary .............................................................................. 83
- Word should be given its ordinary meaning—permission, importing discretion ...... 83

#### Narrow construction

- Plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, or strained construction ......................... 3, 30
- Noscitur a sociis. Meaning of word takes color and expression from purport of entire phrase of which it is part, and it must be construed so as to harmonize with context as whole ......................................................... 6
- Term must be construed with reference to words with which it is used .......... 6
- "Or." Disjunctive .................................................................................. 117

#### Ordinances

- Consistency with state law ................................................................. 254
- Local ordinances adopted under broad police power authority must not be inconsistent with state law ....................................................... 67
<table>
<thead>
<tr>
<th>STATUTORY CONSTRUCTION</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ordinary meaning.</strong> Absent statutory definition, words [terms] are given their [common,] [plain and] ordinary meaning [within statutory context]</td>
<td>186, 214, 232, 244, 297, 321</td>
</tr>
<tr>
<td>Word in statute is to be given its everyday, ordinary meaning unless word is term of art</td>
<td>164, 288</td>
</tr>
<tr>
<td>Words and phrases used in statute should be given their ordinary and usually accepted meaning unless different intention is fairly manifest</td>
<td>164</td>
</tr>
<tr>
<td><strong>Penal statute.</strong> Penal statutes [generally] are strictly construed [against Commonwealth and in favor of accused]</td>
<td>138, 142</td>
</tr>
<tr>
<td><strong>Plain meaning.</strong> Absent ambiguity, plain meaning of statute must prevail</td>
<td>83, 288, 312</td>
</tr>
<tr>
<td>Absent express definition of term, intent of the legislature may be inferred from plain meaning of words used</td>
<td>344</td>
</tr>
<tr>
<td>Absent statutory definition, term should be given its plain and ordinary meaning</td>
<td>214</td>
</tr>
<tr>
<td>Courts are not permitted to add language to statute or accord words meaning that legislature did not intend when legislature has used words of plain and definite meaning</td>
<td>293</td>
</tr>
<tr>
<td>Give words as written their plain meaning</td>
<td>169</td>
</tr>
<tr>
<td>Language of statute that is [clear and] unambiguous should be given its plain meaning[, without resort to (extrinsic evidence or) rules of statutory interpretation]</td>
<td>3, 18, 22, 77, 107, 112, 117, 122, 217, 224, 252, 315</td>
</tr>
<tr>
<td>Language of statute that is plain and unambiguous, and its meaning perfectly clear and definite, must be given effect. [It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In such situations, statute's plain meaning and intent govern]</td>
<td>173, 320</td>
</tr>
<tr>
<td>Manifest intention of legislature, clearly disclosed by its language, must be applied. Take words as written and give them their plain meaning</td>
<td>297</td>
</tr>
<tr>
<td>Plain and unambiguous terms expressed in statute, whether general or limited, should be intended to mean what they have plainly expressed, and no room is left for construction</td>
<td>70</td>
</tr>
<tr>
<td>Plain meaning of statute controls</td>
<td>18</td>
</tr>
<tr>
<td>Plain meaning of statute that is unambiguous is to be accepted without resort to rules of statutory interpretation</td>
<td>70</td>
</tr>
</tbody>
</table>
### STATUTORY CONSTRUCTION

<table>
<thead>
<tr>
<th>Plain meaning (contd.)</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, or strained construction</td>
<td>3,30</td>
</tr>
<tr>
<td>Province of statutory construction lies wholly within domain of ambiguity, and that which is plain needs no interpretation</td>
<td>242</td>
</tr>
<tr>
<td>Resort to rules of statutory construction is necessary only when there is ambiguity; otherwise, clear and unambiguous words of statute must be accorded their plain meaning</td>
<td>142</td>
</tr>
<tr>
<td>Statute which is plain needs no interpretation</td>
<td>320</td>
</tr>
<tr>
<td>Statutes are to be read in accordance with their plain meaning and intent</td>
<td>142</td>
</tr>
<tr>
<td>When interpreting statute or legislative enactment, look at plain meaning to determine if there is any ambiguity in its meaning. No cause to resort to rules of statutory construction if meaning is clear and unambiguous. Resort to such rules to determine legislative intent if there is genuine ambiguity as to meaning of statute or legislative enactment</td>
<td>18</td>
</tr>
<tr>
<td>Where language of enactment is plain and unambiguous, its plain meaning must be applied. Words must be taken as written and history of particular enactment, extrinsic facts, or general rules of construction of enactments that have doubtful meaning do not apply</td>
<td>6,266</td>
</tr>
<tr>
<td>Where there is no ambiguity in statute, statute is not to be construed but is to be given effect in accordance with its plain meaning and intent</td>
<td>82,140,176</td>
</tr>
<tr>
<td>Words of instrument should be given their commonly accepted meaning; if no ambiguity exists, there is no need to do more than accept plain meaning of instrument and give effect accordingly</td>
<td>140</td>
</tr>
</tbody>
</table>

**Procedural provisions.** Procedural provisions of statute in effect on date of trial control conduct of trial insofar as practicable | 158  |

**Prospective statute.** Reenacted statute is prospective, absent specific retroactive date | 273  |

| Statute is always to be construed as operating prospectively, [absent express legislative provision to contrary] unless contrary intent is manifest | 158,273|

**Prospective vs. retroactive statutes.** New law, except as to matters of remedy, is presumed to be prospective rather than retroactive in its application | 182  |

| New statutes may not be applied retroactively to modify existing substantive rights | 182  |
STATUTORY CONSTRUCTION

Prospective vs. retroactive statutes (contd.)
Statutes should be given prospective rather than retrospective construction, unless their language clearly indicates contrary ......................................................... 182

Purpose. Purpose underlying statute’s enactment is particularly significant in construing it ...................................................................................................... 199

Qualifying words. Referential or qualifying words, where no contrary intention appears, refer solely to last antecedent ............................................................. 315

Rationality. Plain, obvious, and rational meaning of statute is always to be preferred to any curious, narrow, or strained construction .............................. 3,30
Statute must be given rational interpretation consistent with its purposes, and not one which will substantially defeat its objectives ............................. 217
Statutes [and regulations] should not be interpreted in ways that produce absurd or irrational consequences ............................................................... 199,233

Reasonableness. In considering object and purpose of statute, reasonable construction should be given to promote end for which it was enacted .......... 217

Regulations. Regulations by implication will be upheld, even if they conflict with other statutes, unless there is manifest intent on part of legislature to preempt field. No basis for agency regulation where legislature has plainly, broadly and comprehensively addressed same object ........................................ 34
Regulations promulgated pursuant to definitive statutory authority have force and effect of law .................................................................................................. 34
Regulations which clearly and explicitly mirror statutory authority are likeliest to be sustained ................................................................. 34

Remedial statute. Such statute should be liberally construed to accomplish underlying legislative intent ................................................................. 109

Repeal. Law does not favor repeal by implication, unless repugnance is plain, and then only to extent of repugnancy ......................................................... 285

Same subject. Sections of comprehensive statute on particular subject should not be read in isolation, but must be construed as parts of coordinated whole ...... 331
Statutes dealing with same subject matter should be construed together to achieve harmonious result, resolving conflicts to give effect to legislative intent ........................................................................................................ 30
Statutes relating to same subject [or thing] should be considered in pari materia ................................................................................................. 30, 82, 199, 214, 233, 306
"Shall." [Generally] implies terms of statute are intended to be mandatory, rather than permissive or directive ........................................................... 58, 199, 230, 266

If it appears from nature, context, and purpose of act that legislature intended that “shall” be treated as advisory or directory, then it should be accorded that meaning ................................................................. 112, 264

Ordinarily, but not always, implies statutory provisions are mandatory .......... 112

Term generally indicates procedure is mandatory, while “may” indicates that it is permissive ..................................................................................................... 83

Use in statute requiring action by public official is directory and not mandatory, unless statute manifests contrary intent ............................................. 112, 155, 264

Specificity. Every power expressly granted, or fairly implied from language used, or which is necessary to enable agency to exercise powers expressly granted, should and must be accorded; in considering whether authority is implied from powers expressly granted by statute, look to purpose and objective of provision ................................................................. 217

Expression of one thing in a statute means exclusion of others ..................... 224

Grant of express power carries with it authority to exercise all other activities reasonably necessary to carry it into effect ................................................. 217

Mention of specific item in statute implies that omitted items were not intended to be included within its scope ....................................................... 117

Statute specifying method by which something shall be done evinces legisla-

tive intent that it not be done otherwise .................................................... 224

When one statute speaks to subject in general way and another deals with part of same subject in more specific manner[, two should be harmonized, if possible, and] where they conflict, latter prevails ...................................... 124, 308

When statute creates specific grant of authority, authority exists only to ex-
tent specifically granted in statute ..................................................... 70, 83, 91, 109, 122, 188, 233

Strict construction. Penal statutes [generally] are strictly construed [against Commonwealth and in favor of accused] ........................................ 138, 142

Property tax exemptions are strictly construed against party claiming exemption ...................................................................................................... 64

Rule of construction does not abrogate well-recognized canon that statute should be read and applied so as to accord with intended purpose .............. 138
<table>
<thead>
<tr>
<th>Term of Art</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict construction (contd.)</td>
<td>Strict construction of powers of local governing bodies</td>
</tr>
<tr>
<td>Surplusage</td>
<td>Word or clause in statute that appears to have been inserted through inadvertence or mistake may be rejected as surplusage</td>
</tr>
<tr>
<td>Taxation</td>
<td>Exemption from taxation is exception and provisions exempting property from taxation must be strictly construed. Any doubt concerning exemption must be resolved against party claiming exemption</td>
</tr>
<tr>
<td>Imposition of taxation only in manner prescribed by express statutory authority</td>
<td>18</td>
</tr>
<tr>
<td>Strict construction of tax exemptions; rule of liberal construction exists only where property was actually owned on July 1, 1971</td>
<td>338</td>
</tr>
<tr>
<td>Taxing statutes must be construed strongly in taxpayer's favor, and will not be extended by implication beyond clear import of statutory language</td>
<td>18</td>
</tr>
<tr>
<td>Term of art</td>
<td>Word in statute is to be given its everyday, ordinary meaning unless word is term of art</td>
</tr>
<tr>
<td>Unambiguous language</td>
<td>Language of statute that is plain and unambiguous, and its meaning perfectly clear and definite, must be given effect. [It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In such situations, statute's plain meaning and intent govern]</td>
</tr>
<tr>
<td>Plain and unambiguous terms expressed in statute, whether general or limited, should be intended to mean what they have plainly expressed, and no room is left for construction</td>
<td>70</td>
</tr>
<tr>
<td>Plain meaning of statute that is unambiguous is to be accepted without resort to rules of statutory interpretation</td>
<td>70</td>
</tr>
<tr>
<td>Resort to rules of statutory construction is necessary only when there is ambiguity; otherwise, clear and unambiguous words of statute must be accorded their plain meaning</td>
<td>142</td>
</tr>
<tr>
<td>Statute that is [clear and] unambiguous should be given its plain meaning[, without resort to (extrinsic evidence or) rules of statutory interpretation]</td>
<td>3, 18, 22, 107, 112, 122, 217, 224, 252</td>
</tr>
</tbody>
</table>
Unambiguous language (contd.)

Where language of enactment is plain and unambiguous, its plain meaning must be applied. Words must be taken as written and history of particular enactment, extrinsic facts, or general rules of construction of enactments that have doubtful meaning are not used .............................................................. 6,266

Where there is no ambiguity in statute, statute is not to be construed but is to be given effect in accordance with its plain meaning and intent ......................... 82

Usual meaning. Words in statute should be given their usual, commonly understood meaning ................................................................................................... 138

Validity. Presumption of validity that attaches to statute requires court to resolve any reasonable doubt as to its constitutionality in favor of its legality if possible ................................................................................................................ 38

Regulations, statutes and ordinances carry with them presumption of validity ...... 38

SUPREME COURT RULES, VIRGINIA
(See Rules of Supreme Court of Virginia)

TAXATION

Cigarette Tax. Cigarette manufacturer’s sweepstakes promotion at retail establishment is prohibited ................................................................. 138

Department of Taxation. Department may add language in guideline definition of “contractor” to clarify and explain which businesses are included in “contractor” classification for purpose of determining maximum BPOL tax rate, provided language is consistent with license tax laws .............................................. 293

Guidelines are accorded weight of regulation ................................ 293

Guidelines must amplify and clarify statutory provisions; have force of regulations .............................................................. 297

Tax Commissioner’s rulings and policies regarding assessments are not entitled to great weight unless expressed in regulations .............................................. 293

Exemption. Strict construction of tax exemptions; rule of liberal construction exists only where property was actually owned on July 1, 1971 ....................... 338

General Provisions of Title 58.1. Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable ........................................................................................................ 306
<table>
<thead>
<tr>
<th>TAXATION</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Provisions of Title 58.1 (secrecy of information). Commissioner of revenue is not prohibited from releasing nonprotected information that will be used for purposes of solicitation</td>
<td>285</td>
</tr>
<tr>
<td>Commissioner of revenue may release names and addresses of businesses licensed within his locality for purposes of solicitation. Business is considered trading under assumed or fictitious name when assumed or fictitious name certificate is filed in appropriate clerk's office</td>
<td>285</td>
</tr>
<tr>
<td>Disclosure prohibition does not extend to whether person, firm or corporation is licensed to do business</td>
<td>285</td>
</tr>
<tr>
<td>Allowance of credit against individual and corporate income tax in amount equal to 50% of fair market value of land or interest in land donated for conservation purposes. Donor of land or interest in land may transfer tax credit to other taxpayers to make full use of credit. Meaning of “taxpayer” for purposes of Act</td>
<td>288</td>
</tr>
<tr>
<td>License Taxes. Additional language in Department of Taxation guidelines’ definition of “definite place of business” amplifies and clarifies meaning of “regular and continuing course of dealing” in statutory definition by specifying conduct deemed to be definite place of business</td>
<td>297</td>
</tr>
<tr>
<td>Commissioners of accounts are subject to BPOL taxation on fees charged and received by them for administration of fiduciary accounts</td>
<td>292</td>
</tr>
<tr>
<td>Compensation received by standing trustee for performance of administrative duties associated with Chapter 13 bankruptcy is subject to local business license taxation</td>
<td>292</td>
</tr>
<tr>
<td>Department of Taxation guidelines are accorded weight of regulation</td>
<td>293, 297</td>
</tr>
<tr>
<td>Department of Taxation may add language in guideline definition of “contractor” to clarify and explain which businesses are included in “contractor” classification for purpose of determining maximum BPOL tax rate, provided language is consistent with license tax laws</td>
<td>293</td>
</tr>
<tr>
<td>Local business, professional and occupational tax is creature of statute, not common law</td>
<td>273</td>
</tr>
<tr>
<td>Local license required for businesses is for revenue, rather than regulatory, purposes</td>
<td>293</td>
</tr>
</tbody>
</table>
License Taxes (contd.)
No conflict between statutory and regulatory definitions of "definite place of business" for purposes of administering BPOL tax. Determination whether business activity at particular location is sufficient for it to become definite place of business, rather than visit, is question of fact for local taxing official. Consistent administration of local tax assessments. Criteria for establishing definite place of business should be same for taxing jurisdictions located in or outside Commonwealth. Application of internal and external consistency tests for purposes of avoiding double taxation and fairly apportioning BPOL tax assessment ................................................................. 297

Question whether locality may impose $500 flat-fee license tax on out-of-state itinerant merchants and peddlers without violating Commerce Clause involves factual determination that is inappropriate for comment by Attorney General ........................................................................................................... 302

Specific statutes requiring imposition of BPOL tax on gross receipts of licensed employees who are shareholders of professional corporation and members of professional limited liability company supersede general business license tax requirements for current and preceding three tax years. Other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation. Imposition of video programming excise tax in lieu of, and exemption of video programming activity from, BPOL tax. No conflict between Department of Taxation guidelines, interpreting BPOL tax laws as authorizing localities to require separate license from salaried professionals, and 1976 opinion, concluding that salaried professions are not exempt from BPOL taxation. Authority to issue advisory opinions relating to situs and apportionment of gross receipts attributable to employees located in branch offices is reserved to Tax Commissioner .......................................................................................... 308

Treasurer has no authority to collect such taxes until they are assessed and due ..................................................................................................................... 306

Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable ............................................. 306

2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and that tangible personal property of association shall be entitled to exemption from personal property tax on household goods is not declaratory of law existing prior to July 1, 2002, effective date of legislation, and is not retroactive in its application ........................................................................................................... 273
TAXATION

Local Officers – Commissioners of the Revenue. Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable ................................................................. 306

Local Officers – Treasurers. No authority to collect license taxes until such taxes are assessed and due ................................................................. 306

Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of “priority” as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale ........................................................................................................ 321

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty .................................................................................. 58

Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable .................................................. 306

Miscellaneous Taxes – Video Programming Excise Tax. Specific statutes requiring imposition of BPOL tax on gross receipts of licensed employees who are shareholders of professional corporation and members of professional limited liability company supersede general business license tax requirements for current and preceding three tax years. Other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation. Imposition of video programming excise tax in lieu of, and exemption of video programming activity from, BPOL tax. No conflict between Department of Taxation guidelines, interpreting BPOL tax laws as authorizing localities to require separate license from salaried professionals, and 1976 opinion, concluding that salaried professions are not exempt from BPOL taxation. Authority to issue advisory opinions relating to situs and apportionment of gross receipts attributable to employees located in branch offices is reserved to Tax Commissioner ........................................ 308

Real Property Tax. Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may
Real Property Tax (contd.) be tax exempt. Determination depends on question of fact reserved for local commissioner of revenue or other appropriate taxing official ........................................ 64

Real Property Tax – Boards of Equalization. Parcel of real estate remaining after division of property, resulting in two or more different owners, does not have to be reassessed immediately during first year of biennial real estate assessment cycle; must be reassessed as of January 1 of second year of biennial assessment cycle, taking into consideration value of land as divided. Authority for board of equalization to hear and consider taxpayer complaints in second year of biennial assessment ............................................................... 312

Tract of land split among different owners following general assessment must be reassessed on January 1 of year following split. Authority for board of equalization to meet in second year of biennial assessment cycle .......... 312

Real Property Tax – Public Taking of Private Real Estate. Parcel of real estate remaining after division of property, resulting in two or more different owners, does not have to be reassessed immediately during first year of biennial real estate assessment cycle; must be reassessed as of January 1 of second year of biennial assessment cycle, taking into consideration value of land as divided. Authority for board of equalization to hear and consider taxpayer complaints in second year of biennial assessment ......................................................... 312

Tract of land split among different owners following general assessment must be reassessed on January 1 of year following split. Authority for board of equalization to meet in second year of biennial assessment cycle .............. 312

Real Property Tax – Reassessment/Assessment (Valuation) Procedure and Practice. Parcel of real estate remaining after division of property, resulting in two or more different owners, does not have to be reassessed immediately during first year of biennial real estate assessment cycle; must be reassessed as of January 1 of second year of biennial assessment cycle, taking into consideration value of land as divided. Authority for board of equalization to hear and consider taxpayer complaints in second year of biennial assessment .......... 312

Tract of land split among different owners following general assessment must be reassessed on January 1 of year following split. Authority for board of equalization to meet in second year of biennial assessment cycle .............. 312

Real Property Tax – Special Assessment for Land Preservation. Authority for local governing body to increase minimum acreage for land classified for open-space use for purpose of special land use taxation; no statutory authority for such increase for land classified for agricultural, horticultural or forest use .......... 315
Real Property Tax – Special Assessment for Land Preservation (cont’d.)
Manifest purpose of statutes is to create financial incentive to encourage preservation and proper use of real estate devoted to agricultural, horticultural, forest, and open-space uses ................................................................. 318

Procedure for revalidating split-off land assessed and taxed under land use assessment program .................................................................................................................. 318

Split-off of small parcel does not cause otherwise qualifying larger tract to lose its eligibility for valuation, assessment, and taxation under land use ordinance during year in which split-off occurred ............................................................... 318

Statutes provide for favorable tax treatment of property devoted to agricultural, horticultural, forest, and open-space uses so long as such property satisfies applicable use and acreage requirements ........................................................................ 318

Review of Local Taxes. Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may be tax exempt. Determination depends on question of fact reserved for local commissioner of revenue or other appropriate taxing official ......................... 64

Five-year statute of limitations for collection of local taxes, including food and beverage taxes, begins to run on December 31 of each year for which back taxes were assessed ...................................................................................... 320

Specific statutes requiring imposition of BPOL tax on gross receipts of licensed employees who are shareholders of professional corporation and members of professional limited liability company supersede general business license tax requirements for current and preceding three tax years. Other salaried professional employees who hold state regulatory licenses, but are not corporate shareholders or company members, are not subject to local license taxation. Imposition of video programming excise tax in lieu of, and exemption of video programming activity from, BPOL tax. No conflict between Department of Taxation guidelines, interpreting BPOL tax laws as authorizing localities to require separate license from salaried professionals, and 1976 opinion, concluding that salaried professions are not exempt from BPOL taxation. Authority to issue advisory opinions relating to situs and apportionment of gross receipts attributable to employees located in branch offices is reserved to Tax Commissioner ........................................................................ 308

Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable ....................................................... 306
TAXATION

Review of Local Taxes (contd.)
2002 amendment providing that any residential cooperative association under Act shall not be considered business for state and local tax purposes and that tangible personal property of association shall be entitled to exemption from personal property tax on household goods is not declaratory of law existing prior to July 1, 2002, effective date of legislation, and is not retroactive in its application ................................................................. 273

Review of Local Taxes – Collection by Distress, Suit, Lien, etc. Distraint of property for collection of delinquent taxes may be accomplished without initial judicial proceeding ................................................................. 321

Factors to consider in determining reasonableness of distress levy ........ 321

Priority as to payment from distress property sale toward secured interests vs. delinquent taxes ............................................................................................................... 321

Sheriff may use distress letter from treasurer to seize property; is required to collect delinquent taxes described in treasurer’s distress letter. Sheriff may not require treasurer to provide indemnity bond for liability arising from distress ................................................................................................ 321

Sheriff’s discretion in determining unreasonableness of distress levy may not be exercised arbitrarily ................................................................. 321

Review of Local Taxes – Collection by Treasurers, etc. Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of “priority” as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale ...... 321

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty .............................................................................. 58

State Recordation Tax. Circuit court clerk must collect, beginning May 1, 2002, $10 assessment fee on every deed subject to recordation tax. Fee is collected in jurisdiction where instrument is first recorded. Assessment of $10 fee for recordation of deed of easement, dedication or subdivision depends on clerk’s current treatment of such deeds for state recordation tax purposes .................. 18
State Recordation Tax (contd.)

Circuit court clerk should base recordation taxes for Security Instrument on original acquisition balance as defined in instrument and assess separate fees for recording Assignment Agreement containing two instruments of equal dignity that serve independent purposes at law ......................................... 132

No exemption from tax on deeds of trust where federal government or agency is guarantor or beneficiary ........................................................................ 328

Recordation tax should be collected on deeds of trust where federal government is guarantor or beneficiary ................................................................. 328

Tangible Personal Property, etc. Authority to impose personal property tax in Virginia is not affected by fact that similar tax may be imposed against same property by jurisdiction outside Commonwealth ...................................... 330

Boat registered in Virginia county but normally garaged, docked, or parked in North Carolina has acquired taxable situs in both states. No statute requires county to refund or reduce payment of taxes on boat........................................ 330

No constitutional barrier to double taxation of property that has acquired taxable situs in more than one state .................................................................. 330

Tax Exempt Property. Application of § 58.1-3606 to religious corporations .......... 331

Christian Aid Mission must show that its property belongs to, and is occupied and used exclusively by, Mission to come within exemption ............................... 331

Church property, which is in process of being developed for its intended use and is being used for certain church-related activities, may be tax exempt. Determination depends on question of fact reserved for local commissioner of revenue or other appropriate taxing official ..................................................... 64

Determination whether property is used exclusively for charitable, religious or educational purposes is factual matter reserved for commissioner of revenue ...... 64

Determination whether property of Christian Aid Mission may be classified as tax exempt rests within judgment of commissioner of revenue, after careful consideration of attendant facts. Unused and undeveloped parcels are subject to real estate taxation while they remain as such. Any portion of such land used by other entities may be exempt if activities of using entities are charitable, religious or educational. Rent paid by using entity considered source of revenue or profit to Mission is taxable ............................................................ 331

Exemption for property used exclusively for charitable, religious or educational purposes ................................................................................................................. 331
Tax Exempt Property (contd.)

Exemption from taxation is exception and provisions exempting property from taxation must be strictly construed. Any doubt concerning exemption must be resolved against party claiming exemption ................................................... 331

General Assembly does not intend religious associations to exclude corporations in statute that offers Young Men’s Christian Association as its prime example of religious associations classified as tax exempt ........................................ 331

Legislative history of §§ 58.1-3617 and 58.1-3606 indicates that General Assembly intended phrase “religious association” as used in both statutes to have same meaning ................................................... 331

Meaning of “religious association” for purpose of exempting property of Young Life from taxation by classification. Commissioner of revenue, or other local taxing official, is responsible for determining whether property owned by Young Life qualifies for tax exemption ........................................ 338

Property held by charitable organizations that remains unused and undeveloped is not tax exempt ............................................................................................................. 64

Property is entitled to exemption if property has direct reference to purposes for which religious association was created and tends immediately and directly to promote those purposes .......................................................... 338

Property is exempt by classification only if it fits within class of property General Assembly has established as exempt[; is exempt by designation when law designates property of named organization as exempt] ......................... 64, 338

Property of institution seeking tax exemption must meet dominant purpose test of whether property promotes purposes for which institution was created ..... 331

Property tax exemptions are strictly construed against party claiming exemption ............................................................................................................. 64

Religious corporations qualify under religious association exemption .......... 331

Strict construction of exemption; rule of liberal construction exists only where property was actually owned on July 1, 1971 ......................................................... 338

Tax exemptions are to be strictly construed .................................................. 331

Term “religious association” includes religious corporations for purposes of tax exemption .......................................................... 331

To qualify for exemption from taxation by qualification, religious association has burden of showing that property belongs to it, is actually and exclusively
TAXATION

Tax Exempt Property (contd.)
occupied and used by it, and meets dominant purpose test of whether property promotes purpose of institution seeking tax exemption ............................................. 338

Taxes can be imposed only in manner prescribed by express statutory authority ...... 18

Taxes must be assessed, levied and collected only in mode expressed by statute .... 273

Taxing statutes must be construed strongly in taxpayer’s favor, and will not be extended by implication beyond clear import of statutory language ..................... 18

TELECOMMUNICATIONS ACT OF 1996

Federal Act restricts ability of Virginia locality to limit provision of telecommunications service through application of land use regulations ............................................. 91

TRADE AND COMMERCE

Fingerprinting In Connection with Business Transaction. Pharmacist, prior to filling prescription, may obtain fingerprint from customer as proof of identification, provided pharmacist returns or destroys print within 21 days of transaction’s completion or termination; may provide to law-enforcement officials fingerprint of any customer suspected of prescription fraud ............................................. 342

Transacting Business Under Assumed Name. Assumed or fictitious name certificate is required when name under which business is transacted does not fairly disclose true ownership ................................................................. 285

Commissioner of revenue may release names and addresses of businesses licensed within his locality for purposes of solicitation. Business is considered trading under assumed or fictitious name when assumed or fictitious name certificate is filed in appropriate clerk’s office ..................................................... 285

Purpose of statutory scheme is to protect public by giving information as to person with which it deals and to afford it protection from fraud and deceit ...... 285

TREASURERS

Amended ordinance establishing Elizabeth Lake Estates Service District does not specify Elizabeth Lake Estates Civic Association as entity to develop plan for services to be rendered in service district, receive funds, or provide services; provides for tax levy to be set annually as part of budget process with other tax rates. Amended ordinance does not create long-term unconditional debt obligation, in violation of Constitution, and does not delegate legislative authority of city council ................................................................. 96
Constitutional office constitutes “unit of local government,” which is designated as “agency” for purposes of Act. Act’s definition of “agency” includes local constitutional officer ................................................................................................. 6

Five-year statute of limitations for collection of local taxes, including food and beverage taxes, begins to run on December 31 of each year for which back taxes were assessed .................................................................................................... 320

Locality that adopts ordinance to enforce payment of local motor vehicle license fee must issue some form of license upon payment of fee; may prescribe form of license to be displayed on vehicle. Refusal of DMV Commissioner, per agreement with local treasurer or director of finance, to issue or renew vehicle registration for individual whose local license fee is unpaid ................................................... 227

No authority to collect license taxes until such taxes are assessed and due ...... 306

Ordinance relating to expenditure of tax revenue by Elizabeth Lake Estates Civic Association is inconsistent with constitutional debt limitations, contrary to state laws governing service districts, and unenforceable ......................... 101

Sheriff is appropriate official to determine, based on facts, reasonableness of distress levy and holding public sale of property when proceeds will not satisfy secured interests or unpaid taxes. Meaning of “priority” as it relates to payment of distress sale proceeds toward delinquent taxes or secured interests. Requirement that secured party with lien on distressed property receive notice of distress sale ............................................................................................................... 321

To extent confidential tax information maintained by commissioner of revenue is necessary for treasurer to fulfill his duty to collect business, professional and occupational license taxes, dissemination to him or his employees of such information is allowable ........................................................................................... 306

Treasurer is independent of control of local governing body and, except as abrogated by statute, retains complete discretion in day-to-day operations of office, personnel matters, and manner in which duties of office are performed. Independence derives from constitutional status of office and popular election of individual filling office .................................................................................. 58

Treasurer is not required to relinquish his office when involuntarily recalled to active military duty. No statute prevents treasurer from continuing to oversee and manage his office via use of Internet, or in person during evening hours and weekends when he is physically present in county. Treasurer may continue to receive compensation for performing duties of his office while involuntarily recalled to active duty ................................................................. 58
Treasurer may not demand payment of, and taxpayer is not obligated to remit, BPOL taxes that have not been assessed. To extent treasurer or bank acting as depository needs confidential tax information maintained by commissioner of revenue, dissemination of such information is allowable ........................................... 306

**UNEMPLOYMENT COMPENSATION**

Workforce Investment Act precludes General Assembly from directing Governor to reallocate unobligated WIA funds to community college located within same geographic area from which funds were obtained. Attorney General declines to comment on action community colleges may take to seek reallocation of such funds .............................................................. 25

**UNIFORM CRIMINAL EXTRADITION ACT**
(See CRIMINAL PROCEDURE: Extradition of Criminals)

**UNIFORM STATEWIDE BUILDING CODE**
(See HOUSING)

**VIDEO PROGRAMMING EXCISE TAX ACT**
(See TAXATION: Video Programming Excise Tax)

**VIRGINIA COALFIELD ECONOMIC DEVELOPMENT AUTHORITY**
(See COUNTIES, CITIES AND TOWNS)

**VIRGINIA FAIR HOUSING LAW**
(See HOUSING)

**VIRGINIA FREEDOM OF INFORMATION ACT**
(See ADMINISTRATION OF GOVERNMENT)

**VIRGINIA LAND CONSERVATION INCENTIVES ACT OF 1999**
(See TAXATION: Income Tax)

**VIRGINIA PROFESSIONAL LIMITED LIABILITY COMPANY ACT**
(See CORPORATIONS)

**VIRGINIA PROPERTY OWNERS’ ASSOCIATION ACT**
(See PROPERTY AND CONVEYANCES: Property Owners’ Association Act)

**VIRGINIA PUBLIC PROCUREMENT ACT**
(See ADMINISTRATION OF GOVERNMENT)

**VIRGINIA REAL ESTATE COOPERATIVE ACT**
(See PROPERTY AND CONVEYANCES)

**VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT**
(See PROPERTY AND CONVEYANCES: Residential Landlord and Tenant Act)
WELFARE (SOCIAL SERVICES)

Child Abuse and Neglect – Complaints. Duty of volunteer and professional Boy Scout leaders to report suspected child abuse or neglect to local department of social services or Department of Social Services’ hotline ..................... 344

Child Welfare, Homes, Agencies, etc. Disclosure of identity and presence of resident(s) in spouse abuse shelter to law-enforcement officials charged with serving criminal or civil warrant or subpoena, or seeking to investigate crime ....... 346

Services for Abused Spouses. Disclosure of identity and presence of resident(s) in spouse abuse shelter to law-enforcement officials charged with serving criminal or civil warrant or subpoena, or seeking to investigate crime .......... 346

Law-enforcement officer charged with serving criminal or civil warrant or subpoena, or seeking to investigate crime has legitimate interest in locating person to be served or interviewed; has legitimate interest in knowing whether such person is present or likely to be present at spouse abuse shelter .......... 346

Spouse abuse shelter personnel may provide law-enforcement officials with information reasonably calculated to assist in locating individual specifically sought by law enforcement; may not disclose identity of persons located at shelter but not specifically sought by law enforcement ........................................... 346
Act precludes General Assembly from directing Governor to reallocate unobligated WIA funds to community college located within same geographic area from which funds were obtained. Attorney General declines to comment on action community colleges may take to seek reallocation of such funds.
Statutory and Constitutional Provisions and Rules of Court
This index provides a numerical listing of statutory and constitutional provisions and rules of court cited in opinions within this report. Unless otherwise noted, opinions issued January through June cite Virginia law effective through the 2001 Session of the General Assembly, and opinions issued July through December cite Virginia law effective through the 2002 Session of the General Assembly.
### Acts of Assembly

#### Acts of 1838

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 101</td>
<td>38</td>
</tr>
</tbody>
</table>

#### Acts of 1918

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 388</td>
<td>137, 138</td>
</tr>
</tbody>
</table>

#### Acts of 1924

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 407</td>
<td>214</td>
</tr>
</tbody>
</table>

#### Acts of 1934

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 357</td>
<td>81</td>
</tr>
</tbody>
</table>

#### Acts of 1952

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 666</td>
<td>214</td>
</tr>
</tbody>
</table>

#### Acts of 1958

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 496</td>
<td>214</td>
</tr>
<tr>
<td>Ch. 541</td>
<td>214</td>
</tr>
</tbody>
</table>

#### Acts of 1968

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 474</td>
<td>252</td>
</tr>
</tbody>
</table>

#### Acts of 1970

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 77</td>
<td>312</td>
</tr>
<tr>
<td>Ch. 763</td>
<td>336, 341</td>
</tr>
<tr>
<td>Ch. 786</td>
<td>336</td>
</tr>
<tr>
<td>H.J. Res. 786</td>
<td>341</td>
</tr>
</tbody>
</table>

#### Acts of 1972

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 591</td>
<td>194</td>
</tr>
</tbody>
</table>

#### Acts of 1974

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 469</td>
<td>337</td>
</tr>
</tbody>
</table>

#### Acts of 1976

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 480</td>
<td>77</td>
</tr>
<tr>
<td>Ch. 597</td>
<td>5</td>
</tr>
<tr>
<td>Ch. 611</td>
<td>81</td>
</tr>
</tbody>
</table>

#### Acts of 1977

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 228</td>
<td>90</td>
</tr>
<tr>
<td>Ch. 685</td>
<td>244</td>
</tr>
</tbody>
</table>

#### Acts of 1978

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 216</td>
<td>337</td>
</tr>
</tbody>
</table>
## Acts of Assembly

### Acts of 1982 (contd.)

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 633</td>
<td>312</td>
</tr>
</tbody>
</table>

### Acts of 1984

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 675</td>
<td>320, 321, 337</td>
</tr>
<tr>
<td>Ch. 699</td>
<td>284</td>
</tr>
</tbody>
</table>

### Acts of 1985

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 67</td>
<td>284</td>
</tr>
</tbody>
</table>

### Acts of 1989

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 679</td>
<td>269</td>
</tr>
</tbody>
</table>

### Acts of 1991

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 64</td>
<td>214</td>
</tr>
<tr>
<td>Ch. 427</td>
<td>197</td>
</tr>
<tr>
<td>Ch. 557</td>
<td>194</td>
</tr>
</tbody>
</table>

### Acts of 1994

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 214</td>
<td>191</td>
</tr>
<tr>
<td>Ch. 359</td>
<td>214</td>
</tr>
</tbody>
</table>

### Acts of 1995

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 17</td>
<td>327</td>
</tr>
<tr>
<td>Ch. 702</td>
<td>191</td>
</tr>
<tr>
<td>Ch. 827</td>
<td>191</td>
</tr>
<tr>
<td>Ch. 836</td>
<td>223, 224</td>
</tr>
<tr>
<td>Ch. 851</td>
<td>223, 224</td>
</tr>
</tbody>
</table>

### Acts of 1996

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 912</td>
<td>254</td>
</tr>
</tbody>
</table>

### Acts of 1997

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 579</td>
<td>272</td>
</tr>
<tr>
<td>Ch. 587</td>
<td>327</td>
</tr>
<tr>
<td>Ch. 794</td>
<td>185</td>
</tr>
<tr>
<td>Ch. 898</td>
<td>185</td>
</tr>
</tbody>
</table>

### Acts of 1998

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 136</td>
<td>77</td>
</tr>
<tr>
<td>Ch. 503</td>
<td>296</td>
</tr>
<tr>
<td>Ch. 872</td>
<td>272</td>
</tr>
</tbody>
</table>
### Acts of Assembly

#### Acts of 2000

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 395</td>
<td>241</td>
</tr>
<tr>
<td>Ch. 644</td>
<td>15</td>
</tr>
<tr>
<td>Ch. 1019</td>
<td>187</td>
</tr>
<tr>
<td>Ch. 1044</td>
<td>187</td>
</tr>
<tr>
<td>Ch. 1072</td>
<td>241</td>
</tr>
</tbody>
</table>

#### Acts of 2000

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 1073</td>
<td>58, 241, 242, 244</td>
</tr>
</tbody>
</table>

#### Acts of 2001

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 497</td>
<td>64</td>
</tr>
<tr>
<td>Ch. 502</td>
<td>32</td>
</tr>
<tr>
<td>Ch. 832</td>
<td>285</td>
</tr>
<tr>
<td>Ch. 836</td>
<td>185</td>
</tr>
<tr>
<td>Ch. 844</td>
<td>5, 9, 15, 285</td>
</tr>
</tbody>
</table>

#### Acts of 2002

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 34</td>
<td>274, 275, 276, 277</td>
</tr>
<tr>
<td>Ch. 206</td>
<td>230</td>
</tr>
<tr>
<td>Ch. 346</td>
<td>312</td>
</tr>
<tr>
<td>Ch. 347</td>
<td>292</td>
</tr>
<tr>
<td>Ch. 358</td>
<td>217</td>
</tr>
<tr>
<td>Ch. 616</td>
<td>217</td>
</tr>
<tr>
<td>Ch. 628</td>
<td>163</td>
</tr>
<tr>
<td>Ch. 669</td>
<td>169</td>
</tr>
<tr>
<td>Ch. 720</td>
<td>191</td>
</tr>
<tr>
<td>Ch. 733</td>
<td>169</td>
</tr>
<tr>
<td>Ch. 739</td>
<td>169</td>
</tr>
<tr>
<td>Ch. 749</td>
<td>160</td>
</tr>
<tr>
<td>Ch. 814</td>
<td>22, 29, 172</td>
</tr>
<tr>
<td>Ch. 899</td>
<td>22, 25, 29, 172, 187</td>
</tr>
<tr>
<td>H.B. 29</td>
<td>26, 27, 28, 187</td>
</tr>
<tr>
<td>H.B. 30</td>
<td>26, 27, 28, 58</td>
</tr>
<tr>
<td>H. Doc. No. 1</td>
<td>58</td>
</tr>
<tr>
<td>H.J. Res. 89</td>
<td>13</td>
</tr>
</tbody>
</table>

### Hening's Statutes at Large (1784)

<table>
<thead>
<tr>
<th>Act</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 37, ¶ 2</td>
<td>166</td>
</tr>
</tbody>
</table>
# Code of Virginia

## Code of 1950

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1-10</td>
<td>13, 18, 22</td>
</tr>
<tr>
<td>§ 1-12(A)</td>
<td>183</td>
</tr>
<tr>
<td>§ 1-13.17</td>
<td>70, 257, 297</td>
</tr>
<tr>
<td>§ 1-13.39:3</td>
<td>276</td>
</tr>
<tr>
<td>§ 1-16</td>
<td>160, 183, 184, 185, 277</td>
</tr>
<tr>
<td>Tit. 2.1</td>
<td>283, 285</td>
</tr>
<tr>
<td>§ 2.1-41.2</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.1-51.40</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.1-342.01</td>
<td>9</td>
</tr>
<tr>
<td>Tit. 2.2</td>
<td>5, 285</td>
</tr>
<tr>
<td>§ 2.2-103</td>
<td>172</td>
</tr>
<tr>
<td>§ 2.2-200(C)(1)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.2-200(C)(2)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.2-200(C)(3)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.2-204</td>
<td>283, 284, 285</td>
</tr>
<tr>
<td>Tit. 2.2, ch. 5, §§ 2.2-500 to 2.2-518</td>
<td>30, 242, 269</td>
</tr>
<tr>
<td>§ 2.2-505</td>
<td>28, 132, 135, 240, 241, 245, 267, 344</td>
</tr>
<tr>
<td>§ 2.2-505(B)</td>
<td>5, 46, 70, 93</td>
</tr>
<tr>
<td>§ 2.2-1500(B)</td>
<td>172</td>
</tr>
<tr>
<td>§ 2.2-1509(A)</td>
<td>170, 172</td>
</tr>
<tr>
<td>§ 2.2-1840(B)</td>
<td>247</td>
</tr>
<tr>
<td>§ 2.2-2234(C)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.2-2315(C)</td>
<td>285</td>
</tr>
<tr>
<td>§§ 2.2-2404 to 2.2-2406</td>
<td>83</td>
</tr>
<tr>
<td>§ 2.2-2406</td>
<td>83</td>
</tr>
<tr>
<td>§ 2.2-2800</td>
<td>59</td>
</tr>
<tr>
<td>§ 2.2-2802</td>
<td>59, 61</td>
</tr>
<tr>
<td>Tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714</td>
<td>9, 13, 76, 288</td>
</tr>
<tr>
<td>§ 2.2-3700(B)</td>
<td>9, 12</td>
</tr>
<tr>
<td>§ 2.2-3701</td>
<td>11, 13, 74, 77</td>
</tr>
<tr>
<td>§ 2.2-3704(A)</td>
<td>11, 77</td>
</tr>
<tr>
<td>§ 2.2-3704(G)</td>
<td>11</td>
</tr>
<tr>
<td>§ 2.2-3705</td>
<td>9</td>
</tr>
<tr>
<td>§ 2.2-3705(A)</td>
<td>9, 11</td>
</tr>
<tr>
<td>§ 2.2-3705(A)(10)</td>
<td>8, 9</td>
</tr>
<tr>
<td>Code of Virginia</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 2.2-3705(D)</td>
<td>13</td>
</tr>
<tr>
<td>Tit. 2.2, ch. 38, §§ 2.2-3800 to 2.2-3809</td>
<td>3, 4, 5, 8, 347</td>
</tr>
<tr>
<td>§ 2.2-3800(C)</td>
<td>348</td>
</tr>
<tr>
<td>§ 2.2-3800(C)(1)</td>
<td>5</td>
</tr>
<tr>
<td>§ 2.2-3801(2)</td>
<td>4</td>
</tr>
<tr>
<td>§ 2.2-3801(6)</td>
<td>6, 8, 347</td>
</tr>
<tr>
<td>§ 2.2-3803(A)</td>
<td>3, 5</td>
</tr>
<tr>
<td>§ 2.2-3803(A)(1)</td>
<td>6, 8, 348</td>
</tr>
<tr>
<td>§ 2.2-3803(A)(3)</td>
<td>348</td>
</tr>
<tr>
<td>§ 2.2-3803(A)(4)</td>
<td>6, 348</td>
</tr>
<tr>
<td>§ 2.2-3803(A)(6)</td>
<td>348</td>
</tr>
<tr>
<td>§ 2.2-3803(A)(8)</td>
<td>348</td>
</tr>
<tr>
<td>§ 2.2-3803(A)(9)</td>
<td>348</td>
</tr>
<tr>
<td>§ 2.2-3806(A)</td>
<td>4, 5</td>
</tr>
<tr>
<td>§ 2.2-3808.1</td>
<td>13</td>
</tr>
<tr>
<td>§§ 2.2-4000 to 2.2-4033</td>
<td>51, 301</td>
</tr>
<tr>
<td>§ 2.2-4011(A)</td>
<td>204</td>
</tr>
<tr>
<td>§§ 2.2-4300 to 2.2-4377</td>
<td>14, 83, 100, 157, 254</td>
</tr>
<tr>
<td>§ 2.2-4300(B)</td>
<td>15</td>
</tr>
<tr>
<td>§ 2.2-4300(C)</td>
<td>14, 15, 16</td>
</tr>
<tr>
<td>§ 2.2-4301</td>
<td>14, 15, 83</td>
</tr>
<tr>
<td>§ 2.2-4303(A)</td>
<td>14, 158</td>
</tr>
<tr>
<td>§ 2.2-4327(A)</td>
<td>16</td>
</tr>
<tr>
<td>§ 2.2-4328</td>
<td>16</td>
</tr>
<tr>
<td>§ 2.2-4344(A)(2)</td>
<td>158</td>
</tr>
<tr>
<td>§ 2.2-4344(B)</td>
<td>82</td>
</tr>
<tr>
<td>§ 3.1-1107(A)</td>
<td>285</td>
</tr>
<tr>
<td>§ 4.1-304</td>
<td>16</td>
</tr>
<tr>
<td>§ 4.1-305</td>
<td>16, 17, 124, 125, 126</td>
</tr>
<tr>
<td>§ 4.1-305(A)</td>
<td>16, 124</td>
</tr>
<tr>
<td>§ 4.1-305(C)</td>
<td>124, 126</td>
</tr>
<tr>
<td>§ 4.1-305(F)</td>
<td>125, 126</td>
</tr>
<tr>
<td>§ 6.1-125.1</td>
<td>336</td>
</tr>
<tr>
<td>§ 6.1-194.2</td>
<td>336</td>
</tr>
<tr>
<td>Tit. 6.1, ch. 16, §§ 6.1-408 to 6.1-431</td>
<td>30, 32</td>
</tr>
</tbody>
</table>
CODE OF VIRGINIA

CODE OF 1950 (contd.)

§ 6.1-422 ................................................................. 30, 31
§ 6.1-422(A) ............................................................ 30
§ 6.1-422(B) ............................................................ 30
§ 6.1-422(B)(5) ......................................................... 30, 31, 32
§ 6.1-422(C) ............................................................ 30, 31, 32
§ 8-422.1 ................................................................. 328
§ 8.01-15 ................................................................. 336
§ 8.01-195.2 ............................................................ 261
§ 8.01-295 ............................................................... 323, 327
§ 8.01-305 ............................................................... 336
§ 8.01-399 ............................................................... 343
Tit. 8.01, ch. 17, §§ 8.01-426 to 8.01-465 .................. 149, 150
§ 8.01-446 ............................................................... 149
§ 8.01-449 ............................................................... 150
§ 8.01-450 ............................................................... 150
§ 8.01-457 ............................................................... 150
§ 8.01-465 ............................................................... 150
§ 8.01-490 ................................................................. 322, 324, 326
§ 8.01-492 ............................................................... 322, 326
§ 8.01-511 ............................................................... 33
§ 8.01-515 ............................................................... 166
§ 8.01-537 ............................................................... 33
§ 8.01-537.1 ............................................................ 33
§ 8.01-562 ............................................................... 166
§ 8.01-582 ............................................................... 50
§ 8.01-600 ............................................................... 48
§ 8.01-600(A) .......................................................... 50
§ 8.01-600(B) .......................................................... 50
§ 9-169 ................................................................. 174
§ 9-169(1) ............................................................... 175
§ 9-169(3) ............................................................... 174, 175, 176
§ 9.1-101 ............................................................... 152, 153, 154, 200
§ 9.1-102(23) ........................................................... 201, 202
Tit. 10.1, ch. 1, art. 1, §§ 10.1-100 to 10.1-104.3 .......... 34
§ 10.1-104(A) ........................................................ 35
# Code of Virginia

## Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 10.1-104(A)(1)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-104(A)(2)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-104(A)(3)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-104(A)(4)</td>
<td>34</td>
</tr>
<tr>
<td>§ 10.1-104(A)(5)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-104(A)(6)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-115(A)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-117(A)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-117(B)</td>
<td>38</td>
</tr>
<tr>
<td>§§ 10.1-200 to 10.1-205</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200</td>
<td>35, 37</td>
</tr>
<tr>
<td>§ 10.1-200(1)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200(2)-(4)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200(6)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200(7)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200(8)</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200.1</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200.2</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-200.3</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-201</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-202</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-202.1</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-203</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-204</td>
<td>37</td>
</tr>
<tr>
<td>§ 10.1-205</td>
<td>37</td>
</tr>
</tbody>
</table>

Tit. 10.1, ch. 14, §§ 10.1-1400 to 10.1-1457 | 70

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 10.1-1402</td>
<td>70</td>
</tr>
<tr>
<td>§ 10.1-1408.1(B)(1)</td>
<td>70</td>
</tr>
<tr>
<td>§ 10.1-1411</td>
<td>70</td>
</tr>
</tbody>
</table>
| §§ 10.1-2100 to 10.1-2116 | 41
| § 10.1-2100(A) | 42 |
| § 10.1-2101 | 41 |
| § 10.1-2102 | 41 |
| § 10.1-2103(8) | 41 |
| § 10.1-2107 | 41 |
## Code of Virginia

### Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Code Reference</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 10.1-2109(C)</td>
<td>41</td>
</tr>
<tr>
<td>§ 10.1-2109(E)</td>
<td>41</td>
</tr>
<tr>
<td>§§ 11-35 to 11-80</td>
<td>14</td>
</tr>
<tr>
<td>§ 11-35</td>
<td>14</td>
</tr>
<tr>
<td>§ 11-35(G)</td>
<td>14</td>
</tr>
<tr>
<td>§ 11-37</td>
<td>14</td>
</tr>
<tr>
<td>Tit. 13.1, ch. 7</td>
<td>312</td>
</tr>
<tr>
<td>§ 13.1-554</td>
<td>308, 309, 310, 311, 312</td>
</tr>
<tr>
<td>§ 13.1-826</td>
<td>81</td>
</tr>
<tr>
<td>§ 13.1-826(A)(4)</td>
<td>81</td>
</tr>
<tr>
<td>§ 13.1-1119</td>
<td>308, 309, 310, 311, 312</td>
</tr>
<tr>
<td>§ 14.1-112(2)</td>
<td>135</td>
</tr>
<tr>
<td>Tit. 15.1</td>
<td>323</td>
</tr>
<tr>
<td>§ 15.1-79</td>
<td>323, 324</td>
</tr>
<tr>
<td>Tit. 15.1, ch. 40</td>
<td>112</td>
</tr>
<tr>
<td>§ 15.1-446.1</td>
<td>90</td>
</tr>
<tr>
<td>§ 15.1-1260</td>
<td>114, 115</td>
</tr>
<tr>
<td>§ 15.1-1261</td>
<td>114, 115</td>
</tr>
<tr>
<td>§ 15.1-1646</td>
<td>112</td>
</tr>
<tr>
<td>Tit. 15.2</td>
<td>96, 246</td>
</tr>
<tr>
<td>§ 15.2-102</td>
<td>96</td>
</tr>
<tr>
<td>§ 15.2-519</td>
<td>67</td>
</tr>
<tr>
<td>§ 15.2-617</td>
<td>67</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 8, §§ 15.2-800 to 15.2-858</td>
<td>107, 109</td>
</tr>
<tr>
<td>§ 15.2-853</td>
<td>107, 108, 109</td>
</tr>
<tr>
<td>§ 15.2-854</td>
<td>108</td>
</tr>
<tr>
<td>§ 15.2-940</td>
<td>73</td>
</tr>
<tr>
<td>§ 15.2-951</td>
<td>50</td>
</tr>
<tr>
<td>§ 15.2-953</td>
<td>74</td>
</tr>
<tr>
<td>§ 15.2-953(A)</td>
<td>72, 73, 76</td>
</tr>
<tr>
<td>§ 15.2-953(B)</td>
<td>75, 76</td>
</tr>
<tr>
<td>§§ 15.2-1100 to 15.2-1132</td>
<td>257</td>
</tr>
<tr>
<td>§ 15.2-1102</td>
<td>257</td>
</tr>
<tr>
<td>§ 15.2-1200</td>
<td>68, 70</td>
</tr>
<tr>
<td>§ 15.2-1300</td>
<td>247</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§§ 15.2-1414.1 to 15.2-1414.7</td>
<td>168, 169</td>
</tr>
<tr>
<td>§ 15.2-1414.6</td>
<td>168, 169</td>
</tr>
<tr>
<td>§ 15.2-1427</td>
<td>246</td>
</tr>
<tr>
<td>§ 15.2-1427(A)-(C)</td>
<td>247</td>
</tr>
<tr>
<td>§ 15.2-1427(F)</td>
<td>247</td>
</tr>
<tr>
<td>§ 15.2-1429</td>
<td>78</td>
</tr>
<tr>
<td>§ 15.2-1500(A)</td>
<td>246</td>
</tr>
<tr>
<td>§ 15.2-1503</td>
<td>76</td>
</tr>
<tr>
<td>§ 15.2-1508</td>
<td>245, 246</td>
</tr>
<tr>
<td>§ 15.2-1527</td>
<td>273</td>
</tr>
<tr>
<td>§ 15.2-1600(A)</td>
<td>61, 64, 251, 265</td>
</tr>
<tr>
<td>§ 15.2-1608</td>
<td>59</td>
</tr>
<tr>
<td>§ 15.2-1609</td>
<td>248, 252</td>
</tr>
<tr>
<td>§ 15.2-1613</td>
<td>251, 252</td>
</tr>
<tr>
<td>§ 15.2-1613.1</td>
<td>84, 85</td>
</tr>
<tr>
<td>§ 15.2-1701</td>
<td>95, 249</td>
</tr>
<tr>
<td>§ 15.2-1704(A)</td>
<td>95, 249</td>
</tr>
<tr>
<td>§ 15.2-1704(B)</td>
<td>249</td>
</tr>
<tr>
<td>§ 15.2-2109(A)</td>
<td>257</td>
</tr>
<tr>
<td>§ 15.2-2143</td>
<td>257</td>
</tr>
<tr>
<td>§ 15.2-2144</td>
<td>257</td>
</tr>
<tr>
<td>§ 15.2-2149</td>
<td>114, 116</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 22 §§ 15.2-2200 to 15.2-2327</td>
<td>90, 92</td>
</tr>
<tr>
<td>§ 15.2-2200</td>
<td>90</td>
</tr>
<tr>
<td>§ 15.2-2204</td>
<td>94</td>
</tr>
<tr>
<td>§ 15.2-2221</td>
<td>94</td>
</tr>
<tr>
<td>§§ 15.2-2223 to 15.2-2228</td>
<td>88, 92</td>
</tr>
<tr>
<td>§ 15.2-2223</td>
<td>88, 90, 93, 94</td>
</tr>
<tr>
<td>§ 15.2-2232</td>
<td>88, 92</td>
</tr>
<tr>
<td>§ 15.2-2232(A)</td>
<td>88, 90, 91, 92, 93, 94</td>
</tr>
<tr>
<td>§ 15.2-2232(F)</td>
<td>91, 92, 93, 94</td>
</tr>
<tr>
<td>§ 15.2-2233</td>
<td>93</td>
</tr>
<tr>
<td>§ 15.2-2239</td>
<td>93, 94</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 22, art. 6, §§ 15.2-2240 to 15.2-2279</td>
<td>87</td>
</tr>
<tr>
<td>§ 15.2-2240</td>
<td>87</td>
</tr>
</tbody>
</table>
# Code of Virginia

## Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.2-2241</td>
<td>87</td>
</tr>
<tr>
<td>§§ 15.2-2251 to 15.2-2253</td>
<td>93</td>
</tr>
<tr>
<td>§ 15.2-2251</td>
<td>94</td>
</tr>
<tr>
<td>§§ 15.2-2258 to 15.2-2261</td>
<td>94</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 22, art. 7, §§ 15.2-2280 to 15.2-2316</td>
<td>87</td>
</tr>
<tr>
<td>§ 15.2-2283</td>
<td>87, 90</td>
</tr>
<tr>
<td>§ 15.2-2283(iv)</td>
<td>90</td>
</tr>
<tr>
<td>§ 15.2-2284</td>
<td>87, 88, 90</td>
</tr>
<tr>
<td>§ 15.2-2286</td>
<td>93</td>
</tr>
<tr>
<td>§ 15.2-2296</td>
<td>88</td>
</tr>
<tr>
<td>§ 15.2-2298(A)</td>
<td>91</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 24, §§ 15.2-2400 to 15.2-2413</td>
<td>98, 100</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 24, art. 1, §§ 15.2-2400 to 15.2-2403</td>
<td>97, 101</td>
</tr>
<tr>
<td>§ 15.2-2400</td>
<td>97, 101, 105</td>
</tr>
<tr>
<td>§ 15.2-2403</td>
<td>100, 105</td>
</tr>
<tr>
<td>§ 15.2-2403(1)</td>
<td>99, 103</td>
</tr>
<tr>
<td>§ 15.2-2403(1)-(2)</td>
<td>97, 102</td>
</tr>
<tr>
<td>§ 15.2-2403(3)</td>
<td>100, 104</td>
</tr>
<tr>
<td>§ 15.2-2403(4)</td>
<td>100, 104</td>
</tr>
<tr>
<td>§ 15.2-2403(6)</td>
<td>100, 104</td>
</tr>
<tr>
<td>§ 15.2-2403(8)</td>
<td>100, 104</td>
</tr>
<tr>
<td>§ 15.2-2403(9)</td>
<td>98, 102</td>
</tr>
<tr>
<td>§ 15.2-2404</td>
<td>113, 114, 116</td>
</tr>
<tr>
<td>§ 15.2-2405</td>
<td>113</td>
</tr>
<tr>
<td>§ 15.2-2503</td>
<td>247</td>
</tr>
<tr>
<td>§ 15.2-2506</td>
<td>76</td>
</tr>
<tr>
<td>§§ 15.2-4900 to 15.2-4920</td>
<td>82</td>
</tr>
<tr>
<td>§ 15.2-4901</td>
<td>83</td>
</tr>
<tr>
<td>§ 15.2-4902</td>
<td>82, 83, 110, 112</td>
</tr>
<tr>
<td>§ 15.2-4903</td>
<td>83</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 51, §§ 15.2-5100 to 15.2-5158</td>
<td>116</td>
</tr>
<tr>
<td>§ 15.2-5136</td>
<td>113, 114, 115</td>
</tr>
<tr>
<td>§ 15.2-5136(A)</td>
<td>114</td>
</tr>
<tr>
<td>§ 15.2-5137</td>
<td>113, 115</td>
</tr>
<tr>
<td>§ 15.2-5137(A)</td>
<td>114</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 15.2-5137(B)</td>
<td>114</td>
</tr>
<tr>
<td>§ 15.2-5137(E)</td>
<td>113, 114, 115, 116</td>
</tr>
<tr>
<td>§ 15.2-5139</td>
<td>113</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 53, §§ 15.2-5300 to 15.2-5367</td>
<td>79, 81</td>
</tr>
<tr>
<td>§ 15.2-5300</td>
<td>79, 80, 81</td>
</tr>
<tr>
<td>§ 15.2-5302</td>
<td>79</td>
</tr>
<tr>
<td>§ 15.2-5303</td>
<td>79</td>
</tr>
<tr>
<td>§ 15.2-5307</td>
<td>79</td>
</tr>
<tr>
<td>§ 15.2-5319</td>
<td>79</td>
</tr>
<tr>
<td>§ 15.2-5327</td>
<td>81</td>
</tr>
<tr>
<td>§ 15.2-5337</td>
<td>80</td>
</tr>
<tr>
<td>§ 15.2-5349</td>
<td>80</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 53, art. 4, §§ 15.2-5365 to 15.2-5367</td>
<td>81</td>
</tr>
<tr>
<td>§ 15.2-5365</td>
<td>80, 81</td>
</tr>
<tr>
<td>§ 15.2-5366</td>
<td>81</td>
</tr>
<tr>
<td>§ 15.2-5367</td>
<td>81</td>
</tr>
<tr>
<td>Tit. 15.2, ch. 60, §§ 15.2-6000 to 15.2-6015</td>
<td>110, 112</td>
</tr>
<tr>
<td>§ 15.2-6000</td>
<td>112</td>
</tr>
<tr>
<td>§ 15.2-6001</td>
<td>112</td>
</tr>
<tr>
<td>§ 15.2-6002</td>
<td>110</td>
</tr>
<tr>
<td>§ 15.2-6003</td>
<td>112</td>
</tr>
<tr>
<td>§ 15.2-6011</td>
<td>110, 111, 112</td>
</tr>
<tr>
<td>§ 15.2-6011(1)</td>
<td>112</td>
</tr>
<tr>
<td>§ 15.2-6011(8)</td>
<td>112</td>
</tr>
<tr>
<td>§ 15.2-6013</td>
<td>112</td>
</tr>
<tr>
<td>Tit. 16.1, ch. 4.1, §§ 16.1-69.1 to 16.1-69.58</td>
<td>124</td>
</tr>
<tr>
<td>§ 16.1-69.9:1(a)</td>
<td>122</td>
</tr>
<tr>
<td>§ 16.1-69.9:1(c)</td>
<td>122</td>
</tr>
<tr>
<td>§ 16.1-69.21</td>
<td>122, 123</td>
</tr>
<tr>
<td>§ 16.1-69.35</td>
<td>123</td>
</tr>
<tr>
<td>§ 16.1-69.35(1)</td>
<td>123</td>
</tr>
<tr>
<td>§ 16.1-69.35(1)(a)-(c)</td>
<td>124</td>
</tr>
<tr>
<td>§ 16.1-94.01</td>
<td>148, 149, 150</td>
</tr>
<tr>
<td>§ 16.1-107</td>
<td>131</td>
</tr>
<tr>
<td>Tit. 16.1, ch. 11, §§ 16.1-226 to 16.1-361</td>
<td>118, 120, 124, 125</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------</td>
<td>------------</td>
</tr>
<tr>
<td>§ 16.1-227</td>
<td>120, 121</td>
</tr>
<tr>
<td>§ 16.1-228</td>
<td>25, 126</td>
</tr>
<tr>
<td>§ 16.1-241</td>
<td>118, 122, 125</td>
</tr>
<tr>
<td>§ 16.1-241(A)(1)</td>
<td>126</td>
</tr>
<tr>
<td>§ 16.1-241(A)(4)</td>
<td>119</td>
</tr>
<tr>
<td>§ 16.1-241(D)</td>
<td>122</td>
</tr>
<tr>
<td>§ 16.1-247(A)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-247(B)(1)-(3)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-247(C)(2)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-247(I)(2)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-248.1</td>
<td>120</td>
</tr>
<tr>
<td>§ 16.1-248.1(A)</td>
<td>120, 121</td>
</tr>
<tr>
<td>§ 16.1-248.1(A)(1)</td>
<td>121</td>
</tr>
<tr>
<td>§ 16.1-248.1(B)</td>
<td>121</td>
</tr>
<tr>
<td>§ 16.1-248.1(C)</td>
<td>121</td>
</tr>
<tr>
<td>§ 16.1-250(C)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-250(E)(1)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-250(H)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-250.1</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-260(C)</td>
<td>25</td>
</tr>
<tr>
<td>§ 16.1-266</td>
<td>117</td>
</tr>
<tr>
<td>§ 16.1-266(A)</td>
<td>24, 117</td>
</tr>
<tr>
<td>§ 16.1-266(A)-(C)</td>
<td>117, 118, 119</td>
</tr>
<tr>
<td>§ 16.1-266(B)</td>
<td>117, 118</td>
</tr>
<tr>
<td>§ 16.1-266(B)(1)</td>
<td>119</td>
</tr>
<tr>
<td>§ 16.1-266(B)(2)</td>
<td>25, 119</td>
</tr>
<tr>
<td>§ 16.1-266(B)(3)</td>
<td>25, 119</td>
</tr>
<tr>
<td>§ 16.1-266(C)</td>
<td>118</td>
</tr>
<tr>
<td>§ 16.1-266(C)(2)</td>
<td>119</td>
</tr>
<tr>
<td>§ 16.1-266(C)(3)</td>
<td>119</td>
</tr>
<tr>
<td>§ 16.1-266(D)</td>
<td>117, 118, 119</td>
</tr>
<tr>
<td>§ 16.1-266.1</td>
<td>119</td>
</tr>
<tr>
<td>§ 16.1-278.8</td>
<td>121, 125, 126</td>
</tr>
<tr>
<td>§ 16.1-278.8(A)</td>
<td>121, 126</td>
</tr>
<tr>
<td>§ 16.1-278.9</td>
<td>124, 125, 126</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 16.1-278.9(A)</td>
<td>125, 126</td>
</tr>
<tr>
<td>§ 16.1-278.9(D)</td>
<td>125</td>
</tr>
<tr>
<td>§ 16.1-278.9(F)</td>
<td>125</td>
</tr>
<tr>
<td>§ 16.1-278.16</td>
<td>131</td>
</tr>
<tr>
<td>§ 16.1-296(H)</td>
<td>127, 129, 130, 131</td>
</tr>
<tr>
<td>§ 16.1-302</td>
<td>166</td>
</tr>
<tr>
<td>§ 16.1-305</td>
<td>13</td>
</tr>
<tr>
<td>Tit. 17</td>
<td>272</td>
</tr>
<tr>
<td>§ 17-43</td>
<td>13</td>
</tr>
<tr>
<td>§ 17-60</td>
<td>272</td>
</tr>
<tr>
<td>Tit. 17.1</td>
<td>272</td>
</tr>
<tr>
<td>§ 17.1-112</td>
<td>249</td>
</tr>
<tr>
<td>§ 17.1-208</td>
<td>10, 11, 12, 13</td>
</tr>
<tr>
<td>§ 17.1-209</td>
<td>64</td>
</tr>
<tr>
<td>§§ 17.1-223 to 17.1-229</td>
<td>13</td>
</tr>
<tr>
<td>§ 17.1-223</td>
<td>64</td>
</tr>
<tr>
<td>§ 17.1-225</td>
<td>63, 64</td>
</tr>
<tr>
<td>§ 17.1-227</td>
<td>134, 135, 272</td>
</tr>
<tr>
<td>§ 17.1-242</td>
<td>11, 63, 64</td>
</tr>
<tr>
<td>§ 17.1-275(A)(2)</td>
<td>134, 135</td>
</tr>
<tr>
<td>§ 17.1-279(B)</td>
<td>12</td>
</tr>
<tr>
<td>§ 18-77</td>
<td>213</td>
</tr>
<tr>
<td>§ 18-78</td>
<td>213</td>
</tr>
<tr>
<td>Tit. 18.2</td>
<td>213</td>
</tr>
<tr>
<td>§ 18.2-11</td>
<td>139</td>
</tr>
<tr>
<td>§ 18.2-11(a)</td>
<td>79</td>
</tr>
<tr>
<td>§ 18.2-36.1</td>
<td>214</td>
</tr>
<tr>
<td>§ 18.2-51.4</td>
<td>214</td>
</tr>
<tr>
<td>§ 18.2-242</td>
<td>138, 139</td>
</tr>
<tr>
<td>§ 18.2-258.1</td>
<td>343</td>
</tr>
<tr>
<td>§ 18.2-266</td>
<td>210, 213, 214</td>
</tr>
<tr>
<td>§ 18.2-271(A)</td>
<td>212, 213</td>
</tr>
<tr>
<td>§ 18.2-271.1(E)</td>
<td>125</td>
</tr>
<tr>
<td>§ 18.2-272</td>
<td>210, 211, 212, 213, 214</td>
</tr>
<tr>
<td>§ 18.2-283</td>
<td>38</td>
</tr>
</tbody>
</table>
CODE OF VIRGINIA

CODE OF 1950 (contd.)

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 18.2-283.1</td>
<td>38</td>
</tr>
<tr>
<td>§ 18.2-287.4</td>
<td>36</td>
</tr>
<tr>
<td>Tit. 18.2, ch. 7, §§ 18.2-288 to 18.2-298</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-288</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-288(3)</td>
<td>144</td>
</tr>
<tr>
<td>§§ 18.2-289 to 18.2-291</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-289</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-290</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-291</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-291(1)</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-291(2)</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-291(3)</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-291(4)</td>
<td>143, 144</td>
</tr>
<tr>
<td>§ 18.2-293.1</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-294</td>
<td>144</td>
</tr>
<tr>
<td>§ 18.2-295</td>
<td>144</td>
</tr>
<tr>
<td>Tit. 18.2, ch. 7, art. 7, §§ 18.2-308 to 18.2-311.2</td>
<td>201</td>
</tr>
<tr>
<td>§ 18.2-308</td>
<td>36, 38, 140, 141</td>
</tr>
<tr>
<td>§ 18.2-308(A)</td>
<td>140, 141</td>
</tr>
<tr>
<td>§ 18.2-308(B)</td>
<td>140</td>
</tr>
<tr>
<td>§ 18.2-308(B)(8)</td>
<td>140, 141</td>
</tr>
<tr>
<td>§ 18.2-308(D)</td>
<td>36, 38</td>
</tr>
<tr>
<td>§ 18.2-308(H)</td>
<td>38</td>
</tr>
<tr>
<td>§ 18.2-308(J3)</td>
<td>38</td>
</tr>
<tr>
<td>§ 18.2-308(O)</td>
<td>38</td>
</tr>
<tr>
<td>§ 18.2-308.1</td>
<td>38</td>
</tr>
<tr>
<td>§ 18.2-308.1:2</td>
<td>201</td>
</tr>
<tr>
<td>§ 18.2-308.1:3(A)</td>
<td>201</td>
</tr>
<tr>
<td>Tit. 18.2, ch. 8, art. 1</td>
<td>147</td>
</tr>
<tr>
<td>§ 18.2-325</td>
<td>147</td>
</tr>
<tr>
<td>§ 18.2-325(1)</td>
<td>145, 147</td>
</tr>
<tr>
<td>§ 18.2-326</td>
<td>145</td>
</tr>
<tr>
<td>§ 18.2-332</td>
<td>147</td>
</tr>
<tr>
<td>§ 18.2-365</td>
<td>147</td>
</tr>
<tr>
<td>§ 18.2-460(A)</td>
<td>136, 137</td>
</tr>
</tbody>
</table>
CODE OF VIRGINIA

CODE OF 1950 (CONTD.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 19.1-100</td>
<td>18</td>
</tr>
<tr>
<td>Tit. 19.2</td>
<td>157</td>
</tr>
<tr>
<td>§ 19.2-72</td>
<td>348</td>
</tr>
<tr>
<td>§ 19.2-73.2</td>
<td>348</td>
</tr>
<tr>
<td>§ 19.2-76</td>
<td>323</td>
</tr>
<tr>
<td>§ 19.2-81</td>
<td>17, 18, 348</td>
</tr>
<tr>
<td>§ 19.2-81.3</td>
<td>348</td>
</tr>
<tr>
<td>§ 19.2-81.4(1)-(2)</td>
<td>348</td>
</tr>
<tr>
<td>§§ 19.2-85 to 19.2-118</td>
<td>96</td>
</tr>
<tr>
<td>§ 19.2-108</td>
<td>96</td>
</tr>
<tr>
<td>Tit. 19.2, ch. 9</td>
<td>244</td>
</tr>
<tr>
<td>§ 19.2-119</td>
<td>150, 244</td>
</tr>
<tr>
<td>§ 19.2-120</td>
<td>150</td>
</tr>
<tr>
<td>§ 19.2-121</td>
<td>150</td>
</tr>
<tr>
<td>§ 19.2-135</td>
<td>149</td>
</tr>
<tr>
<td>§ 19.2-143</td>
<td>149, 150</td>
</tr>
<tr>
<td>§ 19.2-165</td>
<td>157, 158</td>
</tr>
<tr>
<td>§ 19.2-166</td>
<td>157</td>
</tr>
<tr>
<td>§ 19.2-181</td>
<td>197</td>
</tr>
<tr>
<td>§ 19.2-182.2</td>
<td>197</td>
</tr>
<tr>
<td>§ 19.2-187.02</td>
<td>159, 160</td>
</tr>
<tr>
<td>§ 19.2-243</td>
<td>164</td>
</tr>
<tr>
<td>§ 19.2-299</td>
<td>13</td>
</tr>
<tr>
<td>§ 19.2-306</td>
<td>161, 162, 163</td>
</tr>
<tr>
<td>§ 19.2-306(A)</td>
<td>163</td>
</tr>
<tr>
<td>§ 19.2-306(A)-(E)</td>
<td>163</td>
</tr>
<tr>
<td>§ 19.2-306(B)</td>
<td>162</td>
</tr>
<tr>
<td>§ 19.2-306(D)</td>
<td>163</td>
</tr>
<tr>
<td>§ 19.2-308</td>
<td>96</td>
</tr>
<tr>
<td>Tit. 19.2, ch. 23, §§ 19.2-387 to 19.2-392.02</td>
<td>200</td>
</tr>
<tr>
<td>§ 19.2-387(A)</td>
<td>202</td>
</tr>
<tr>
<td>§ 19.2-388</td>
<td>200</td>
</tr>
<tr>
<td>§ 19.2-388(A)</td>
<td>202</td>
</tr>
<tr>
<td>§ 19.2-389</td>
<td>151, 154, 174</td>
</tr>
<tr>
<td>§ 19.2-389(A)</td>
<td>151, 200</td>
</tr>
</tbody>
</table>
# Code of Virginia

## Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 19.2-389(A)(1)</td>
<td>154, 174, 175, 200</td>
</tr>
<tr>
<td>§ 19.2-389(A)(3)</td>
<td>153, 154</td>
</tr>
<tr>
<td>§ 19.2-389(A)(6)</td>
<td>152, 175</td>
</tr>
<tr>
<td>§ 19.2-390(B)</td>
<td>155, 156</td>
</tr>
<tr>
<td>§ 20-23</td>
<td>164, 165, 166</td>
</tr>
<tr>
<td>§ 20-25</td>
<td>121</td>
</tr>
<tr>
<td>§ 20-146.21</td>
<td>166</td>
</tr>
<tr>
<td>§ 22.1-8</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-18</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-25(A)</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-32</td>
<td>166, 167, 168, 169</td>
</tr>
<tr>
<td>§ 22.1-32(A)</td>
<td>168, 169</td>
</tr>
<tr>
<td>§ 22.1-32(A)-(B)</td>
<td>169</td>
</tr>
<tr>
<td>§ 22.1-32(A)-(D)</td>
<td>169</td>
</tr>
<tr>
<td>§ 22.1-32(B)</td>
<td>169</td>
</tr>
<tr>
<td>§ 22.1-32(B)-(C)</td>
<td>169</td>
</tr>
<tr>
<td>§ 22.1-32(B)-(E)</td>
<td>169</td>
</tr>
<tr>
<td>§ 22.1-32(D)</td>
<td>169</td>
</tr>
<tr>
<td>§ 22.1-32(F)</td>
<td>168, 169</td>
</tr>
<tr>
<td>§ 22.1-32(F)(2)</td>
<td>168</td>
</tr>
<tr>
<td>§ 22.1-60</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-238</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-253.13:3(C)</td>
<td>53, 54</td>
</tr>
<tr>
<td>§ 22.1-298</td>
<td>54</td>
</tr>
<tr>
<td>§ 22.1-305.2</td>
<td>54</td>
</tr>
<tr>
<td>§ 22.1-305.3(B)</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-305.5(5)</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-305.5(6)</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-305.5(11)</td>
<td>53</td>
</tr>
<tr>
<td>§ 22.1-305.6</td>
<td>53</td>
</tr>
<tr>
<td>Tit. 22.1, ch. 18, §§ 22.1-339 to 22.1-345</td>
<td>253</td>
</tr>
<tr>
<td>§ 22.1-339</td>
<td>253</td>
</tr>
<tr>
<td>§ 22.1-345</td>
<td>253</td>
</tr>
<tr>
<td>Tit. 23</td>
<td>181</td>
</tr>
<tr>
<td>Tit. 23, ch. 10</td>
<td>180</td>
</tr>
</tbody>
</table>
# Code of Virginia

## Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 24.2-108</td>
<td>170, 171, 172</td>
</tr>
<tr>
<td>§ 24.2-111</td>
<td>170, 171, 172</td>
</tr>
<tr>
<td>Tit. 26, §§ 26-1 to 26-71</td>
<td>173, 174, 175</td>
</tr>
<tr>
<td>Tit. 26, ch. 2, §§ 26-8 to 26-37</td>
<td>50</td>
</tr>
<tr>
<td>§ 26-8</td>
<td>49, 174, 175, 176, 293</td>
</tr>
<tr>
<td>§ 26-8.1</td>
<td>174</td>
</tr>
<tr>
<td>§ 26-12</td>
<td>175</td>
</tr>
<tr>
<td>§ 26-13</td>
<td>173, 174</td>
</tr>
<tr>
<td>§ 26-18</td>
<td>174</td>
</tr>
<tr>
<td>§ 26-24</td>
<td>50</td>
</tr>
<tr>
<td>§ 26-27</td>
<td>293</td>
</tr>
<tr>
<td>§ 27-99</td>
<td>176, 177, 178</td>
</tr>
<tr>
<td>§ 30-100</td>
<td>182</td>
</tr>
<tr>
<td>§ 30-101</td>
<td>182</td>
</tr>
<tr>
<td>§ 30-103(5)</td>
<td>181</td>
</tr>
<tr>
<td>§ 30-103(6)</td>
<td>181</td>
</tr>
<tr>
<td>§ 30-108</td>
<td>182</td>
</tr>
<tr>
<td>§ 32.1-12</td>
<td>256</td>
</tr>
<tr>
<td>§ 32.1-20</td>
<td>208</td>
</tr>
<tr>
<td>§ 32.1-42</td>
<td>208</td>
</tr>
<tr>
<td>§ 32.1-43</td>
<td>204</td>
</tr>
<tr>
<td>Tit. 32.1, ch. 6, art. 1, §§ 32.1-163 to 32.1-166</td>
<td>68</td>
</tr>
<tr>
<td>§ 32.1-164.5</td>
<td>68, 69, 70</td>
</tr>
<tr>
<td>§ 32.1-164.5(A)</td>
<td>68, 69, 70</td>
</tr>
<tr>
<td>§ 32.1-164.5(B)</td>
<td>68</td>
</tr>
<tr>
<td>§ 32.1-164.5(C)(7)</td>
<td>69</td>
</tr>
<tr>
<td>§ 32.1-170</td>
<td>256</td>
</tr>
<tr>
<td>§ 32.1-267(B)</td>
<td>183</td>
</tr>
<tr>
<td>§ 32.1-267(F)</td>
<td>183, 184, 185</td>
</tr>
<tr>
<td>§ 33.1-23.03:8</td>
<td>187</td>
</tr>
<tr>
<td>§ 33.1-267</td>
<td>187</td>
</tr>
<tr>
<td>§ 36-49(1)</td>
<td>191</td>
</tr>
<tr>
<td>§ 36-49.1:1</td>
<td>188, 190, 191</td>
</tr>
<tr>
<td>§ 36-55.27</td>
<td>285</td>
</tr>
<tr>
<td>Tit. 36, ch. 5, §§ 36-86 to 36-96</td>
<td>194</td>
</tr>
<tr>
<td>Code of Virginia</td>
<td>Page</td>
</tr>
<tr>
<td>------------------</td>
<td>------</td>
</tr>
<tr>
<td>Tit. 36, ch. 5.1, §§ 36-96.1 to 36-96.23</td>
<td>194</td>
</tr>
<tr>
<td>§ 36-96.3</td>
<td>193, 194</td>
</tr>
<tr>
<td>§ 36-96.3(A)</td>
<td>192</td>
</tr>
<tr>
<td>§ 36-96.7</td>
<td>192</td>
</tr>
<tr>
<td>§ 36-96.7(A)</td>
<td>193</td>
</tr>
<tr>
<td>§ 36-96.7(B)(2)</td>
<td>193</td>
</tr>
<tr>
<td>§ 36-98</td>
<td>189</td>
</tr>
<tr>
<td>§ 36-98.1</td>
<td>176, 178</td>
</tr>
<tr>
<td>§ 36-105</td>
<td>189, 190, 191</td>
</tr>
<tr>
<td>§ 36-139.4</td>
<td>176, 177, 178</td>
</tr>
<tr>
<td>Tit. 37.1</td>
<td>198</td>
</tr>
<tr>
<td>§ 37.1-1</td>
<td>198</td>
</tr>
<tr>
<td>§ 37.1-65.1(A)</td>
<td>198</td>
</tr>
<tr>
<td>§ 37.1-65.1(B)</td>
<td>198</td>
</tr>
<tr>
<td>§ 37.1-67.1</td>
<td>195, 197, 198</td>
</tr>
<tr>
<td>§ 37.1-67.3</td>
<td>197, 198, 199, 200, 201</td>
</tr>
<tr>
<td>§ 37.1-70</td>
<td>196</td>
</tr>
<tr>
<td>§ 37.1-88</td>
<td>197, 198</td>
</tr>
<tr>
<td>§ 37.1-134.18(B)</td>
<td>199, 200, 201</td>
</tr>
<tr>
<td>§ 37.1-203(2)</td>
<td>263</td>
</tr>
<tr>
<td>§ 38.2-1916.1(J)</td>
<td>131</td>
</tr>
<tr>
<td>§ 39-96.6(C)</td>
<td>277</td>
</tr>
<tr>
<td>§ 40-112</td>
<td>346</td>
</tr>
<tr>
<td>§§ 40.1-28.8 to 40.1-28.12</td>
<td>15</td>
</tr>
<tr>
<td>§ 44-1</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-2</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-3</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-4</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-8</td>
<td>208</td>
</tr>
<tr>
<td>§ 44-54.6(2)</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-85</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-86</td>
<td>205</td>
</tr>
<tr>
<td>§ 44-87</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-88</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-93</td>
<td>59, 60</td>
</tr>
</tbody>
</table>
### Code of Virginia

**Code of 1950 (contd.)**

<table>
<thead>
<tr>
<th>Section Reference</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§§ 44-146.13 to 44-146.28:1</td>
<td>208</td>
</tr>
<tr>
<td>§ 44-146.14(a)(2)</td>
<td>208</td>
</tr>
<tr>
<td>§ 44-146.14(b)</td>
<td>208</td>
</tr>
<tr>
<td>§ 44-146.16</td>
<td>207</td>
</tr>
<tr>
<td>§ 44-146.16(2)</td>
<td>203</td>
</tr>
<tr>
<td>§ 44-146.16(3)</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-146.17</td>
<td>204</td>
</tr>
<tr>
<td>§ 44-146.17(1)</td>
<td>204, 205, 206, 208</td>
</tr>
<tr>
<td>§ 44-146.17(2)</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-146.17(7)</td>
<td>208</td>
</tr>
<tr>
<td>§ 44-146.17:1</td>
<td>208</td>
</tr>
<tr>
<td>§ 44-146.18(a)</td>
<td>210</td>
</tr>
<tr>
<td>§ 44-146.18:1</td>
<td>207, 209</td>
</tr>
<tr>
<td>§ 44-146.24</td>
<td>209</td>
</tr>
<tr>
<td>§ 44-146.27(A)</td>
<td>210</td>
</tr>
<tr>
<td>§ 44-146.27(A)-(B)</td>
<td>207</td>
</tr>
<tr>
<td>§ 44-146.27(C)</td>
<td>207</td>
</tr>
<tr>
<td>§ 44-146.28(a)</td>
<td>207</td>
</tr>
<tr>
<td>Tit. 46</td>
<td>213</td>
</tr>
<tr>
<td>§ 46-347.1</td>
<td>212, 213</td>
</tr>
<tr>
<td>Tit. 46.1</td>
<td>213</td>
</tr>
<tr>
<td>§ 46.1-65</td>
<td>230</td>
</tr>
<tr>
<td>§ 46.1-65(e)</td>
<td>230</td>
</tr>
<tr>
<td>§ 46.1-350</td>
<td>213</td>
</tr>
<tr>
<td>§ 46.1-350(a)</td>
<td>213</td>
</tr>
<tr>
<td>Tit. 46.2, §§ 46.2-100 to 46.2-2610</td>
<td>78, 213, 215, 216</td>
</tr>
<tr>
<td>§ 46.2-100</td>
<td>217</td>
</tr>
<tr>
<td>§ 46.2-104</td>
<td>137</td>
</tr>
<tr>
<td>§ 46.2-113</td>
<td>77</td>
</tr>
<tr>
<td>§ 46.2-208(A)</td>
<td>175</td>
</tr>
<tr>
<td>§ 46.2-208(B)</td>
<td>175</td>
</tr>
<tr>
<td>§ 46.2-208(B)(9)</td>
<td>175</td>
</tr>
<tr>
<td>§ 46.2-301</td>
<td>210, 211, 212, 213, 214</td>
</tr>
<tr>
<td>§ 46.2-301(A)</td>
<td>214</td>
</tr>
<tr>
<td>§ 46.2-301(B)</td>
<td>214</td>
</tr>
<tr>
<td>Code of Virginia</td>
<td>Page</td>
</tr>
<tr>
<td>------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 46.2-301.1</td>
<td>210, 211, 213, 214</td>
</tr>
<tr>
<td>§ 46.2-301.1(A)</td>
<td>210</td>
</tr>
<tr>
<td>§ 46.2-341.4</td>
<td>215, 217</td>
</tr>
<tr>
<td>§ 46.2-341.24</td>
<td>214</td>
</tr>
<tr>
<td>§ 46.2-389</td>
<td>214</td>
</tr>
<tr>
<td>§ 46.2-391</td>
<td>214</td>
</tr>
<tr>
<td>§ 46.2-752</td>
<td>227, 230</td>
</tr>
<tr>
<td>§ 46.2-752(A)</td>
<td>224, 225, 226, 227</td>
</tr>
<tr>
<td>§ 46.2-752(A)(4)</td>
<td>226</td>
</tr>
<tr>
<td>§ 46.2-752(A)(5)</td>
<td>226</td>
</tr>
<tr>
<td>§ 46.2-752(A)(11)</td>
<td>225, 226</td>
</tr>
<tr>
<td>§ 46.2-752(G)</td>
<td>227, 228, 229, 230</td>
</tr>
<tr>
<td>§ 46.2-752(J)</td>
<td>227, 229</td>
</tr>
<tr>
<td>§ 46.2-752(K)</td>
<td>230</td>
</tr>
<tr>
<td>§ 46.2-755</td>
<td>230</td>
</tr>
<tr>
<td>§ 46.2-1048</td>
<td>220, 223</td>
</tr>
<tr>
<td>Tit. 46.2, ch. 10, art. 13, §§ 46.2-1095 to 46.2-1100</td>
<td>214</td>
</tr>
<tr>
<td>§ 46.2-1095</td>
<td>215</td>
</tr>
<tr>
<td>§ 46.2-1095(A)</td>
<td>215, 217</td>
</tr>
<tr>
<td>§ 46.2-1095(E)</td>
<td>215, 216, 217</td>
</tr>
<tr>
<td>§ 46.2-1095(F)</td>
<td>215, 217</td>
</tr>
<tr>
<td>§ 46.2-1099</td>
<td>214, 215, 216, 217</td>
</tr>
<tr>
<td>§ 46.2-1100</td>
<td>215, 216</td>
</tr>
<tr>
<td>§ 46.2-1163</td>
<td>217</td>
</tr>
<tr>
<td>Tit. 46.2, ch. 10, art. 22, §§ 46.2-1176 to 46.2-1187.3</td>
<td>219, 220</td>
</tr>
<tr>
<td>§ 46.2-1176</td>
<td>219, 222</td>
</tr>
<tr>
<td>§ 46.2-1178(C)</td>
<td>219, 220, 221</td>
</tr>
<tr>
<td>§ 46.2-1178.1</td>
<td>220</td>
</tr>
<tr>
<td>§ 46.2-1180(A)</td>
<td>219</td>
</tr>
<tr>
<td>§ 46.2-1180(A)(1)</td>
<td>220</td>
</tr>
<tr>
<td>§ 46.2-1180(A)(5)</td>
<td>221</td>
</tr>
<tr>
<td>§ 46.2-1230</td>
<td>77</td>
</tr>
<tr>
<td>§ 46.2-1300</td>
<td>77</td>
</tr>
<tr>
<td>§ 49-12</td>
<td>273</td>
</tr>
<tr>
<td>§ 51.1-124.3</td>
<td>232, 233</td>
</tr>
</tbody>
</table>
**Code of Virginia**

**Code of 1950 (contd.)**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 51.1-124.30(C)</td>
<td>234</td>
</tr>
<tr>
<td>§ 51.1-124.31</td>
<td>241</td>
</tr>
<tr>
<td>§ 51.1-126</td>
<td>234, 239</td>
</tr>
<tr>
<td>§ 51.1-126(D)</td>
<td>234, 239, 242</td>
</tr>
<tr>
<td>§ 51.1-126.5</td>
<td>234, 238</td>
</tr>
<tr>
<td>§ 51.1-126.5(G)</td>
<td>238</td>
</tr>
<tr>
<td>§ 51.1-126.5(H)</td>
<td>238</td>
</tr>
<tr>
<td>§ 51.1-142.2(B.1)</td>
<td>232</td>
</tr>
<tr>
<td>§ 51.1-142.2(B.1)(v)</td>
<td>232, 233</td>
</tr>
<tr>
<td>Tit. 51.1, ch. 6, §§ 51.1-600 to 51.1-606</td>
<td>234, 236</td>
</tr>
<tr>
<td>§ 51.1-600</td>
<td>236</td>
</tr>
<tr>
<td>§ 51.1-602</td>
<td>236, 237, 238, 242</td>
</tr>
<tr>
<td>§ 51.1-602(A)</td>
<td>235, 236, 237, 238, 241</td>
</tr>
<tr>
<td>§ 51.1-606</td>
<td>234, 237, 242</td>
</tr>
<tr>
<td>§ 51.1-606(A)</td>
<td>237, 242</td>
</tr>
<tr>
<td>§ 51.1-606(B)</td>
<td>242</td>
</tr>
<tr>
<td>Tit. 51.1, ch. 12, §§ 51.1-1200 to 51.1-1211</td>
<td>234, 240, 242</td>
</tr>
<tr>
<td>§ 51.1-1200</td>
<td>242</td>
</tr>
<tr>
<td>§ 51.1-1201(A)</td>
<td>240</td>
</tr>
<tr>
<td>§ 51.1-1202</td>
<td>242</td>
</tr>
<tr>
<td>Tit. 52, ch. 2, §§ 52-12 to 52-15</td>
<td>151, 154, 174, 175</td>
</tr>
<tr>
<td>§ 52-12</td>
<td>154</td>
</tr>
<tr>
<td>§ 52-14</td>
<td>153, 154</td>
</tr>
<tr>
<td>§ 52-15</td>
<td>153, 154</td>
</tr>
<tr>
<td>§ 53.1-32(A)</td>
<td>253</td>
</tr>
<tr>
<td>§ 53.1-32.1</td>
<td>253</td>
</tr>
<tr>
<td>§ 53.1-41</td>
<td>252, 253</td>
</tr>
<tr>
<td>§ 53.1-79.1</td>
<td>250</td>
</tr>
<tr>
<td>§ 53.1-85</td>
<td>247</td>
</tr>
<tr>
<td>§ 53.1-105</td>
<td>246, 251</td>
</tr>
<tr>
<td>§ 53.1-106(A)</td>
<td>247</td>
</tr>
<tr>
<td>§ 53.1-106(B)(4)</td>
<td>247</td>
</tr>
<tr>
<td>§ 53.1-107</td>
<td>245</td>
</tr>
<tr>
<td>§ 53.1-109</td>
<td>252</td>
</tr>
<tr>
<td>§ 53.1-109(ii)</td>
<td>252</td>
</tr>
<tr>
<td>Code of Virginia Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 53.1-109.1 ................................................................. 247</td>
<td></td>
</tr>
<tr>
<td>§ 53.1-112 ................................................................. 247</td>
<td></td>
</tr>
<tr>
<td>§ 53.1-113 ................................................................. 252</td>
<td></td>
</tr>
<tr>
<td>§ 53.1-114 ................................................................. 247</td>
<td></td>
</tr>
<tr>
<td>§ 53.1-120 ................................................................. 243, 244</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-1102 ................................................................. 257</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-1102(A) ................................................................. 255</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-1117 ................................................................. 294, 297</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-1128 ................................................................. 256</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2400(3) ................................................................. 208</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2900 ................................................................. 261</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2902 ................................................................. 208</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2957.4 ................................................................. 259, 261</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2957.4(A) ................................................................. 259</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2957.6 ................................................................. 259, 261</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2957.6(A) ................................................................. 261</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2957.6(C) ................................................................. 261</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2969 ................................................................. 262, 263</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2969(E) ................................................................. 262</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2969(E)(3) ................................................................. 263</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-2969(K) ................................................................. 263</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-3303 ................................................................. 342, 343</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-3303(B) ................................................................. 342, 343</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-3310 ................................................................. 208</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-3319(D) ................................................................. 342, 343</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-3319(D)(1) ................................................................. 343</td>
<td></td>
</tr>
<tr>
<td>§ 54.1-3420.1 ................................................................. 342, 343</td>
<td></td>
</tr>
<tr>
<td>§ 55-58.1 ................................................................. 272</td>
<td></td>
</tr>
<tr>
<td>Tit. 55, ch. 6, §§ 55-106 to 55-142.9 ................................................................. 232</td>
<td></td>
</tr>
<tr>
<td>§ 55-106 ................................................................. 231, 270, 272</td>
<td></td>
</tr>
<tr>
<td>§ 55-106.5 ................................................................. 273</td>
<td></td>
</tr>
<tr>
<td>§ 55-108 ................................................................. 270, 273</td>
<td></td>
</tr>
<tr>
<td>Tit. 55, ch. 6, art. 2 ................................................................. 231</td>
<td></td>
</tr>
<tr>
<td>Tit. 55, ch. 6, art. 2.1, §§ 55-118.1 to 55-118.9 ................................................................. 231, 232</td>
<td></td>
</tr>
<tr>
<td>§ 55-118.1(1) ................................................................. 232</td>
<td></td>
</tr>
<tr>
<td>Title 55, chapter, section</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Title 55, ch. 6, art. 3</td>
<td>231</td>
</tr>
<tr>
<td>Title 55, ch. 11.1</td>
<td>50</td>
</tr>
<tr>
<td>§ 55-210.2</td>
<td>336</td>
</tr>
<tr>
<td>§ 55-237.1</td>
<td>264, 265</td>
</tr>
<tr>
<td>§ 55-248.38:2</td>
<td>264, 265</td>
</tr>
<tr>
<td>§ 55-368(1)</td>
<td>336</td>
</tr>
<tr>
<td>§§ 55-424 to 55-506</td>
<td>274</td>
</tr>
<tr>
<td>§ 55-426</td>
<td>277</td>
</tr>
<tr>
<td>§ 55-428</td>
<td>274, 275, 276</td>
</tr>
<tr>
<td>§ 55-428(F)</td>
<td>274, 276</td>
</tr>
<tr>
<td>§ 55-428(G)</td>
<td>274, 276</td>
</tr>
<tr>
<td>§ 55-458</td>
<td>336</td>
</tr>
<tr>
<td>§§ 55-508 to 55-516</td>
<td>269</td>
</tr>
<tr>
<td>Title 55, ch. 26, §§ 55-508 to 55-516.2</td>
<td>266, 269</td>
</tr>
<tr>
<td>§ 55-509</td>
<td>270</td>
</tr>
<tr>
<td>§ 55-509.2</td>
<td>269</td>
</tr>
<tr>
<td>§§ 55-510 to 55-516</td>
<td>269</td>
</tr>
<tr>
<td>§ 55-510(A)</td>
<td>269</td>
</tr>
<tr>
<td>§ 55-510(B)</td>
<td>267</td>
</tr>
<tr>
<td>§ 55-510.1(A)</td>
<td>267, 269</td>
</tr>
<tr>
<td>§ 55-512</td>
<td>269</td>
</tr>
<tr>
<td>§ 55-512(A)</td>
<td>268, 269</td>
</tr>
<tr>
<td>§ 55-512(A)(14)</td>
<td>269</td>
</tr>
<tr>
<td>§ 55-516.1</td>
<td>269</td>
</tr>
<tr>
<td>Title 58</td>
<td>321, 334, 337</td>
</tr>
<tr>
<td>§ 58-12</td>
<td>334, 337</td>
</tr>
<tr>
<td>§ 58-12(2)</td>
<td>337</td>
</tr>
<tr>
<td>§ 58-12(5)</td>
<td>334, 337</td>
</tr>
<tr>
<td>§ 58-12.24</td>
<td>334, 337, 341</td>
</tr>
<tr>
<td>§ 58-46</td>
<td>288</td>
</tr>
<tr>
<td>§ 58-62</td>
<td>22</td>
</tr>
<tr>
<td>§ 58-65</td>
<td>22</td>
</tr>
<tr>
<td>§ 58-255</td>
<td>311, 312</td>
</tr>
<tr>
<td>§ 58-773</td>
<td>315</td>
</tr>
<tr>
<td>§ 58-822</td>
<td>315</td>
</tr>
</tbody>
</table>
# Code of Virginia

**Code of 1950 (contd.)**

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 58-967</td>
<td>321</td>
</tr>
<tr>
<td>§ 58-1001</td>
<td>327</td>
</tr>
<tr>
<td>Tit. 58.1</td>
<td>287, 292, 299, 319, 321, 325, 337</td>
</tr>
<tr>
<td>§ 58.1-1</td>
<td>292</td>
</tr>
<tr>
<td>§ 58.1-3</td>
<td>286, 287, 288, 307</td>
</tr>
<tr>
<td>§ 58.1-3(A)</td>
<td>286</td>
</tr>
<tr>
<td>§ 58.1-3(A)(2)</td>
<td>308</td>
</tr>
<tr>
<td>§ 58.1-3(B)</td>
<td>286, 287, 288</td>
</tr>
<tr>
<td>§ 58.1-4</td>
<td>287</td>
</tr>
<tr>
<td>§ 58.1-205</td>
<td>297</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 3, art. 20.1, §§ 58.1-510 to 58.1-513</td>
<td>291</td>
</tr>
<tr>
<td>§ 58.1-510</td>
<td>291</td>
</tr>
<tr>
<td>§ 58.1-512(A)</td>
<td>289, 290, 291</td>
</tr>
<tr>
<td>§ 58.1-512(A)-(B.1)</td>
<td>290</td>
</tr>
<tr>
<td>§ 58.1-512(B)</td>
<td>289</td>
</tr>
<tr>
<td>§ 58.1-512(B.1)</td>
<td>289, 290, 291, 292</td>
</tr>
<tr>
<td>§ 58.1-513</td>
<td>290</td>
</tr>
<tr>
<td>§ 58.1-513(C)</td>
<td>289, 290, 291, 292</td>
</tr>
<tr>
<td>§ 58.1-801(A)</td>
<td>19, 20, 21, 22</td>
</tr>
<tr>
<td>§ 58.1-803</td>
<td>328, 329</td>
</tr>
<tr>
<td>§ 58.1-803(A)</td>
<td>134</td>
</tr>
<tr>
<td>§ 58.1-805</td>
<td>21</td>
</tr>
<tr>
<td>§ 58.1-806</td>
<td>21</td>
</tr>
<tr>
<td>§ 58.1-809</td>
<td>22</td>
</tr>
<tr>
<td>§ 58.1-810</td>
<td>22</td>
</tr>
<tr>
<td>§ 58.1-810(2)</td>
<td>21</td>
</tr>
<tr>
<td>§ 58.1-811</td>
<td>22</td>
</tr>
<tr>
<td>§ 58.1-811(A)(3)</td>
<td>330</td>
</tr>
<tr>
<td>§ 58.1-811(B)</td>
<td>328</td>
</tr>
<tr>
<td>§ 58.1-812</td>
<td>21</td>
</tr>
<tr>
<td>§ 58.1-812(A)</td>
<td>21</td>
</tr>
<tr>
<td>§§ 58.1-1000 to 58.1-1030</td>
<td>140</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 31, art. 1, §§ 58.1-3100 to 58.1-3122.2</td>
<td>307</td>
</tr>
<tr>
<td>§ 58.1-3107</td>
<td>307</td>
</tr>
<tr>
<td>§ 58.1-3109</td>
<td>296</td>
</tr>
</tbody>
</table>
§ 58.1-3109(1) ........................................................................................................ 307
Tit. 58.1, ch. 31, art. 2, §§ 58.1-3123 to 58.1-3172.1 ..................................... 59, 61, 323, 327
§ 58.1-3127(A) ........................................................................................................ 307, 327
§ 58.1-3149 ............................................................................................................. 308
Tit. 58.1, ch. 32 ..................................................................................................... 315
Tit. 58.1, ch. 32, art. 4, §§ 58.1-3229 to 58.1-3244 ........................................ 316, 318, 319
§ 58.1-3229 ............................................................................................................. 320
§ 58.1-3230 ............................................................................................................. 316, 318, 319
§ 58.1-3231 ............................................................................................................. 316
§ 58.1-3233 ............................................................................................................. 316, 320
§ 58.1-3233(1) ........................................................................................................ 318
§ 58.1-3233(2)(iii) .................................................................................................. 317, 318
§ 58.1-3234 ............................................................................................................. 318, 319
§ 58.1-3234(3) ........................................................................................................ 319
§ 58.1-3236 ............................................................................................................. 320
§ 58.1-3236(D) ....................................................................................................... 320
§ 58.1-3238 ............................................................................................................. 320
§ 58.1-3241 ............................................................................................................. 319
§ 58.1-3241(A) ....................................................................................................... 319
§ 58.1-3243 ............................................................................................................. 319
§ 58.1-3260 ............................................................................................................. 67
§ 58.1-3261 ............................................................................................................. 67
§ 58.1-3271 ............................................................................................................. 67
§ 58.1-3290 ............................................................................................................. 313, 314, 315
§ 58.1-3314 ............................................................................................................. 21
§ 58.1-3360 ............................................................................................................. 313, 314, 315
§ 58.1-3373 ............................................................................................................. 313
§ 58.1-3378 ............................................................................................................. 314, 315
§ 58.1-3379 ............................................................................................................. 315
§ 58.1-3511 ............................................................................................................. 330
§ 58.1-3511(A) ...................................................................................................... 330, 331
§ 58.1-3515 ............................................................................................................. 331
§ 58.1-3516(A) ...................................................................................................... 331
Tit. 58.1, ch. 36 ..................................................................................................... 333
## Code of Virginia

### Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 58.1-3603</td>
<td></td>
<td>336</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 36, arts. 2-3, §§ 58.1-3606 to 58.1-3622</td>
<td></td>
<td>66, 336</td>
</tr>
<tr>
<td>§ 58.1-3606</td>
<td></td>
<td>66, 333, 334, 336, 337, 341</td>
</tr>
<tr>
<td>§ 58.1-3606(A)</td>
<td></td>
<td>339</td>
</tr>
<tr>
<td>§ 58.1-3606(A)(5)</td>
<td></td>
<td>331, 332, 334, 335, 336, 337, 338, 340, 341</td>
</tr>
<tr>
<td>§ 58.1-3607</td>
<td></td>
<td>66, 336, 341</td>
</tr>
<tr>
<td>§ 58.1-3608</td>
<td></td>
<td>336, 341</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 36, art. 3, §§ 58.1-3609 to 58.1-3622</td>
<td></td>
<td>341</td>
</tr>
<tr>
<td>§ 58.1-3609</td>
<td></td>
<td>66, 332, 333, 334, 336, 340, 341</td>
</tr>
<tr>
<td>§ 58.1-3609(A)</td>
<td></td>
<td>65, 333, 336, 339, 341</td>
</tr>
<tr>
<td>§ 58.1-3609(B)</td>
<td></td>
<td>66</td>
</tr>
<tr>
<td>§§ 58.1-3610 to 58.1-3621</td>
<td></td>
<td>336, 341</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 36, art. 4, §§ 58.1-3650 to 58.1-3650.904</td>
<td></td>
<td>336, 341</td>
</tr>
<tr>
<td>§ 58.1-3650(A)</td>
<td></td>
<td>336, 341</td>
</tr>
<tr>
<td>§§ 58.1-3650.1 to 58.1-3650.904</td>
<td></td>
<td>336, 341</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 37, §§ 58.1-3700 to 58.1-3735</td>
<td></td>
<td>292, 293, 294, 297, 306, 308, 309, 310, 311, 312, 328</td>
</tr>
<tr>
<td>§ 58.1-3700</td>
<td></td>
<td>293, 294, 295</td>
</tr>
<tr>
<td>§ 58.1-3700.1</td>
<td></td>
<td>294, 297, 298, 300, 307</td>
</tr>
<tr>
<td>§ 58.1-3701</td>
<td></td>
<td>295, 296, 297, 298, 301, 312</td>
</tr>
<tr>
<td>§ 58.1-3702</td>
<td></td>
<td>309</td>
</tr>
<tr>
<td>§ 58.1-3703(A)</td>
<td></td>
<td>292, 307</td>
</tr>
<tr>
<td>§ 58.1-3703(A)(3)(a)</td>
<td></td>
<td>299, 301</td>
</tr>
<tr>
<td>§ 58.1-3703(A)(3)(b)</td>
<td></td>
<td>301</td>
</tr>
<tr>
<td>§ 58.1-3703.1</td>
<td></td>
<td>307, 308</td>
</tr>
<tr>
<td>§ 58.1-3703.1(A)(2)</td>
<td></td>
<td>308</td>
</tr>
<tr>
<td>§ 58.1-3703.1(A)(3)(a)</td>
<td></td>
<td>299, 301</td>
</tr>
<tr>
<td>§ 58.1-3703.1(A)(3)(b)</td>
<td></td>
<td>299</td>
</tr>
<tr>
<td>§ 58.1-3703.1(A)(5)</td>
<td></td>
<td>274, 277, 312</td>
</tr>
<tr>
<td>§ 58.1-3706(A)</td>
<td></td>
<td>294, 295</td>
</tr>
<tr>
<td>§ 58.1-3706(A)(1)</td>
<td></td>
<td>294, 295, 297</td>
</tr>
<tr>
<td>§ 58.1-3706(A)(4)</td>
<td></td>
<td>296</td>
</tr>
<tr>
<td>§ 58.1-3714(B)</td>
<td></td>
<td>296</td>
</tr>
</tbody>
</table>
# Code of Virginia

## Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 58.1-3714(D)</td>
<td>295, 296</td>
</tr>
<tr>
<td>§ 58.1-3717</td>
<td>302, 305</td>
</tr>
<tr>
<td>§ 58.1-3732(B)(2)</td>
<td>297, 298, 300, 301</td>
</tr>
<tr>
<td>§ 58.1-3818.4</td>
<td>309, 310, 311, 312</td>
</tr>
<tr>
<td>§ 58.1-3818.5</td>
<td>309, 310, 311, 312</td>
</tr>
<tr>
<td>§ 58.1-3903</td>
<td>312</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 39, art. 2, §§ 58.1-3910 to 58.1-3939</td>
<td>59, 61, 323, 327</td>
</tr>
<tr>
<td>§ 58.1-3910</td>
<td>327</td>
</tr>
<tr>
<td>§ 58.1-3919</td>
<td>308, 323</td>
</tr>
<tr>
<td>§ 58.1-3920</td>
<td>307, 308</td>
</tr>
<tr>
<td>Tit. 58.1, ch. 39, art. 3, §§ 58.1-3940 to 58.1-3964</td>
<td>323</td>
</tr>
<tr>
<td>§ 58.1-3940(A)</td>
<td>320, 321</td>
</tr>
<tr>
<td>§ 58.1-3941</td>
<td>323, 327, 328</td>
</tr>
<tr>
<td>§ 58.1-3942(B)</td>
<td>322, 326</td>
</tr>
<tr>
<td>§ 58.1-3942(C)</td>
<td>322, 325, 326</td>
</tr>
<tr>
<td>§ 58.1-3942(D)</td>
<td>327</td>
</tr>
<tr>
<td>§ 58.1-3980</td>
<td>312</td>
</tr>
<tr>
<td>§ 58.1-3981</td>
<td>66, 67, 274, 277</td>
</tr>
<tr>
<td>§ 58.1-3983.1(D)</td>
<td>274, 277</td>
</tr>
<tr>
<td>§ 58.1-3984</td>
<td>312, 319</td>
</tr>
<tr>
<td>§ 58.1-3984(A)</td>
<td>67, 277</td>
</tr>
<tr>
<td>§ 59.1-9.10(K)</td>
<td>131</td>
</tr>
<tr>
<td>Tit. 59.1, ch. 5, §§ 59.1-69 to 59.1-76</td>
<td>287</td>
</tr>
<tr>
<td>§ 59.1-69(A)</td>
<td>286, 287, 288</td>
</tr>
<tr>
<td>§ 59.1-207.10</td>
<td>81</td>
</tr>
<tr>
<td>§§ 59.1-415 to 59.1-523</td>
<td>147</td>
</tr>
<tr>
<td>§ 59.1-478</td>
<td>342, 343</td>
</tr>
<tr>
<td>§ 59.1-501.2</td>
<td>336</td>
</tr>
<tr>
<td>§ 62.1-44.19:3(C)</td>
<td>69</td>
</tr>
<tr>
<td>Tit. 62.1, ch. 21, §§ 62.1-197 to 62.1-223</td>
<td>284</td>
</tr>
<tr>
<td>§ 62.1-198</td>
<td>284</td>
</tr>
<tr>
<td>§ 62.1-200</td>
<td>284, 285</td>
</tr>
<tr>
<td>§ 62.1-201(A)</td>
<td>284</td>
</tr>
<tr>
<td>§ 62.1-201(A)</td>
<td>284, 285</td>
</tr>
</tbody>
</table>
### Code of Virginia

#### Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 62.1-201(B)</td>
<td>284</td>
</tr>
<tr>
<td>§ 62.1-202</td>
<td>281, 284</td>
</tr>
<tr>
<td>§ 62.1-203</td>
<td>282</td>
</tr>
<tr>
<td>§ 62.1-203(8)</td>
<td>284, 285</td>
</tr>
<tr>
<td>§ 62.1-204</td>
<td>284</td>
</tr>
<tr>
<td>§ 62.1-206</td>
<td>284</td>
</tr>
<tr>
<td>§ 62.1-207</td>
<td>284</td>
</tr>
<tr>
<td>§ 63.1-209</td>
<td>347, 348</td>
</tr>
<tr>
<td>§ 63.1-209(A)</td>
<td>347, 348</td>
</tr>
<tr>
<td>§ 63.1-248.3</td>
<td>344</td>
</tr>
<tr>
<td>§ 63.1-248.3(A)</td>
<td>344, 345</td>
</tr>
<tr>
<td>§ 63.1-248.3(A)(12)</td>
<td>344, 345</td>
</tr>
<tr>
<td>§ 63.1-248.5</td>
<td>345</td>
</tr>
<tr>
<td>§ 63.1-315</td>
<td>348</td>
</tr>
<tr>
<td>§ 63.1-318</td>
<td>348</td>
</tr>
<tr>
<td>§ 63.2-1230</td>
<td>119</td>
</tr>
</tbody>
</table>

### Constitution of Virginia

#### Constitution of 1902

<table>
<thead>
<tr>
<th>Article</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. I, § 14</td>
<td></td>
<td>85, 107, 109, 318</td>
</tr>
<tr>
<td>Art. IX, § 133</td>
<td></td>
<td>54</td>
</tr>
</tbody>
</table>

#### Constitution of 1971

<table>
<thead>
<tr>
<th>Article</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. I</td>
<td></td>
<td>182</td>
</tr>
<tr>
<td>Art. I, § 3</td>
<td></td>
<td>54, 158, 182</td>
</tr>
<tr>
<td>Art. I, § 5</td>
<td></td>
<td>48</td>
</tr>
<tr>
<td>Art. I, § 7</td>
<td></td>
<td>208</td>
</tr>
<tr>
<td>Art. I, § 11</td>
<td></td>
<td>42, 184, 206</td>
</tr>
<tr>
<td>Art. I, § 14</td>
<td></td>
<td>84, 85, 106, 107, 108, 109, 316, 318</td>
</tr>
<tr>
<td>Art. II, § 5</td>
<td></td>
<td>55, 180</td>
</tr>
<tr>
<td>Art. II, § 6</td>
<td></td>
<td>277</td>
</tr>
<tr>
<td>Art. III, § 1</td>
<td></td>
<td>48</td>
</tr>
<tr>
<td>Art. IV, § 1</td>
<td></td>
<td>48</td>
</tr>
</tbody>
</table>
## Constitution of Virginia

### Constitution of 1971 (contd.)

<table>
<thead>
<tr>
<th>Article Section</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. IV, § 4</td>
<td>55, 56, 181</td>
</tr>
<tr>
<td>Art. IV, § 11</td>
<td>49</td>
</tr>
<tr>
<td>Art. IV, § 13</td>
<td>183, 277</td>
</tr>
<tr>
<td>Art. IV, § 14</td>
<td>42, 57, 58</td>
</tr>
<tr>
<td>Art. IV, § 16</td>
<td>57, 58, 72</td>
</tr>
<tr>
<td>Art. V, § 7</td>
<td>208</td>
</tr>
<tr>
<td>Art. V, § 15</td>
<td>28, 240, 267</td>
</tr>
<tr>
<td>Art. VI, § 1</td>
<td>48, 163</td>
</tr>
<tr>
<td>Art. VII, § 4</td>
<td>7, 50, 56, 61, 62, 153, 155, 195, 197, 251, 265, 273, 327</td>
</tr>
<tr>
<td>Art. VII, § 5</td>
<td>56</td>
</tr>
<tr>
<td>Art. VII, § 6</td>
<td>56, 181</td>
</tr>
<tr>
<td>Art. VII, § 7</td>
<td>49</td>
</tr>
<tr>
<td>Art. VII, § 10(b)</td>
<td>98, 102</td>
</tr>
<tr>
<td>Art. VIII</td>
<td>52, 53</td>
</tr>
<tr>
<td>Art. VIII, § 1</td>
<td>51</td>
</tr>
<tr>
<td>Art. VIII, § 2</td>
<td>54</td>
</tr>
<tr>
<td>Art. VIII, § 4</td>
<td>51, 52, 53, 54</td>
</tr>
<tr>
<td>Art. VIII, § 5</td>
<td>51</td>
</tr>
<tr>
<td>Art. VIII, § 5(a)</td>
<td>53</td>
</tr>
<tr>
<td>Art. VIII, § 5(b)</td>
<td>53</td>
</tr>
<tr>
<td>Art. VIII, § 5(c)</td>
<td>53</td>
</tr>
<tr>
<td>Art. VIII, § 5(d)</td>
<td>53</td>
</tr>
<tr>
<td>Art. VIII, § 5(e)</td>
<td>54</td>
</tr>
<tr>
<td>Art. VIII, § 7</td>
<td>52, 54</td>
</tr>
<tr>
<td>Art. X, § 6</td>
<td>332, 339</td>
</tr>
<tr>
<td>Art. X, § 6(a)(6)</td>
<td>65, 332, 336, 339, 341</td>
</tr>
<tr>
<td>Art. X, § 6(f)</td>
<td>332, 337, 339, 340</td>
</tr>
<tr>
<td>Art. X, § 7</td>
<td>172</td>
</tr>
</tbody>
</table>

### Virginia Rules Annotated

**Rules of Supreme Court of Virginia**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pt. 6, § II, R. 1.15(c)(3)</td>
<td>34</td>
</tr>
<tr>
<td>Pt. 6, § II, R. 1.15(c)(4)</td>
<td>34</td>
</tr>
<tr>
<td>Pt. 6, § III, Canon 3(C)(2)</td>
<td>280</td>
</tr>
</tbody>
</table>
# Virginia Rules Annotated

<table>
<thead>
<tr>
<th>Rules of Supreme Court of Virginia (contd.)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pt. 6, § III, Canon 6(C)</td>
<td>198</td>
</tr>
<tr>
<td>R. 3A:12(b)</td>
<td>166</td>
</tr>
</tbody>
</table>