OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
2003

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
AT RICHMOND
THE 2003
REPORT OF THE ATTORNEY GENERAL
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Letter of Transmittal

May 1, 2004

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 2003. During the period covered by this report, the Office of the Attorney General issued fifty-eight opinions. This Office, through its dedicated public servants, has represented the Commonwealth in thousands of legal disputes in state and federal courts, including habeas corpus actions, criminal appeals, and civil suits involving many facets of state government.

The issues addressed in the opinions contained in this report represent a wide variety of legal issues facing the Commonwealth and its local governments, including application of the Dillon Rule to local government powers and interpretation of the Commonwealth’s gun-free school law. Many constitutional officers and local government attorneys 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 enacted 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.

2003 Legislative Accomplishments

During the 2003 Session of the General Assembly, the Office worked with House and Senate members to enact legislation to make Virginia a better place to call home. In particular, I am pleased to report that the General Assembly overwhelmingly adopted the legislative package I proposed during the second year of my term. This legislative package included measures to protect our children, address the growing crime of identity theft, fight bulk e-mail (known as spam), prevent potential terrorist threats, and implement Virginia’s sexually violent predators’ law.

Protecting Children

The Child Protection Act of 2003 addresses issues related to protecting the well-being of our Commonwealth’s children. Patroned by Senator Kenneth W. Stolle and Delegate Ryan Todd McDougle, the General Assembly enacted antichild pornography legislation, which increases the penalty of possessing child pornography from a misdemeanor to a felony, thereby increasing the maximum sentence from twelve months to five years. The legislation also creates a child pornography registry so that
law-enforcement authorities can discern actual child pornography from that which is digitally created.

Additional legislation, sponsored by Senator Stephen D. Newman and Delegates Clifford L. Athey, Jr., Allen W. Dudley, and Clarke N. Hogan, requires the Virginia State Police to develop policies to create a statewide AMBER Alert program. AMBER Alert combines the efforts of the law-enforcement community and broadcast media to disseminate quickly information about missing children who are in immediate physical danger. Local law-enforcement officials will determine if a child has been abducted and is in danger, and the State Police will issue a bulletin to Virginia’s existing emergency alert system.

Another aspect of this legislation creates a Code Adam program in all government buildings that are open to the public. Under the Code Adam program, public buildings will be locked down and searched when a child is declared missing on the premises. Further, the legislation encourages private companies to provide child identification kits for distribution to parents. The Department of Education will inform local school systems about the availability of such kits, which parents may use to collect information identifying their children, including DNA samples, fingerprints, photographs, and medical information. Parents of missing children will retain the information which may be used to help locate such children.

Another component of the Child Protection Act strengthens Virginia’s drug-free school zone laws. Under the legislation, sponsored by Senator D. Nick Rerras and Delegate Winsome Sears, prosecutors no longer need to prove that drug dealers intend to sell illegal drugs on school property, so long as they are guilty of possession with intent to sell.

The Child Protection Act also addresses the tragic situation of abandoned babies. The legislation provides an affirmative defense to a parent if he or she leaves a child at a hospital with twenty-four-hour emergency services or at an attended rescue squad that employs emergency medical technicians, within the first fourteen days of the child’s life. This legislation was sponsored by Senators Kenneth W. Stolle and Marty E. Williams and Delegate H. Morgan Griffith.

Finally, the Child Protection Act, sponsored by Senator Stephen D. Newman and Delegate Glenn Oder, includes provisions making it easier for parents to collect child support payments by allowing access to personal injury awards of their delinquent spouses and directing the publication and roundup of deadbeat parents by the Department of Child Support Enforcement.

**Combating Identity Theft**

Shortly after the 2002 General Assembly Session, I announced a Task Force on Identity Theft, bringing together technology and business leaders with law-enforcement agencies, legislators, and identity theft victims. Identity theft affects approximately one in five Americans and is estimated to cost financial institutions, utilities, and merchants over $5 billion. After meeting in various communities across the Commonwealth, the Task Force released a final report containing twenty-seven recommendations for consideration as part of my 2003 legislative package.
This Office worked tirelessly with Senator William C. Mims and Delegate Rob B. Bell, III, to enact comprehensive identity theft protection laws. These laws include a majority of the Task Force’s recommendations, such as implementation of the Identity Theft Passport program within the Office of Attorney General. Under the program, victims who have become aware that their identities have been stolen will be able to submit expungement orders or police reports they have obtained to the Office of the Attorney General for the issuance of an Identity Theft Passport. The Identity Theft Passport will serve as a shield to protect victims from arrest for crimes committed by someone else under a stolen identity. Creditors also may recognize these Passports.

The newly enacted identity theft protection laws strengthen existing laws by prohibiting the impersonation of a law-enforcement officer or any other official of the Commonwealth in order to carry out identity theft and the theft of a person’s identity, whether the person is dead or alive. Additionally, the laws require credit bureaus to block any information resulting from the crime of identity theft from appearing on a credit report when a victim of identity theft has filed a police report with the credit agency. Furthermore, the laws prohibit the use of social security numbers on certain government-issued documents, such as state employee IDs or student IDs, and removes social security numbers from the outside of state mailings, such as tax forms. Finally, the identity theft protection laws require the Library Board to develop regulations for destroying public documents that contain social security numbers and allows circuit court clerks to refuse to accept documents for public recordation that include unnecessary social security numbers.

**Combating Terrorism**

During my first year in office, I proposed a comprehensive terrorism package to address the emerging threat of terrorism to Virginia and our nation. The General Assembly overwhelmingly passed the antiterrorism package developed by this Office. Building on that success, I proposed legislation, sponsored by Senator Jay O’Brien and Delegate David B. Albo, to address loopholes in our legal presence statute. Noting that seven of the nineteen September 11 highjackers held fraudulently obtained Virginia drivers’ licenses, the legislation closes a loophole in the law that allowed these men to receive this identification. The legislation prohibits illegal immigrants from obtaining drivers’ licenses or official Virginia identification cards. It also ties the expiration dates of drivers’ licenses held by legal immigrants to the expiration dates of the immigration documents they possess.

**Stopping Spam**

Understanding consumers’ frustration with unsolicited bulk electronic mail, my Office worked with Senators Kenneth W. Stolle and Jeannemarie A. Devolites to shepherd legislation establishing Virginia’s antispam law. The antispam law represents the nation’s strongest law limiting unsolicited e-mail. The legislation, among other provisions, makes certain obscenity violations—as already defined by law—separate criminal offenses, if they are performed using a computer, punishable as a Class 1 misdemeanor or as a Class 6 felony for a second offense. The law also makes it a Class 1 misdemeanor to use a computer or network to falsify or forge transmission or routing
information when sending unsolicited bulk e-mail. The legislation also prohibits selling, distributing, or possessing, with intent to sell, the software that makes it possible to conceal the routing information.

Confining Sexually Violent Predators

In September 2002, this Office issued a report concerning Virginia's civil commitment procedures for sexually violent predators. The report details sixteen recommendations to enhance the effectiveness of the civil commitment law for sexually violent predators. In the fall of 2002, Delegate H. 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 House Majority Leader and pledged my commitment to ensure that the sexually violent predator program would be funded in the 2003 General Assembly Session.

Working tirelessly with Delegate Griffith and Senator Kenneth W. Stolle, we were able to ensure that the civil commitment component to Virginia's sexually violent predators' law was funded and operational. With the General Assembly's inclusion of $500,000 in funding for the program, sexual predators nearing the end of their criminal sentences will be evaluated, and if they are deemed to be a continuing threat to the community, they will be civilly committed to institutions.

In addition to these accomplishments in the 2003 Session of the General Assembly, I announced several initiatives that I would seek in the upcoming 2004 Session. I announced the formation of two task forces. The first task force focused on access to higher education in Virginia, and the second task force dealt with the growing problem of gang violence in Virginia. Both task forces consisted of General Assembly members and leaders within each of the various areas related to each task force. Each task force issued a report late in the year for consideration as part of this Office's 2004 legislative package.

Additionally, in the fall of 2003, after the devastating impact of Hurricane Isabel, I announced that I would seek legislation creating the Virginia Post-Disaster Anti-Price Gouging Act, which will prohibit merchants from selling, leasing, or licensing necessary goods and services at unconscionable prices during declared states of emergency.

DOMESTIC VIOLENCE

Since taking office, reducing domestic violence has been, and continues to be, a priority of my administration. Over the course of 2003, this Office:

- Launched the Verizon Wireless Hopeline™ Virginia Partnership in January 2003. This initiative collects used cell phones for recycling. New cell phones are provided to victims of domestic violence to enable them to report domestic violence in emergency situations. The program also provides small grants to domestic violence shelters. The Office has collected approximately 400 cell phones as part of this initiative, while thousands have been collected statewide.

- Launched "Cut Out Domestic Violence" program in August 2003. This initiative is designed to raise awareness about domestic violence and to provide
information to hair and nail professionals about helping a client they suspect is a victim of abuse. Mary Kay, Inc., supported the program with a $2,000 contribution to Virginians Against Domestic Violence, which partnered with the Attorney General's Office on this initiative. Thirteen seminars on domestic violence have been held to date.

- Held conference on family abuse for clergy in September 2003. The conference was designed to acquaint members of the clergy with issues concerning domestic violence and child and elder abuse. The Grants to Encourage Arrest and Enforcement of Protection Orders funded the conference.
- Received the Rural Domestic Violence and Child Victimization Grant in November 2003. The grant provides $450,000 to help support multidisciplinary responses to domestic violence in rural areas.
- Provided law-enforcement officers, probation officers, sheriffs, and others in the field of domestic violence with brochures to aid them in informing individuals subject to protective orders of their rights and responsibilities.
- Provided law-enforcement officers with guides to assist them in handling domestic violence cases involving Spanish-speaking individuals.

CIVIL DIVISION

Antitrust and Consumer Litigation Section

In January 2003, Virginia and forty-nine other states entered into an $80 million nationwide settlement with Andrx Corporation, Aventis Pharmaceuticals, Inc., and affiliated entities. The settlement resolved antitrust claims that Andrx had agreed to keep a less expensive generic version of the drug Cardizem® CD off the market in exchange for payments from Aventis. The delays in bringing the generic drug to market allegedly resulted in higher prices for consumers and governmental agencies. Under the settlement, Andrx and Aventis agree to pay $80 million into a fund as compensation for overpayment by consumers, state agencies, and insurance companies of Cardizem® CD.

In early 2003, Virginia, forty-nine other states, and all six U.S. territories announced settlement of a federal antitrust lawsuit against Bristol-Myers Squibb, the manufacturer of Taxol®, a chemotherapy drug used primarily to treat breast and ovarian cancers. The states will receive a total of $55 million, including a $20 million consumer fund set up to compensate uninsured and underinsured patients who were overcharged for Taxol® treatments as a result of Bristol-Myers’ allegedly anticompetitive activity in keeping generic versions of Taxol® off the market. Restitution will be made to affected consumers in 2004, and a portion of the settlement will be reimbursed to state agencies that overpaid for Taxol®, such as State Medicaid agencies, self-insured employee health benefit plans, and state cancer centers.

Charitable Solicitation/Trust

During 2003, the Office's nonprofit review panel, which includes representatives from the Antitrust and Finance and Health Sections, completed review of three transactions: (1) sale of assets of The Hospital Authority of the City of Petersburg, d/b/a
Southside Regional Medical Center, to Petersburg Virginia Hospital Corporation, a wholly-owned subsidiary of CHS/Community Health Systems, Inc.; (2) sale of assets of R.J. Reynolds—Patrick County Memorial Hospital, Inc., to Patrick Hospital Investors, LLC; and (3) sale of Mary Washington Senior Living Community, d/b/a Mary Washington Health Center, to MWHC, LLC.

**Consumer Protection**


In January 2003, Virginia entered into a settlement with Paramount Builders, Inc., Paramount Builders—Chesapeake, Inc., Paramount Builders—Peninsula, Inc., and Paramount Builders—Richmond, Inc., to resolve allegations that these companies had violated the Virginia Consumer Protection Act and Virginia Home Solicitation Sales Act in sales of home repair services, such as replacing windows and siding. The settlement reinforced the right of homeowners to cancel home repair contracts within three days of signing. Under the settlement, the companies agreed to pay the Attorney General's Office and the Virginia Beach Commonwealth's Attorney's Office $85,000 as reimbursement of their attorneys' fees and investigative costs.

In September 2003, Virginia and forty-two other states entered into an agreement with Wal-Mart Stores, Inc., concerning its tobacco retailing practices. Pursuant to the agreement, Wal-Mart has voluntarily implemented new policies to reduce the sale of tobacco to minors. For example, Wal-Mart agreed to train its employees on state and local laws and company practices regarding tobacco sales to minors; check the IDs of purchasers of tobacco products who appear to be under the age of twenty-seven; use cash registers programmed to prompt ID checks on all tobacco sales; hire an independent entity to conduct random compliance checks of stores; and prohibit self-service displays of, the use of vending machines to sell, and the distribution of free samples of, tobacco products.

In the case of *Commonwealth ex rel. Kilgore v. H&R Block Services, Inc.*, Virginia and forty other states announced a settlement with H&R Block, under which the tax preparation company agreed to establish a $1 million fund to reimburse clients who believe they were misled into purchasing the company's "Peace of Mind Guarantee" during the 2001 tax preparation season. Under the settlement, the company will seek an affirmative agreement from the consumer before charging for the guarantee. Further, the company will give consumers seven days within which to cancel, and a written copy of the terms and conditions of, the guarantee. Finally, the company agreed to pay the settling states $2.3 million as reimbursement of their costs and fees.
for investigating and bringing the action. Virginia received its share of this amount in May 2003.

In February 2003, Virginia entered into an assurance of voluntary compliance with Commonwealth Benefit Plan, Inc., a Virginia Beach telemarketing company that sells medical benefit plans and discount-buying club memberships. We alleged that the company's business practices violated the Virginia Consumer Protection Act, the Virginia Home Solicitation Sales Act, and the federal telemarketing sales rule. Specifically, we alleged that the company was billing consumers a one-time charge of $95.40 for medical benefits plans and discount-buying membership services without fully advising consumers that this charge would be made. Under the terms of the assurance, the company agreed to injunctive provisions and to pay the Commonwealth $125,000, including a civil penalty of $75,000 and reimbursement of attorney's fees and costs in the amount of $50,000. Commonwealth Benefit Plan also agreed to resolve any consumer complaints, including refund requests, and to change its ongoing telemarketing scripts to advise consumers more clearly that, if they do not call to cancel within any "free trial period" offered, their credit card or bank account number automatically will be billed. The company has refunded several million dollars to consumers.

In November 2001, Virginia, along with the Federal Trade Commission, announced the settlement of a case against Med Resorts International. The case alleged that Med Resorts and affiliated companies and their owners had violated the Virginia Consumer Protection Act and similar federal laws, by misrepresenting the total cost of resort memberships, and stating that consumers who had purchased long-term vacation travel memberships could travel any time they wanted and obtain discount airfares. The settlement provides for injunctive relief, restitution to consumers, and an additional $22 million in canceled contractual payment obligations. Refund checks totaling approximately $4.2 million were mailed to more than 46,000 consumers in September 2003. Approximately 6,745 Virginians received $660,067.68 of that amount.

Insurance and Utilities Regulatory Section

The Insurance and Utilities Regulatory Section continued to participate 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 on 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.

In the utility area, the Office remained active in many aspects of the Virginia Electric Utility Restructuring Act, including participating in the various State Corporation Commission proceedings implementing the Act and appearing before the General Assembly's Commission on Electric Utility Restructuring. The Office intervened in the major rate cases at the State Corporation Commission involving electric and natural gas utilities and in important telecommunications proceedings.

The Office was instrumental in negotiating a settlement that significantly reduces a proposed $441.7 million "fuel factor" rate increase for Dominion Virginia Power. The
testimony of our Office’s expert witnesses largely impacted the settlement, which reduces the total fuel expense increase by approximately $56 million and amortizes a majority of the increase over three and one-half years. This results in lowering rate increases to residential electric consumers from 8.7% to 3.4%, and to industrial consumers from 17.7% to 6.9%.

The Office intervened in a Federal Energy Regulatory Commission proceeding, The New PJM Companies, to defend the laws of the Commonwealth after the Commission made a preliminary finding to exempt American Electric Power Company and its Virginia subsidiary, Appalachian Power Company, from complying with § 56-579 of the Virginia Electric Utility Restructuring Act. Attorneys general and public utility commissions from sixteen states, the District of Columbia, and other parties, intervened in some capacity in this proceeding, as the outcome has significant national ramifications on state regulatory authority over the transfer by electric utilities of the operation and control of transmission assets to regional transmission organizations. This proceeding is pending before the Federal Energy Regulatory Commission.

The Office participated in several natural gas cases at the State Corporation Commission involving local distribution companies across the Commonwealth. Columbia Gas of Virginia, Washington Gas Light Company, Roanoke Gas Company, and Southwestern Virginia Gas Company sought rate increases and/or tariff changes. In each rate case, the Commission approved an increase that was lower than that initially sought by the company. In the Columbia Gas of Virginia case, the Office worked to ensure that a company-proposed gas costs-sharing plan would not be implemented without safeguards to protect consumers. The Office secured certain customer protections to accompany “weather normalization” rate adjustments sought by the companies.

The Office remains active in several State Corporation Commission-established committee work groups examining market-opening measures and performance standards relative to competition in the local exchange telecommunications market. The most significant result arising from these undertakings is the inclusion of the Verizon service area formerly served by GTE South, Inc., under the Carrier Performance Standards and Performance Assurance Plan already in operation for Verizon Virginia, Inc. Both service areas will be covered by the same monthly reports on the Carrier Performance Standards and subject to bill credits for competitive local carriers under the Performance Assurance Plan for service failures anywhere by Verizon. In addition, the Office participated in an ongoing Commission rulemaking proceeding considering revisions to retail service quality standards governing the provisioning of local telephone service. The Office supports the notion that the Commission must maintain minimum standards with regard to operation of the network and quality of service.

The Insurance and Utilities Regulatory Section coordinated with the Antitrust and Consumer Litigation Section and the State Solicitor to file an amicus brief with the Supreme Court of the United States in support of Verizon’s appeal of a Second Circuit decision. The case, Verizon Communications, Inc. v. Law Office of Curtis Trinko LLP, dealt with the intersection of antitrust principles and telecommunications law as established under the Federal Telecommunications Act of 1996. Though some states
sided with Trinko, seven states—Alabama, Delaware, Indiana, Nebraska, New Hampshire, Oklahoma, and Utah—joined us on the brief. The Court issued a unanimous decision reversing the Second Circuit.

In the insurance area, the Office participated in the National Council on Compensation Insurance annual workers' compensation rate case at the State Corporation Commission. We successfully obtained reductions to dramatic increases sought in workers' compensation rates for coal mining companies to cover expanded benefits mandated by federal regulations covering black lung disease. The Commission approved increases that were much lower than they would have been except for our involvement. Our efforts also resulted in lower rates for all other classes in the voluntary market and a change in rate design that will lessen the volatility of rates in smaller classes, thereby ensuring that this important program is affordable to businesses and available to workers.

Real Estate, Land Use and Construction Section

The Real Estate, Land Use and Construction Section continued to handle a high volume of transactional matters, construction claims and litigation, and unusual complex projects for various state agencies, opening 221 new matters during the year. Following a record number of Department of Transportation claims filed in 2002, the Section resolved a higher than average number of claims in 2003. A total of twenty-six claims for $21,939,691.95 were resolved during 2003 for $5,808,948.65, resulting in a savings to the Commonwealth of $16,130,743.30. This is an average recovery of only 26.48% of the claimed amount. The Section also received twenty-six new Department of Transportation claims during 2003 with a total stated value of $14,508,024.90.

Trial Section

The Trial Section represented the interests of the Commonwealth in 1,024 lawsuits in 2003 involving breach of contract, personal injury, denial of due process, defamation, and challenges to state statutes. The Section successfully defended Hall v. Commonwealth, a case in which plaintiffs brought a vote dilution challenge to the General Assembly's 2001 congressional redistricting plan under § 2 of the Voting Rights Act. Plaintiffs have appealed the United States District Court's dismissal of plaintiffs' claim, finding no evidence of vote dilution. The Section handled numerous cases for the Virginia State Bar involving attorney disciplinary appeals and the prosecution of persons engaged in the unauthorized practice of law.

DIVISION OF HEALTH, EDUCATION AND SOCIAL SERVICES

The attorneys in the Division of Health, Education and Social Services provide advice to Virginia’s public colleges and universities and to agencies charged with protecting the health of all Virginians and providing essential services for those least able to help themselves. The Division also protects the rights of Virginia taxpayers by ensuring the proper use of state and federal funds in health and social services programs; provides advice on a daily basis to members of the General Assembly on issues of health, education, social services, child support, and mental health; and represents the children of Virginia by vigorously enforcing child support payments.
The Department of Mental Health, Mental Retardation and Substance Abuse Services sought to establish the Virginia Center for Behavioral Rehabilitation in Dinwiddie County, to provide treatment for sexually violent predators committed to its care. Department attorneys provided advice on this project and successfully defended the Governor in the case of *Barefoot v. Warner* with regard to site selection for the program.

The Federal Health Insurance Portability and Accountability Act of 1996 required state agencies to implement privacy policies and procedures regarding health insurance information by April 13, 2003. This included providing training to state and local community services board employees throughout the Commonwealth. This Office drafted and reviewed various privacy policies and procedures and worked closely with the Virginia Bar Association and attorneys practicing health law throughout the Commonwealth on drafting legislative changes to conform Virginia law to the requirements of the Federal Act.

The Division worked closely with the Department of Mental Health, Mental Retardation and Substance Abuse Services and the Department of General Services to develop a combination lease/renovation agreement and services contract enabling a private corporation to lease and renovate a vacant building at Southwestern Virginia Mental Health Institute to deliver residential services for emotionally disturbed adolescents in Southwest Virginia. This lease/services contract may serve as a prototype throughout the state for utilizing vacant buildings in order to provide these much-needed services.

Three same-sex couples challenged the long-standing public policy of the Commonwealth rejecting the equivalency between heterosexual and same-sex relationships by seeking to have the Registrar of Vital Records give full faith and credit to out-of-state adoption decrees and issue new birth certificates listing the adoptive fathers as the children’s parents. The Circuit Court of the City of Richmond granted this Office’s motion for summary judgment and upheld the policy of the Commonwealth.

This Office successfully prosecuted many findings of child abuse and neglect, including one involving a Chesterfield County school teacher and a ten-year-old special needs student. *Mulvey v. Jones* represents the first time the Court of Appeals of Virginia has addressed significant portions of Virginia’s Child Abuse and Neglect statutes. The Supreme Court denied the teacher’s appeal. The Office also prevailed in a case before the Court of Appeals challenging the authority of the Department of Social Services to intervene in a parent’s use of corporal punishment of a child under the child-protective services program. The court affirmed that the parent crossed the line between discipline and physical abuse as a result of the child’s severe bruising. This Office also succeeded several times in preserving the right of the Commissioner of Social Services to intervene in any child abuse proceeding in the juvenile and domestic relations district courts.

The Office succeeded in terminating a mother’s parental rights to her three-year-old son, who was born with cocaine in his system and had been in foster care since birth. The mother admitted that she had smoked crack cocaine two weeks before the child’s birth. While the juvenile and domestic relations district court declined to terminate parental rights, the Fairfax Circuit Court found that this Office had proven
by clear and convincing evidence that it was unlikely the mother would correct the circumstance which led to her abusing her child.

This Office assisted the Department of Social Services in appealing the license revocation of an adult care facility in Smyth County and negotiated the facility’s relicensure following substantial changes in management personnel and practices, thereby preventing closure and relocation of the facility’s elderly or disabled residents. After years of litigation, the Office finally closed an adult facility whose license had not been renewed by the Department as a result of severe and numerous recurring violations of Virginia’s licensing statutes and regulations. After two years of administrative litigation, a final order denying the license to operate an assisted living facility was issued in December 2002. While appellate litigation concerning this case continues, all residents have been relocated safely into licensed facilities where they are receiving appropriate care.

This Office successfully defended several challenges in federal court against the Commissioner and employees of the Department of Social Services regarding the administration of their official duties, including the dismissal of a $2 million case in the Eastern District of Virginia. This Office provided extensive agency advice on a variety of programs administered by the Department, including the Food Stamp program, TANF, adoption, foster care, child-care subsidy, and other programs providing for the health and welfare of the citizens of this Commonwealth. The Office also successfully defended many cases appealed to circuit court regarding the Department’s decisions pursuant to these programs.

This Office successfully defended many eligibility determinations made by the Department of Medical Assistance Services in administering the Medicaid program and worked with the Department to provide medically necessary surgery to a young man with cerebral palsy.

This Office assisted in negotiating agreements with nursing home owners/operators, which prevented the facilities’ closure, maintained nursing home access in communities served by the facilities, and avoided issues related to patients’ “transfer trauma” in the event of a facility’s closure. The Office also handled provider appeals of reimbursement decisions by the Department of Medical Assistance Services.

In response to the 2003 Appropriation Act, the Department of Medical Assistance Services created a Pharmacy and Therapeutics Committee to assist in implementing a preferred drug list program. The Appropriation Act required this program to be in place no later than January 1, 2004, and also required the program to generate savings of $9 million in fiscal year 2004 and $18 million in subsequent fiscal years. This Office has rendered advice to the Department and the Committee on the program’s implementation, regulatory structure, and operational aspects.

One of the most important duties of this Division is to provide advice to the colleges and universities of Virginia. These colleges and universities are public institutions—arms of the state—tasked with fulfilling the commitment of the Commonwealth to provide education to the students of this Commonwealth. Attorneys in the Richmond office and at various college campus sites assist Virginia’s colleges and universities with their daily operations. These attorneys work intimately with the presidents,
staff, faculty, and boards of visitors to ensure the smooth operation of our institutions of higher education, the efficient use of taxpayer dollars, and the proper responsibility of colleges and universities to the Commonwealth.

An important project occurred at Norfolk State University regarding the construction of the first academic building in the University RISE Center Project. This Office’s advice on financing realized a $2 million savings on this project, which is critical to the future of Norfolk State students.

Finally, the Child Support Enforcement Section of this Division appeared in over 100,000 hearings (a 14% increase from the previous year), resulting in a lump sum recovery of $7.7 million (an increase of 27% from the previous year).

SEXUAL PREDATORS, TOBACCO, ALCOHOL AND GAMING DIVISION

Our attorneys serve as counsel to the various gaming agencies—the Lottery, the Department of Charitable Gaming, and the Racing Commission. The attorneys provide significant client advice and assistance on matters involving various contractual and personnel issues, promulgation of regulations, administrative litigation, and licensing. We have provided guidance pertaining to the transition of the charitable gaming agency from a commission to an executive branch agency, the creation by the Racing Commission of account wagering regulations, and the potential placement of a satellite wagering facility in Vinton, Virginia. The Division also provides counsel to the Virginia Tobacco Settlement Foundation, the Workers’ Compensation Commission, the Commonwealth Health Research Board, and the Virginia Birth-Related Neurological Injury Program.

**Tobacco Unit**

The Tobacco Unit administers and enforces the Master Settlement Agreement, the landmark settlement that the Commonwealth and other states entered into with leading tobacco product manufacturers in November 1998. Under the terms of the Agreement, the Commonwealth receives a portion of the yearly settlement payment paid by the participating manufacturers. In addition, the Tobacco Unit diligently enforces the tobacco escrow statutes, which apply to nonparticipating manufacturers. During 2003, the Tobacco Unit filed suit against twenty-six nonparticipating manufacturers alleging violations of the tobacco escrow statutes, and reached settlements with numerous other companies resulting in the collection of $944,714.90 in penalties from nonparticipating manufacturers for failure to comply in a timely manner with Virginia law. Pursuant to newly enacted legislation, the Tobacco Unit developed the Virginia Tobacco Directory, which lists tobacco product manufacturers, together with their brand families, that have been certified as compliant with Virginia law. Since the introduction of the Tobacco Directory in October 2003, the Tobacco Unit has certified fifty-three tobacco product manufacturers. Finally, the Tobacco Unit continues to monitor the administration of the National Tobacco Grower Settlement Trust (Phase II Agreement), and to provide legal advice and representation to the Virginia Tobacco Indemnification and Community Revitalization Commission.
Sexually Violent Predator Civil Commitment Unit

Legislation providing funding for civil commitment of sexually violent predators became effective April 1, 2003. The Unit has handled cases involving sexually violent predators in the counties of Accomack, Campbell, Culpeper, Dickenson, Hanover, Prince William, Roanoke, and York, and in the cities of Alexandria, Chesapeake, Martinsville, Norfolk, Portsmouth, Richmond, Roanoke, and Winchester. Unit attorneys are also the primary litigators for cases involving the Virginia Birth-Related Neurological Injury Fund and have handled cases in Harrisonburg, Richmond, Roanoke, and Virginia Beach.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

Criminal Litigation Section

The Criminal Litigation Section handled all postconviction litigation filed by state prisoners challenging their convictions. In 2003, the Section defended against 1,498 habeas corpus petitions filed in state and federal courts and twenty-seven DNA writs of actual innocence. In addition, the Section represented the Commonwealth in 584 state and federal court appeals.

The Division handled four noteworthy appellate cases in 2003. In Commonwealth v. Hudson, the Supreme Court of Virginia unanimously reversed the Court of Appeals of Virginia and reinstated Hudson's conviction for second-degree murder and use of a firearm. The Supreme Court extensively set forth the proper appellate standard of review for judging sufficiency of the evidence, particularly where the conviction is based on circumstantial evidence. In King v. Commonwealth, the Court of Appeals held that the Commonwealth has a coequal right to have twelve jurors hear a criminal case. In Johnson v. Commonwealth, the Court of Appeals held that a Virginia statute, which allows child victims of certain sex crimes to testify via closed circuit television, is not an unconstitutional violation of the Confrontation Clause. In McClellan v. Commonwealth, the Court of Appeals held that Virginia's food and drink laws apply to manufacturers of food to be sold to the public, regardless of where the food is made or the size of the facility.

The Section's Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. Two executions were carried out in 2003, and five new death penalty appeals were received. Of the many capital cases handled by the Unit, three were of particular significance. In Bramblett v. Warden, the Supreme Court of the United States refused to grant the death row inmate's petition for review of his federal habeas corpus case, and both the federal courts and Supreme Court of Virginia denied the inmate's last-minute successive rounds of litigation on the eve of his execution. In Swisher v. Warden, the United States Supreme Court refused to grant the death row inmate's petition for review of his federal habeas corpus case, and the Supreme Court of Virginia denied the inmate's third successive state habeas corpus case on the eve of his execution. In Reid v. Warden, all execution eve suits filed by the inmate in the Supreme Court of Virginia and in the federal courts were denied on the day of execution. The Supreme Court of the United States, however,
refused to overturn a stay of execution entered by the federal courts because of the similarity between the inmate’s claim that lethal injection is cruel and unusual punishment and the claim in an Alabama case currently pending in the Court.

**Special Prosecutions Section**

The Special Prosecutions Section prosecutes both criminal and administrative cases and comprises four distinct units—Environmental, Health Professions, Medicaid Fraud Control, and Organized Crime.

The Environmental Unit represents all agencies under the Natural Resources Secretariat and certain other related agencies. The Unit’s services to these agencies include general legal advice; litigation; regulation, contract, and other document review; legislation drafting and review; and personnel matters. A Unit environmental prosecutor assists local Commonwealth’s attorneys in criminal prosecutions under environmental laws.

In the landmark case of *Treacy v. Newdumm Associates, LLP*, the Environmental Unit successfully defended the new state wetlands laws against a federal court challenge. The Unit has also defended several state wetlands law challenges brought in state courts. In addition, the Unit worked with the Environmental Protection Agency to negotiate successfully a historic consent decree with Dominion Virginia Power requiring the utility to expend considerable sums to reduce air pollution. It has defended two state agencies that issued permitting decisions regarding the King William Reservoir. Moreover, the Unit represented the Department of Environmental Quality in a dispute with Page County over the county’s landfill. A resolution to the Page County landfill litigation is expected sometime in 2004. The Unit also 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 both the “New Source Review” regulations and “New Source Review II” regulations adopted by the 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—Boards of Medicine, Nursing, Pharmacy, and Dentistry. The creation of the Health Professions Unit provides for more focused and effective administrative prosecution of cases involving violations of health care-related licensing laws and regulations.

The Medicaid Fraud Control Unit investigated and prosecuted many major fraud cases throughout Virginia, which resulted in the successful conviction of thirteen health care providers for fraud and the court-ordered recovery of criminal and civil restitution, fines, and penalties totaling more than $15.9 million. Among the significant cases handled by the Unit are *United States v. Kukash* and *United States v. Worrell*. The *Kukash* case involved the owner of a medical transportation company that fraudulently billed the Virginia Medicaid program over $857,000 for medical transportation services that were not provided. Kukash was convicted in federal court of health care fraud and false statements, sentenced to seventy-one months in prison, and ordered to repay the Virginia Medicaid program. The *Worrell* case involved co-owners of a
medical equipment and supplies company that fraudulently billed the Virginia Medicaid program over $522,000 for medical equipment that was either unnecessary or not provided. As the result of pleading guilty to health care fraud, Worrell received a three-year prison sentence and the co-owner an eighteen-month prison sentence; both received three years’ probation and were ordered to reimburse the Medicaid program.

Consistent with the past two successful years, the United States Department of Health and Human Services, through its Office of Inspector General, awarded the Medicaid Fraud Control Unit for its effectiveness by approving the Unit's expansion to include regional offices. Expansion of the Unit was completed in December 2003.

The successful investigations of the Unit, in large part, are attributable to the outstanding working relationship established between this Office and other federal, state, and local agencies. The United States Attorney’s Offices in the Eastern and Western Districts of Virginia and this Office jointly prosecuted the majority of these investigations.

The Organized Crime Unit covers a wide range of criminal and enforcement matters. The Unit is responsible for initiating and/or conducting criminal prosecutions on behalf of the Attorney General. The Unit includes the Financial Crime Intelligence Center and a special prosecutor assigned to “Project Exile/Project Safe Neighborhoods” in the Office of the United States Attorney for the Eastern District of Virginia. In addition to overseeing the operations of the Financial Crime Intelligence Center, the Unit is responsible for providing legal advice on all criminal matters to the Department of State Police. It also provides legal advice on regulatory and administrative matters to the Department of Criminal Justice Services, including the Division of Forensic Science, and the Department of Military Affairs. Additionally, the Unit handles prosecutions before the Alcoholic Beverage Control Board on behalf of its Bureau of Law Enforcement Operations.

Further, the Organized Crime Unit provides representation before various federal and state courts throughout the Commonwealth for all divisions of the State Police and for the Department of Criminal Justice Services, including the Division of Forensic Science. Such representation has included defending the integrity and confidentiality of criminal investigation files, creating and adopting regulations related to criminal procedure and public safety issues, and revoking or denying certain licenses granted by the Department of Criminal Justice Services. Finally, several significant administrative prosecutions were initiated before the Alcoholic Beverage Control Board at the specific request of its Bureau of Law Enforcement Operations, which resulted in the suspension or surrender of ABC licenses for establishments operating illegally in the Commonwealth.

The newest addition to the Special Prosecutions Section is a three-year antigang initiative for the City of Richmond made possible by a federal grant. The Office of Juvenile Justice and Delinquency Prevention awarded the Office a $2.5 million grant to institute a Gang Reduction Program in a target area within the city. The city, several federal partners, and local private organizations are working with this Office to administer this pilot program. The Richmond location was one of four areas selected for this innovative new program aimed at reducing youth violence and providing individuals with healthy alternatives to crime.
Correctional Litigation Section

The Correctional Litigation Section provides advice to the Parole Board and to the Departments of Corrections, Juvenile Justice, and Correctional Education, and their citizen policymaking boards. Additionally, the Section represents the Secretary of Public Safety, the Governor on extradition matters, Commonwealth’s attorneys on detainer matters, and Correctional Enterprises. During 2003, the Section handled 317 § 1983 cases, 21 employee grievances, 270 habeas corpus cases, 305 mandamus petitions, 60 tort claims, and 15 warrants in debt.

TRANSPORTATION AND TECHNOLOGY DIVISION

Transportation Section

The Transportation Section represents the state agencies and boards under the Secretary of Transportation. The Department of Transportation occupies the majority of the Section’s time, as many legal issues arise daily. Section attorneys assist the Transportation Department and the Department of Rail and Public Transportation in negotiating comprehensive agreements under the Public/Private Transportation Act of 1995. In 2003, Section attorneys worked on the Dulles Corridor Rapid Transit project and the Interstate 81 proposals, and assisted the Department of Transportation in successfully negotiating and executing the comprehensive agreement for Route 58 improvements between Hillsville and Stuart. Of particular note, the United States Department of Justice awarded Certificates of Commendation to two Section attorneys for their outstanding performance and invaluable assistance in supporting the activities of the Environmental and Natural Resources Division in a Fourth Circuit appeal regarding the Route 29 Bypass in Charlottesville.

The other major client of the Section is the Department of Motor Vehicles. Two significant cases affected the Department in 2003. First, Section attorneys successfully defended the constitutionality of a motorcycle dealer franchise protection statute against a Commerce Clause challenge. Second, attorneys in the Section successfully validated the constitutionality of the statutes dealing with the dual role of the Commissioner as Commissioner of the Department of Motor Vehicles and as Chairman of the Motor Vehicle Dealer Board.

Computer Crimes Unit

In 1999, the General Assembly authorized and funded the creation of a Computer Crimes Unit within the Attorney General’s office with the long-term vision of spearheading Virginia’s computer-related criminal law enforcement in the 21st century. In accordance with § 2.2-511, the Attorney General’s office has concurrent and original jurisdiction to investigate and prosecute crimes that deal with the exploitation of children by means of computer. The Computer Crimes Unit traveled throughout the Commonwealth to investigate and prosecute computer crimes cases during 2003. Some of the jurisdictions in which the Unit has investigated and prosecuted cases involving computer fraud, theft of computer services, computer invasion of privacy, or computer-facilitated child exploitation include the counties of Botetourt, Buchanan, Halifax, Loudoun, Louisa, Prince George, and Tazewell, and the cities of Charlottesville, Newport News,
Richmond, and Virginia Beach. Since all Unit attorneys are cross-designated as Special Assistant United States Attorneys, we have prosecuted cases in federal courts as well.

In addition to investigating and prosecuting computer crimes throughout the Commonwealth, the members of the Computer Crimes Unit received specialized training in computer law enforcement and shared that expertise through training programs with local Commonwealth’s attorneys and law-enforcement officers. In December, the Office conducted the first of a series of Identity Theft Institutes in the state. Over fifty law-enforcement officers throughout the Commonwealth attended the training, which highlighted changes in the law regarding identity theft and focused on investigation and prosecution of identity theft cases. The Office also advised the trainees about Virginia’s Identity Theft Passport program administered by this Office in cooperation with the State Police. The program has been successful, and several states are considering similar measures. Unit members have testified before the Maryland legislature concerning the Identity Theft Passport program.

The Computer Crimes Unit is tasked with making legislative recommendations to me in the field of computer crimes and fraud. In 2003, the Unit worked closely with the Virginia Internet Service Providers Alliance in drafting comprehensive legislation to address the growing problem of unsolicited bulk e-mail (spam). My Office presented a comprehensive computer crimes omnibus bill to the legislature which included the new antispam law. This new law, a violation of which is punishable as a felony, proscribes the use of fraudulent means to send spam and has been touted as the toughest antispam statute in the nation. In July, Congress invited me to testify in reference to Virginia’s new law and ultimately modeled the criminal portion of the federal antispam law after Virginia’s law. In December 2003, a Loudoun County grand jury used Virginia’s antispam law to indict a spam kingpin regarded as the eighth worst spam distributor in the world. This is the first such indictment in the nation. The Computer Crimes Unit will prosecute the case in September 2004.

The Computer Crimes Unit also acts as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet, and regularly advises the public on ways to avoid becoming victims of computer crimes. One of the fastest growing areas of Internet exploitation involves the use of computers by sexual predators to contact children.

The Attorney General’s Safe Surfin’ program is a joint venture of the Attorney General’s Office, the Virginia State Police, and Operation Blue Ridge Thunder in Bedford. The program is designed to make children and parents aware of the dangers of surfing the Internet. The Safe Surfin’ program includes an interactive PowerPoint presentation entitled Safety Net, which is given to middle and high school students and parent groups. In 2003, the Computer Crimes Unit and I presented the Safety Net program to schools in Chesapeake, Tappahannock, and Suffolk, and to parent groups throughout the Commonwealth.

**COMMERCE AND FINANCE**

Commerce and Finance attorneys represented the Treasury Board and other issuing authorities during review and approval of approximately $178,155,000 of
general obligation bonds; $38,810,000 of Virginia Public Building Authority bonds; $140,250,000 of Virginia College Building Authority bonds; and $286,670,000 of Virginia Public School Authority Bonds. The attorneys also rendered advice to the Virginia Retirement System’s Corporate Governance Task Force concerning development of a corporate governance policy.

DIVISION OF DEBT COLLECTION

The Division of Debt Collection operates on a fiscal-year basis and collects debts owed the Commonwealth and its agencies. In fiscal year 2003, the Division collected total revenues of approximately $12,900,000, which represents a significant increase in collections from prior fiscal years.

NOTABLE CASES

The Supreme Court of the United States decided Virginia v. Maryland on December 9, 2003. The Court ruled that Virginia and its governmental subdivisions and citizens may withdraw water from the Potomac River and construct improvements appurtenant to the river’s Virginia shore, free of regulation by Maryland. The Court vindicated Virginia’s dignity and sovereign equality with its sister state over the use of a shared interstate river. The Court held that the Black-Jenkins Award gives Virginia sovereign authority, free from regulation by Maryland, to build improvements appurtenant to her shore and to withdraw water from the river, subject to the constraints of federal common law and the Award. The decision validated Virginia’s right to use the Potomac.

In Black v. Commonwealth, the Supreme Court of the United States upheld Virginia’s fifty-year-old law banning cross-burning with the intent to intimidate. The case was argued before the Supreme Court in December 2002. The Supreme Court of Virginia had declared the law unconstitutional. Although the law initially was crafted as a response to Ku Klux Klan activity, the statute bans cross-burning with the intent to intimidate anyone for any reason, with no regard to race, ethnicity, religion, or other characteristics. The statute differs from a Minnesota law struck down by the United States Supreme Court, in that it broadly covers all of society and contains the requirement of intentional intimidation. The Supreme Court remanded a portion of the case to the Supreme Court of Virginia to consider the portion of the statute that allows intent to intimidate to be inferred from the act of cross-burning alone. The Virginia law places the burden of proving intent on prosecutors.

In Virginia v. Hicks, the United States Supreme Court unanimously upheld a no-trespassing rule enacted by the Richmond Redevelopment and Housing Authority for the Whitcomb Court public housing project. The Office argued that the residents of public housing projects should enjoy the same protections from crime as residents of private apartment complexes. Like many neighborhoods across America, Whitcomb Court had been plagued by an open-air drug market and a crime epidemic. Individuals who were not residents were committing most of the crimes. In response to the problem, the City of Richmond deeded the streets of Whitcomb Court to the Richmond Redevelopment and Housing Authority in June 1997. The purpose was to allow the streets there to be treated as they would be treated in a private apartment project. The
Richmond Redevelopment and Housing Authority, acting as landlord, could then exclude those individuals who had no legitimate purpose for coming to the neighborhood. The United States Supreme Court also remanded the case to the Virginia Supreme Court to determine whether Hicks has preserved other reasons for challenging his conviction, and if so, whether those reasons justify setting aside his conviction.

In Treacy v. Newdunn, a unanimous three-judge panel of the Fourth Circuit Court of Appeals upheld the Commonwealth’s ability to adopt regulations that required those interested in altering nontidal wetlands to first obtain a Virginia Water Protection Permit from the State Water Control Board. The case arose out of the destruction of over thirty acres of nontidal wetlands in Newport News. Wetlands frequently are credited with filtering rainwater and pollution that may run off into rivers and other tributaries that eventually flow into the Chesapeake Bay. The destruction of the thirty acres of wetlands, which many residents blamed for the flooding of a housing development below them, was unlawful under the regulations adopted pursuant to the legislation passed by the 2002 Session of the General Assembly. The United States District Court for the Eastern District of Virginia had ruled that the Water Control Board had no jurisdiction to regulate wetlands not subject to the Clean Water Act. The Fourth Circuit reversal of that ruling means that Virginia retains the authority to adopt its own environmental regulations in areas not subject to the Clean Water Act.

The Office of the Attorney also successfully intervened in District of Columbia v. United States, in the United States District Court for the District of Columbia, to represent the interests of Virginia taxpayers. The District of Columbia sought to have the court declare that the District had the power to tax the income of residents of other states who work in Washington, D.C. This Office argued that the District had no power to impose a commuter tax on Virginia residents unless Congress explicitly gave the District such power. At the end of 2003, the case was still pending.

CONCLUSION

It has been my honor to serve the people of the Commonwealth as Attorney General during the past year. The accomplishments of the attorneys and staff in this Office are numerous. It is impossible to detail all our accomplishments in one document; however, this letter and report are intended to serve as a guide to meet our mandate as the Department of Law for the Commonwealth of Virginia. The names of all the dedicated professionals are listed on the following pages. The citizens of the Commonwealth are extremely well-served by the energetic efforts of these individuals.

While 2003 was marked with many accomplishments by the Office, much remains to be done. I look forward to the challenges of continuing to serve the people of the Commonwealth during 2004.

With kindest regards, I am

Very truly yours,

Jerry W. Kilgore
Attorney General
# Personnel of the Office

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<tr>
<td>Jerry W. Kilgore</td>
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<td>Joseph R. Carico</td>
<td>Chief Deputy Attorney General</td>
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1This list includes all persons employed and compensated, on a full-time basis, by the Office of the Attorney General during calendar year 2003, as provided by the Office's Division of Administration. The most recent title is used for each employee whose position changed during the year.
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<tr>
<td>S. Elizabeth Allen</td>
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<tr>
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ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 2003

Edmund Randolph .................................................. 1776-1786
James Innes ............................................................ 1786-1796
Robert Brooke ........................................................ 1796-1799
Philip Norborne Nicholas ................................. 1799-1819
John Robertson .................................................... 1819-1834
Sidney S. Baxter ................................................... 1834-1852
Willis P. Bocock ..................................................... 1852-1857
John Randolph Tucker .................................. 1857-1865
Thomas Russell Bowden .................................. 1865-1869
Charles Whittlesey (military appointee) ............ 1869-1870
James C. Taylor ................................................... 1870-1874
Raleigh T. Daniel ................................................ 1874-1882
James G. Field ..................................................... 1877-1882
Frank S. Blair ........................................................ 1882-1886
Rufus A. Ayers ....................................................... 1886-1890
R. Taylor Scott ...................................................... 1890-1897
R. Carter Scott ...................................................... 1897-1898
A.J. Montague ....................................................... 1898-1902
William A. Anderson ......................................... 1902-1910
Samuel W. Williams ........................................... 1910-1914
John Garland Pollard ......................................... 1914-1918
J.D. Hank Jr.1 .......................................................... 1918-1918
John R. Saunders ............................................... 1918-1934
Abram P. Staples2 ................................................ 1934-1947
Harvey B. Apperson3 ......................................... 1947-1948
J. Lindsay Almond Jr.4 ........................................ 1948-1957
Kenneth C. Patty5 .................................................. 1957-1958

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

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

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

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

5The 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.
A.S. Harrison Jr. ................................................................. 1958-1961
Frederick T. Gray\(^6\) ......................................................... 1961-1962
Robert Y. Button ............................................................. 1962-1970
Andrew P. Miller ............................................................. 1970-1977
Anthony F. Troy\(^7\) ........................................................... 1977-1978
Gerald L. Baliles ............................................................. 1982-1985
William G. Broaddus\(^8\) ................................................... 1985-1986
Mary Sue Terry .............................................................. 1986-1993
James S. Gilmore III ...................................................... 1994-1997
Richard Cullen\(^10\) .......................................................... 1997-1998
Mark L. Earley ............................................................... 1998-2001
Randolph A. Beales\(^11\) ..................................................... 2001-2002
Jerry W. Kilgore .............................................................. 2002-

\(^6\) 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*.
**C A S E S  D E C I D E D  I N  T H E  S U P R E M E  C O U R T  O F  V I R G I N I A**

*Ashe v. State Water Control Bd.* Judgment of York County Circuit Court granting summary judgment to the Commonwealth affirmed. Ashe sought a declaratory judgment claiming that the State Water Control Law does not confer jurisdiction on the State Water Control Board to regulate state wetlands that are not subject to federal jurisdiction under the Clean Water Act. The lower court ruled that the State Water Control Law encompasses state wetlands not subject to federal jurisdiction.

*Atkins v. Commonwealth.* Capital murder case remanded to circuit court for determination of mental retardation.


*Gilman v. Va. State Bar.* Attorney charged with failure to provide required notice to clients that his license to practice law was suspended made a timely demand that alleged violations be tried before a three-judge court, and from that point the Virginia State Bar Disciplinary Board had no authority to adjudicate the adequacy of the attorney’s compliance with the notice requirement. Reversed and remanded.

*Commonwealth v. Diaz.* Judgment of Court of Appeals, concluding that the circuit court erroneously revoked the suspended portion of Diaz’s sentence, reversed. Circuit court revoked suspended misdemeanor sentence for driving after having been declared a first-offense habitual offender, based on a felony occurring after the misdemeanor conviction in general district court but before withdrawal of the appeal to the circuit court.

*Commonwealth v. Hudson.* Decision of Court of Appeals reversed and trial court judgment reinstated, finding that the evidence was sufficient to sustain Hudson’s conviction for second-degree murder of his wife and related firearms offense.

*Commonwealth v. Leal.* Judgment of Court of Appeals reversed and circuit court judgment reinstated. The circuit court convicted Leal of maiming by mob and inflicting bodily injury and correctly denied a jury instruction on the lesser-included offense of assault and battery by mob.

*Commonwealth v. Nuckles.* Judgment of Court of Appeals reversed and trial court’s conviction of Nuckles for grand larceny reinstated. The corporate status of a corporation was not necessary to identify it as the victim of larceny or to establish an element of the offense, and the Commonwealth proved that the corporation owned the stolen property.

*Commonwealth v. Payne.* Reversal by Court of Appeals of Newport News Circuit Court decision reversed. The circuit court did not abuse its discretion in revoking
26 years of suspended time following Payne’s conviction of a new felony and his failure to make full restitution and report to his probation officer.

_Crawford v. Va. State Bar._ Appeal of order refusing to reinstate attorney’s license to practice law dismissed.

_Daniels v. Warden._ Habeas corpus petition, challenging the legality of Daniel’s convictions in the trial court for robbery, abduction, and two counts of using a firearm in a felony, dismissed, because the allegations were known to him in a previous petition filed in the trial court that was voluntarily nonsuited.

_Dickerson v. Commonwealth._ Decision of Court of Appeals, holding that Dickerson was not subject to unlawful search and seizure subsequent to traffic stop, affirmed. Questions asked by law-enforcement officer in the context of a consensual encounter led to probable cause to search the car for narcotics.


_Esteban v. Commonwealth._ Judgment of Court of Appeals, holding that Esteban was properly convicted of possession of a firearm on school property, despite her claimed unawareness that gun was in her canvas bag, affirmed.

_Fails v. Va. State Bar._ Decision of State Bar Disciplinary Board, revoking attorney’s license to practice law, based on consideration of the interaction between Part 6, § IV, former paragraph 13(C)(6)(a)(i) of the Court rules and § 54.1-3915, affirmed.

_Friedline v. Commonwealth._ Dismissal by Prince William Circuit Court of habeas corpus petition, alleging ineffective assistance of counsel without conducting an evidentiary hearing or receiving an affidavit from trial counsel, affirmed.

_Fugate v. Va. State Bar._ Decision of State Bar Disciplinary Board, revoking attorney’s license to practice law due to two federal felony convictions, affirmed.

_Gaston v. Commonwealth._ Appeal of Virginia Beach Circuit Court’s denial of a motion under § 19.2-327.1 for post-trial scientific analysis of DNA evidence, as the clear and unambiguous language of § 19.2-327.1(G) prohibits appeal of a circuit court ruling, dismissed for lack of jurisdiction.

_Gent v. Commonwealth._ Decision of Court of Appeals, upholding convictions for felony murder, robbery, burglary, and solicitation to commit a felony, affirmed. The Court ruled that, assuming the Wise Circuit Court erred in admitting statements of the victim under the excited utterance exception to the hearsay rule, such error was harmless. The Court also ruled that the trial court did not err in excluding other statements of the victim that did not fall within an exception to the hearsay rule.

_Green v. Commonwealth._ Capital murder conviction and death sentence affirmed.
Harris v. Commonwealth. Decision of Court of Appeals reversed. Harris was illegally detained by police following a traffic stop and completion of an identity check, and evidence of stolen material obtained in a search of his truck should have been suppressed.

Helfer v. Dep't of Rehab. Servs. Appeal from dismissal of workers' compensation claim alleging claimant felt pain after lifting a small binder dismissed.

Henry v. Warden. Decision of City of Richmond Circuit Court, denying habeas corpus petition raising search and seizure issue which, having been addressed and resolved in the trial and direct appeal of his criminal conviction, is not cognizable on habeas review, affirmed.


Hudson v. Commonwealth. Conviction of Hudson for unreasonable refusal to take a breath alcohol test, where a police officer outside his jurisdiction detained Hudson following a vehicle stop for erratic driving and pending arrival of local police, affirmed.

In re Davis. Appeal from decision of three-judge court revoking license to practice law dismissed.

In re People for the Ethical Treatment of Animals. Petition for writ of mandamus to require court to vacate its order sealing file containing allegations of illegal conduct by nonparties dismissed.

In re Phillips. Section 53.1-231.2, which allows a convicted felon to seek circuit court approval of a petition for restoration of eligibility to register to vote, is not unconstitutional. Reversed and remanded.

In re Sawyer. Petition for writ of prohibition asking that judges be prohibited from taking jurisdiction over actions to enforce judgment against attorney ordered to share legal fee with cocounsel dismissed.


Johnson v. Commonwealth. Decision of Court of Appeals affirming holding of Chesterfield Circuit Court. The circuit court did not err (1) in holding that the evidence was sufficient to sustain Johnson's convictions for two counts each of rape, forcible sodomy, and taking indecent liberties with a child; (2) in allowing the child victim to testify by closed circuit television pursuant to § 18.2-67.9; and (3) in finding that § 18.2-67.9(B)(3) is facially valid and was constitutionally applied to Johnson.

Lovitt v. Warden. Habeas corpus petition challenging capital murder conviction and death sentence denied.

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

McCullough v. Commonwealth. Decision of Court of Appeals, holding that Suffolk Circuit Court did not err in imposing approximately $5,000 in restitution upon McCullough's conviction for two counts of misdemeanor welfare fraud, affirmed.


Miles v. Sheriff. Judgment of Newport News Circuit Court dismissing habeas corpus petition reversed. Trial counsel's failure to appeal Miles' convictions, even though he had pleaded guilty to the charges, constituted ineffective assistance of counsel, entitling Miles leave to seek a belated appeal.

Mohajer v. Commonwealth. En banc decision of Court of Appeals, finding that the evidence was sufficient to sustain Mohajer's convictions for forcible sodomy and animate object penetration, affirmed.

Morrisette v. Commonwealth. Petition for rehearing denied, finding that Morrisette's claim of mental retardation was frivolous, and capital murder conviction and death sentence affirmed.


Reid v. Warden. Petition to reopen habeas corpus case challenging capital murder conviction and death sentence denied.

Ripley v. Warden. Habeas corpus petition dismissed. The Court held that, for purposes of the statute of limitations, when a petitioner fails to file a notice of appeal to the Supreme Court from the Court of Appeals, final disposition of his direct appeal occurs 30 days after entry of the Court of Appeals' judgment.

Smith v. Commonwealth. Convictions for first degree murder and use of a firearm in the commission of that crime affirmed, concluding that blood spatter analysis is a matter for expert testimony and that a sufficient evidentiary foundation for such testimony was established.
State Water Control Bd. v. Crutchfield. Judgment of Court of Appeals affirmed and case remanded to City of Richmond Circuit Court for trial on the merits. In a petition challenging a water control permit allowing Hanover County to discharge wastewater into the Pamunkey River, the Court of Appeals did not err in affirming the circuit court decision allowing the county to be added as a party to the appeal and in holding that the circuit court abused its discretion in denying amendment of the allegations in the original petition.


Zimmerman v. Commonwealth. Decision of Court of Appeals affirmed. The evidence was sufficient to convict Zimmerman of felonious assault of a law-enforcement officer engaged in public duties. Zimmerman tried to escape apprehension as a repeat habitual offender as the officer tried to flag his vehicle down by waving his arms.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Bell v. Warden. Habeas corpus case challenging capital murder conviction and death sentence.

Burkett v. Warden. Appeal of denial of habeas corpus relief in attack on conviction for burning a cross with intent to intimidate. Burkett claims Black v. Virginia decision renders his conviction a nullity and trumps all procedural defaults.


Browning v. Warner. Petition for writ of mandamus objecting to having to vote in church as assigned polling place.

Burns v. Warden. Appeal of capital murder conviction and death sentence.

Commonwealth v. Duncan. Appeal of Court of Appeals’ en banc decision holding that the evidence was insufficient to sustain Duncan’s conviction for felony child neglect under § 18.2-371.1(B). Duncan left his 6-month-old baby with people he had just met, for several hours, without providing food or formula for the infant. When the baby had received no nourishment for over 8 hours, Duncan poured wine cooler into a baby bottle and gave it to another person to feed the baby.

Commonwealth v. Jones. Appeal of Court of Appeals’ decision finding that the evidence was insufficient to support robbery and attendant use of a firearm, because the larceny of merchandise was complete at the time Jones introduced the firearm to facilitate his escape.


Emmett v. Warden. Habeas corpus petition challenging capital murder conviction and death sentence.

Holland v. Commonwealth. Appeal of Court of Appeals' decision affirming the circuit court's admission of prior statements the victim made to his mother and a detective under the hearsay exception to the hearsay prohibition.

Hudson v. Warden. Appeal of capital murder conviction and death sentence.

In re Leach. Appeal of revocation of license to practice law.

In re Muhammad-El. Appeal of issuance of writ of quo warranto prohibiting solicitor general for the Moorish-American National Republic from representing individuals in court when he is not admitted to practice law.


Jackson v. Commonwealth. Appeal of Court of Appeals' decision claiming that investigatory detention was justified based on an anonymous tip from three disorderly men brandishing a firearm outside a bar.

Jerman v. Director. Habeas corpus petition challenging convictions for second-degree murder and abduction.

Jones v. Commonwealth. Appeal of order granting plea in bar based on the Workers' Compensation Act. Contractor was injured when he cut through a live wire on University of Virginia property and sued under the Tort Claims Act.

Kingsbur v. Commonwealth. Appeal of Court of Appeals' decision holding that the firearm possessed by Kingsbur, a convicted felon, had not lost its visual characteristics as a firearm, although it was missing several necessary internal parts.

Konan v. Va. State Bar. Appeal of revocation of license to practice law for several violations, including filing misleading statements with courts and filing motions without any legal basis.

Lenz v. Warden. Habeas corpus petition challenging capital murder conviction and death sentence.

Lewis v. Commonwealth. Appeal of capital murder conviction and death sentence.

Maddox v. Commonwealth. Appeal of dismissal of nuisance claim arising out of alleged defectively designed sidewalk.

Raymeur v. Townley. Appeal of circuit court decision dismissing habeas corpus petition as untimely filed.


7-Eleven v. Dep’t of Env’tl. Quality. Appeal of Court of Appeals’ decision holding that payments for third-party damages from the Virginia Petroleum Storage Tank Fund must be based on terms of a private settlement rather than Department’s analysis of the actual damages suffered.

Solomon v. Commonwealth. Appeal of Court of Appeals’ decision affirming trial court’s denial of a motion to remove a member of the venire for cause.

VPI & SU v. Interactive Return Serv., Inc. Appeal of $110,000 judgment against VPI on the grounds that the trial court overruled VPI’s motions to strike, to vacate the final order, and for summary judgment due to a material breach by the Internal Revenue Service; instructed the jury on waiver of breach of contract by VPI; and allowed evidence of consequential damages.

Wells v. Commonwealth. Appeal of dismissal of an appeal for lack of jurisdiction of a general district court order revoking the conditional release of Wells, a not-guilty-by-reason-of-insanity acquittee, pursuant to § 19.2-182.8.

White v. Commonwealth. Appeal of Court of Appeals’ decision holding that the evidence was sufficient to sustain conviction for felony escape from custody.

Yarbrough v. Warden. Habeas corpus petition challenging capital murder conviction and death sentence.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Bell v. Commonwealth. Petition for certiorari, challenging capital murder conviction and death sentence, denied.

Bramblett v. Hinkle. Petition for certiorari from Supreme Court of Virginia decision, refusing challenge to method of execution, denied.

Bramblett v. True. Petition for certiorari from Fourth Circuit decision, upholding capital murder conviction and death sentence, denied.

Dalo v. Commonwealth. Petition for certiorari from Supreme Court of Virginia decision, upholding convictions for driving under the influence and manslaughter, denied.

Emmett v. Virginia. Petition for certiorari from Supreme Court of Virginia decision, upholding capital murder conviction and death sentence, denied.
Green v. Commonwealth. Petition for certiorari, challenging capital murder conviction and death sentence, pending.

Hudson v. Commonwealth. Petition for certiorari from Supreme Court of Virginia decision, upholding convictions for second-degree murder and use of a firearm, denied.

Morrisette v. Warden. Petition for certiorari, challenging capital murder conviction and death sentence, denied.

Murphy v. Reinhard. Petition for certiorari from Supreme Court of Virginia decision, denying habeas corpus petition seeking to prevent involuntary administration of antipsychotic drugs to Murphy, a criminal defendant found incompetent to stand trial on the charge of murder, denied.

Orbe v. Warden. Petition for certiorari, challenging capital murder conviction and death sentence, denied.

Reid v. Warden. Petition for certiorari, challenging capital murder conviction and death sentence, denied.

Turner v. Director. Petition for certiorari from Fourth Circuit decision, denying habeas relief in a case of second-degree murder and use of a firearm, denied.

Virginia v. Maryland. In this suit against the State of Maryland for injunctive and declaratory relief, the Commonwealth asserts that Maryland used its police power to interfere with the exercise of riparian rights by Virginia citizens guaranteed by compact. The case was referred to a special master who recommended that all issues be resolved in favor of the Commonwealth. The Court upheld Virginia's right to build improvements from the Virginia shore and to withdraw water from the Potomac River free from regulation by Maryland.

Walker v. True. Petition for certiorari from Fourth Circuit decision, upholding capital murder conviction and death sentence, and remanding for reconsideration, granted.

Walton v. Johnson. Petition for certiorari from Fourth Circuit decision, upholding capital murder conviction and death sentence, denied.

Williams v. Director. Petition for certiorari from Fourth Circuit decision, denying habeas relief on robbery conviction and trial by jury, denied.

Wolfe v. Virginia. Petition for certiorari from Supreme Court of Virginia decision, upholding capital murder conviction and death sentence, denied.
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 its designated number and 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 opinion number first appears. Cite an opinion in this report as follows: 2003 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.
Board approval is not required prior to issuance of debt to finance student housing project for state university if university has no actual or beneficial ownership in project and neither Commonwealth nor any agency or institution of Commonwealth pays, directly or indirectly, any of debt service on outstanding debt.

THE HONORABLE PAUL S. TRIBLE, JR.
PRESIDENT, CHRISTOPHER NEWPORT COLLEGE
JANUARY 9, 2003

ISSUE PRESENTED
You ask whether the Treasury Board must approve, pursuant to § 2.2-2416(5) or (7), debt incurred by a private foundation to finance a capital project consisting of apartments and retail space, with the apartments offered as student housing by a state university.

RESPONSE
It is my opinion that the Treasury Board is not required to approve debt incurred by a private foundation to finance a capital project that will be included as part of a university's student housing program provided the project is not owned, to be acquired by, or leased by the university and neither the Commonwealth nor any agency or institution thereof is required or expected to provide any debt service, directly or indirectly, for the debt issued to finance the capital project.

BACKGROUND
You relate that a private tax-exempt foundation desires to construct student housing facilities. The private foundation, a private management company, or the university's student housing offices, as management agent, will oversee daily operations of the facilities. A conduit issuer¹ will issue bonds on behalf of the private foundation secured wholly by rental payments received from student or commercial tenants and a deed of trust lien on the project or by a bank letter of credit collateralized by such rental payments and deed of trust lien to finance the project. Repayment of the bonds will not be secured by any obligation of the Commonwealth of Virginia or any agency or instrumentality of the Commonwealth, and no public funds will be pledged or are anticipated to be required for payment of debt service on the bonds. The university will enter into a support agreement, whereby it agrees to promote the project as part of its student housing system. The support agreement, however, will not obligate the university to make any payments or enter into any lease. You advise that no provision of the support agreement would constitute a debt, legal or otherwise, of the university or the Commonwealth.

APPLICABLE LAW AND DISCUSSION
Section 2.2-2416 provides that the Treasury Board shall have the following powers and duties:

5. Make recommendations to the Governor, notwithstanding any provisions to the contrary, on proposed bond issues or other
financing arrangements; approve the terms and structure of bonds or other financing arrangements executed by or for the benefit of educational institutions and state agencies other than independent state authorities, including bonds or other financing arrangements secured by leases, lease purchase agreements, financing leases, capital leases or other similar agreements; and agreements relating to the sale of bonds;

7. Approve, notwithstanding any provisions to the contrary, the terms and structure of bonds or other financing arrangements executed by or for the benefit of state agencies, boards and authorities where debt service payments on such bonds or other financing arrangements are expected by such agency, board or authority to be made, in whole or in part, directly or indirectly, from appropriations of the Commonwealth, including bonds or other financing arrangements secured by leases, lease purchase agreements, financing leases, capital leases or other similar agreements, and agreements relating to the sale of bonds.

You ask whether § 2.2-2416(5) or (7) requires a private tax-exempt foundation to obtain Treasury Board approval prior to the issuance of bonds through a conduit issuer to finance a capital project for student housing under the circumstances described.

Section 2.2-2416(5) provides for the Treasury Board to evaluate debt issues “executed by or for the benefit of” state colleges and universities. The university will not execute any debt in connection with the project. Therefore, it must be determined whether the phrase “for the benefit of” should be interpreted to include the type of transaction you describe.

The phrase “for the benefit of” in § 2.2-2416(5) is subject to various interpretations. Statutory construction requires that words be given their ordinary meaning, given the context in which they are used. Further, statutes should not be interpreted so as to produce absurd results or irrational consequences.

In the context of § 2.2-2416(5), the phrase “for the benefit of” is used to refer to situations where a university derives an ownership interest from the financing arrangement required to be approved by the Treasury Board. The phrase “for the benefit of” may not be interpreted so broadly as to encompass a purely private transaction of the type described. To subject this type of purely private financial transaction to Treasury Board approval, absent an actual or beneficial ownership interest to the Commonwealth or any of its agencies or institutions, would require interpreting § 2.2-2416(5) so broadly as to produce an absurd result. In the facts you present, the state university will have no actual or beneficial ownership interest in the property financed. Instead, the project is purely a private transaction for which the university’s only involvement is the agreement to offer the facility to its students for potential housing.
To interpret § 2.2-2416(5) more broadly would insert the Commonwealth into financial transactions where it has no financial exposure. The described arrangement is a debt transaction to finance a capital project, and the debt is secured by private lease payments from private persons or entities to a private tax-exempt foundation and a deed of trust lien on the project. Neither the Commonwealth nor any of its agencies or institutions will be required to provide any debt service or lease payments for the project. There is no impact on the credit or debt capacity of the Commonwealth or any of its agencies or institutions. In addition, neither the Commonwealth nor any of its agencies or institutions will have any actual or beneficial ownership in the capital project or the land upon which the property is situated.

In Citizens' Foundation of the Richmond Professional Institute, Inc. v. City of Richmond, the Supreme Court of Virginia analyzed the relationship of the Foundation with the College of William and Mary and the Richmond Professional Institute. The Court observed that, while the Foundation held legal title to certain property, the College of William and Mary, and subsequently the Richmond Professional Institute, could request and receive conveyance of the property at any time. "Though bare legal title to property may rest in someone else, if the beneficial interest therein is vested in a public corporation created, managed and controlled by the state, then that property must be said to be owned indirectly by the Commonwealth." In the facts you present the university would not have any beneficial ownership interest in the capital project. At most, the university may serve in a ministerial capacity as property manager for the capital project. Even then, the university could only exercise control to the extent permitted by the tax-exempt private foundation. Absent an actual or beneficial ownership in the project by the university, the project is not "for the benefit of" the university.

Section 2.2-2416(7) requires Treasury Board approval for debt issues that "are expected ... to be made, in whole or in part, directly or indirectly, from appropriations of the Commonwealth." The financing you describe provides that debt service will be paid by the private tax-exempt foundation as it receives lease or rental payments from students or others leasing the apartments or office or retail space to be financed. The only obligation of the university is to include the apartments in the student housing program. Neither the Commonwealth nor any of its agencies or institutions will make payments to the private tax-exempt foundation for the debt service on outstanding bonds. Accordingly, § 2.2-2416(7) does not require the Treasury Board to approve the transaction you describe.

CONCLUSION

Accordingly, it is my opinion that the Treasury Board is not required to approve debt incurred by a private foundation to finance a capital project that will be included as part of a university's student housing program provided the project is not owned, to be acquired by, or leased by the university and neither the Commonwealth nor any agency or institution thereof is required or expected to provide any debt service, directly or indirectly, for the debt issued to finance the capital project.
A "conduit user" generally is a redevelopment and housing authority or industrial development authority.  

1See Black's Law Dictionary 149-52 (7th ed. 1999) (providing various definitions for "beneficial," "beneficiary," and "benefit," depending on context in which these terms are used); see also W. Va. ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, 129 S.E.2d 921, 924 (1963) (noting that "benefit" is generic word subject to many connotations).


5Cf. City of Charlottesville v. DeHaan, 228 Va. 578, 588, 323 S.E.2d 131, 136 (1984) (observing that issuance of bonds providing incidental benefit to developer involved in city's redevelopment effort did not violate constitutional credit clause). In the context of § 2.2-2416, an incidental benefit to a state institution does not destroy the private nature of the transaction, just as an incidental benefit to the private developer in DeHaan did not offend the credit clause.

6In the alternative, the debt may be secured by a bank letter of credit collateralized by such lease payments and deed of trust lien.


8Id.

9Id. at 179, 148 S.E.2d at 815.


11You relate that the project will consist primarily of apartments, and that a small portion of the space may be used for retail and/or office space.

OP. NO. 03-032

ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES.

Meaning of 'members of collegial bodies appointed at state level,' 'state level' for purposes of receiving compensation and expense payments for service on collegial bodies. Only members of collegial bodies established or authorized by General Assembly are entitled to compensation or reimbursement for expenses; members of ad hoc collegial bodies established on authority of state-level official or entity are not entitled to compensation and expense payments. Collegial body members are not entitled to compensation or expenses if enabling legislation establishing body specifically prohibits such payments; § 2.2-2813 applies to compensation where collegial body's enabling statute provides specifically for expense reimbursement but is silent as to compensation; § 2.2-2813 provides method and amount of compensation and reimbursement of expenses for collegial body members where enabling statute is silent as to such payments. Only in instances where § 2.2-2813 and enabling statute are irreconcilably repugnant or inconsistent would timing of enactment be implicated.

THE HONORABLE STEPHEN H. MARTIN
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 11, 2003

ISSUES PRESENTED

You ask several questions pertaining to compensation and expense reimbursement for members of state-level boards and commissions ("collegial bodies"), pursuant to § 2.2-2813. Each question, and subsequent answer, is set forth under a separate heading within this opinion.
APPLICABLE LAW AND DISCUSSION

Section 2.2-2813 is a portion of Chapter 28 of Title 2.2, and pertains to compensation and expense payments from state funds for members serving on collegial bodies. Section 2.2-2813(A) defines the following terms as used in Chapter 28, relating to state officers and employees:

"Compensation" means any amount paid in addition to reimbursement for expenses.

"Expenses" means all reasonable and necessary expenses incurred in the performance of duties.

"Salary" means a fixed compensation for services, paid to part-time and full-time employees on a regular basis.

Section 2.2-2813(B) provides that, subject to § 2.2-2813(C) and (D), members of boards, commissions, committees, councils and other collegial bodies, who are appointed at the state level, shall be compensated at the rate of $50 per day, unless a different rate of compensation is specified by statute for such members, plus expenses for each day or portion thereof in which the member is engaged in the business of that body.

Section 2.2-2823(A) provides:

Pursuant to § 2.2-2825, any person traveling on state business shall be entitled to reimbursement for certain actual expenses as are necessary and ordinarily incidental to travel. If transportation is by public means, reimbursement shall be at the actual cost thereof. If transportation is by private means, reimbursement shall be at the rate as specified in the current general appropriation act.

Section 2.2-2825 provides that “[p]ersons conducting official business of the Commonwealth shall be reimbursed for their reasonable and necessary travel expenditures that shall include transportation as provided in § 2.2-2823, parking, and lodging.”

QUESTION ONE

You ask whether the phrase in § 2.2-2813(B), “members of ... collegial bodies, who are appointed at the state level,” includes persons appointed by state-level officials or entities and persons appointed to their position by enabling legislation.

Absent a statutory definition, words used in a statute are to be given their ordinary meaning. For the purposes of this opinion, I must assume that “members of ... collegial bodies, who are appointed at the state level” are those persons who are appointed by an authorized state official or entity, or as set forth in the collegial bodies’ enabling legislation. I must further assume that the phrase “state level” refers only to those collegial bodies established or authorized by the General Assembly to function at the state level and does not include such bodies that operate at a local government level.
QUESTION TWO

You ask whether a collegial body, including its membership, must be established by statute in order for its members to be entitled to compensation and reimbursement for expenses. As an example, you cite § 51.5-72. Section 51.5-72(B) requires the Board for the Blind and Vision Impaired to establish an advisory board for each of the manufacturing and services industries established by the section.

Given the assumptions that collegial body members "appointed at the state level" are those persons who are appointed by an authorized state official or entity, or as set forth in the enabling statute of the body in question, and that the phrase "state level" refers only to those collegial bodies established pursuant to enabling legislation, I conclude that only members of collegial bodies that are established or authorized to be established by the General Assembly are entitled to compensation or reimbursement for expenses under § 2.2-2813.

If the legislature creates a state-level advisory, supervisory or policy collegial body to advise an agency or public official or to exercise some portion of the Commonwealth's sovereignty and fails to establish a specific limitation on membership, I cannot say that members of such a body are precluded from receiving compensation for their services pursuant to § 2.2-2813. In the example you cite, however, § 51.5-72(B) authorizes the Board for the Blind and Vision Impaired to create advisory boards and limits the membership on each board to nine persons. Accordingly, members of the Board are entitled to receive compensation and reimbursement for expenses pursuant to § 2.2-2813.

QUESTION THREE

You ask whether members serving on ad hoc collegial bodies, which are established solely on the authority of a state-level official or entity, are entitled to compensation and reimbursement for expenses.

Given the assumptions that collegial body members "appointed at the state level" are those persons who are appointed by an authorized state official or entity, or as set forth in the enabling statute of the body in question, and that the phrase "state level" refers only to those collegial bodies established pursuant to enabling legislation, I must conclude that ad hoc collegial bodies established only on the authority of a state-level official or entity are not entitled to receive compensation and reimbursement for expenses. Such ad hoc bodies, by their very nature, are not created or authorized by the General Assembly. Any other interpretation would allow state officials to expend public funds without authorization by the General Assembly. Consequently, members of collegial bodies that are not created or established by the General Assembly, but, rather, are created only on authority of a state-level official or entity, are not entitled to compensation under § 2.2-2813 or travel expenses under § 2.2-2825.

QUESTION FOUR

You next ask whether, pursuant to § 2.2-2813, members serving on collegial bodies are entitled to (a) compensation or expenses if such bodies' enabling legislation specifi-
cally prohibits compensation or expense reimbursement; (b) compensation if such bodies' enabling legislation authorizes reimbursement for expenses but is silent as to compensation; or (c) compensation and expenses if such bodies' enabling legislation is silent as to both.

It is well accepted that statutes relating to the same subject should not be read in isolation.\(^4\) Such statutes should be considered *in pari materia.*\(^5\) Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.\(^6\) An accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general.\(^7\) Also, when statutes provide different procedures on the same subject matter, "the general must give way to the specific."\(^8\)

(a) You cite § 10.1-1422.03 as an example of a statute prohibiting the members of an advisory board from receiving compensation or reimbursement for expenses.\(^9\) Section 10.1-1422.03(B) is specific as to the compensation and reimbursement of expenses of members of the Board. As such, the specific prohibitions of § 10.1-1422.03(B) prevail over the more general provisions of § 2.2-2813. Consequently, the members of the Litter Control and Recycling Fund Advisory Board are not entitled to compensation or reimbursement of expenses under § 2.2-2813.

(b) You cite § 46.2-1503 as an example of a statute providing only for the reimbursement of actual and necessary expenses of members of the Motor Vehicle Dealer Board.\(^10\) Sections 46.2-1503 and 2.2-2813 may be read together without conflict. Because § 46.2-1503 is silent as to compensation, the compensation provisions of § 2.2-2813 apply to the members of the Board. As to expenses, to the extent the two statutes are in conflict or it is unclear which of the two statutes applies, the specific provisions of § 46.2-1503(E) dictate the method and amount of such reimbursement.

(c) You cite § 23-9.3 as an example of an enabling statute that is silent as to compensation and expense reimbursement for members of the State Council of Higher Education for Virginia. Reading § 23-9.3 in conjunction with § 2.2-2813 to achieve a harmonious result, it is evident that there is no conflict. The two statutes may be read together in harmony, with the provisions of § 2.2-2813 providing the method and amount of compensation and expense reimbursement for such members.

**QUESTION FIVE**

Finally, with regard to the above question, you ask whether it matters if § 2.2-2813 or the specific enabling legislation of the collegial body is the later enacted statute. As an example, you note that the General Assembly enacted § 2.2-2813 following its enactment of § 10.1-1422.03. Another rule of statutory construction requires the presumption that, in enacting statutes, the General Assembly has full knowledge of existing law and interpretations thereof.\(^11\) Although the repeal of statutes by implication is not favored, if two statutes are *in pari materia,* then to the extent that their provisions are irreconcilably inconsistent and repugnant, the latter enactment repeals or
amends the earlier enacted statute. 12 The examples cited in the answers to question 4(a)-(c) are not irreconcilably inconsistent or repugnant. Therefore, it does not matter which of the statutes is last enacted. Only in those instances where the provisions of § 2.2-2813 and the statute in question are so irreconcilably repugnant or inconsistent would the timing of enactment be implicated.

1For purposes of standardizing a nomenclature system, § 2.2-600 provides that every board, commission or council "established by law or executive order within the executive branch of state government" is "a permanent collegial body."

2Section 2.2-2813(C) limits payment to reimbursement for expenses of full-time state employees or employees of local political subdivisions; § 2.2-2813(D) limits the total compensation a collegial body member shall receive to no more than "one payment of the highest per diem amount specified in subsection B for attending meetings and for services performed that day" for all collegial bodies, and any related entities of such bodies, of which such person is a member. The compensation and expenses of a member performing services or attending two or more meetings a day for two or more collegial bodies "shall be prorated among the bodies served." VA. CODE ANN. § 2.2-2813(D) (LexisNexis Supp. 2003).


9Section 10.1-1422.03(B) stipulates that the Litter Control and Recycling Fund Advisory Board "shall not receive a per diem, compensation for their service, or travel expenses."

10Section 46.2-1503(E) requires that members of the Motor Vehicle Dealer Board "be reimbursed their actual and necessary expenses incurred in carrying out their duties, such reimbursement to be paid from the special fund referred to in § 46.2-1520."

11See City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); Op. Va. Att’y Gen.: 1996 at 51, 52 (noting that General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change law); 1995 at 130, 131 (noting that General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change then existing law).

Board of trustees of county public library, when using competitive sealed bidding method of procurement, must award contract to lowest responsive and responsible bidder, regardless of source of funding used to pay for procurement.

THE HONORABLE JACKIE T. STUMP
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 22, 2003

ISSUE PRESENTED

You ask whether the board of trustees for a county public library ("library board") is required to contract with the lowest responsible bidder for construction services that will be funded by a private tax-exempt entity, or may the board elect to accept a higher bidder.

RESPONSE

It is my opinion that awards of contracts under the competitive sealed bidding method of procurement must be made to the lowest responsive and responsible bidder, regardless of the source of funding that will be used to pay for the procurement.

BACKGROUND

You indicate that a wing will be added to a county public library and that funds almost sufficient to pay for the addition have been raised by a private tax-exempt entity. From the enclosure to your letter, it appears that the library board is conducting a procurement for these construction services, and that the board, among other things, has scheduled a prebid meeting for potential bidders.

APPLICABLE LAW AND DISCUSSION

I assume that the county public library referenced in your letter and the library board were established pursuant to §§ 42.1-33 and 42.1-35. The Virginia Public Procurement Act, §§ 2.2-4300 through 2.2-4377, sets forth rules applicable to the award of contracts by public bodies. A library board established pursuant to §§ 42.1-33 and 42.1-35 is a "public body" for purposes of the Act.

The Virginia Public Procurement Act describes two main methods of procurement: competitive negotiation and competitive sealed bidding. The enclosure to your letter refers to "bidders" and indicates that a "prebid meeting" has been scheduled. I, therefore, conclude that the library board is conducting this procurement pursuant to the competitive sealed bidding method of procurement. This is consistent with the general practice for procurement of construction services.

The definition of "competitive sealed bidding" in the Virginia Public Procurement Act requires that contractor selection be awarded to the "lowest responsive and responsible bidder" and, thus, precludes award to a higher bidder. The fact that the funds for procurement will be provided by a third party does not affect the applicability of the Act.
Accordingly, it is my opinion that the library board, when using the competitive sealed bidding method of procurement, must award the contract to the lowest responsive and responsible bidder, regardless of the source of funding that will be used to pay for the procurement.

1Section 42.1-33 provides that “[t]he governing body of any city, county or town shall have the power to establish a free public library for the use and benefit of its residents.” Section 42.1-35(A) provides that “[t]he management and control of a free public library system shall be vested in a board of not less than five members or trustees.”

2See, e.g., VA. CODE ANN. § 2.2-4303(A) (LexisNexis Supp. 2003) (“All public contracts with nongovernmental contractors ... 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.”).

3The Virginia Public Procurement Act defines “public body” as “any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in [the Act].” Section 2.2-4301 (LexisNexis Supp. 2003).

4See § 2.2-4301 (defining “competitive negotiation,” “competitive sealed bidding”).

5The Virginia Public Procurement Act refers to competing vendors as “bidders” in the competitive sealed bidding method, and as “offerors” in the competitive negotiation method. See § 2.2-4301 (defining “competitive negotiation,” “competitive sealed bidding”).

6See § 2.2-4303(D) (providing generally that “[c]onstruction may be procured only by competitive sealed bidding,” and listing four exceptions where competitive negotiation may be used); see also VA. CODE ANN. § 56-575.16 (LexisNexis Repl. Vol. 2003) (requiring that procurements conducted under Public-Private Education Facilities and Infrastructure Act of 2002, §§ 56-575.1 to 56-575.16, generally must use procedures consistent with competitive sealed bidding, and listing exceptions where a competitive negotiation procedure may be used).

7Section 2.2-4301 (defining “competitive sealed bidding”). Section 2.2-4301 further defines “responsive bidder” as “a person who has submitted a bid that conforms in all material respects to the Invitation to Bid,” and “responsible bidder” as “a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.”

8See § 2.2-4300(B) (LexisNexis Repl. Vol. 2001) (“[T]he Virginia Public Procurement Act shall apply ... regardless of whether the public body, the contractor, or some third party is providing the consideration.”); 1987-1988 Op. Va. Att’y Gen. 117, 118 (concluding that source of funding does not govern application of Act).
ISSUE PRESENTED

You inquire whether a national bank established under the Federal National Bank Act and supervised and regulated by the Comptroller of the Currency may serve as executor, administrator, or testamentary trustee in Virginia absent a physical presence in Virginia. Specifically, you ask whether the National Bank Act preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act.

RESPONSE

It is my opinion that § 92a of the National Bank Act preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act to the extent that the state statutes prohibit a national bank supervised and regulated by the Comptroller of the Currency from serving as executor, administrator, or trustee in Virginia.

APPLICABLE LAW AND DISCUSSION

Article 3.3, §§ 6.1-32.31 through 6.1-32.45, comprises the Multistate Trust Institutions Act in Chapter 2 of Title 6.1, the Virginia Banking Act. Article 3.3 permits “out-of-state trust institutions, including without limitation national banks whose home state is other than Virginia, to engage in the trust business in this state, in accordance with the provisions set forth in [the Multistate Trust Institutions Act].” Section 6.1-32.35 provides that “[a]n out-of-state trust institution may engage in a trust business at an office in this state only if it maintains (i) a trust office in this Commonwealth as permitted by [Article 3.3] or (ii) a branch in this Commonwealth.” Section 6.1-32.32 defines “out-of-state bank” as “a bank chartered to act as a fiduciary whose home state is a state other than Virginia.” Section 6.1-5 of the Virginia Banking Act requires the existence of a Virginia branch or office before a multistate trust institution may operate in Virginia. There are no specific exceptions for national banks.

National banks are established under the National Bank Act and are supervised and regulated by the Comptroller of the Currency. Section 92a(a) of the National Bank Act authorizes the Comptroller to grant fiduciary powers to national banks:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Section 92a(b) provides that the grant of trust powers pursuant to § 92a(a) is not deemed to be in contravention of state law:

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies,
or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of [§ 92a].

By virtue of the Supremacy Clause of the Constitution of the United States, federal law supersedes any conflicting state law. The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area. Even if Congress does not intend the enactment of a federal statutory scheme completely to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.

The Supreme Court of the United States has identified three ways in which preemption may occur: (1) Congress may adopt express language setting forth the existence and scope of preemption; (2) Congress may adopt a framework for regulation that "occupies the field" and leaves no room for states to adopt supplemental laws; and (3) when state law actually conflicts with federal law, typically when compliance with both laws is a "physical impossibility" or the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Regarding supervision of the National Bank Act, the United States Supreme Court observes that "the Comptroller [of the Currency] bears primary responsibility for surveillance of 'the business of banking.'" Further, the Court reiterates the well-settled rule that "'courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of [the business of banking].'" In defining the preemptive scope of statutes and regulations granting a power to national banks, ... Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. Thus, the Court has determined that "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, ... no such condition applies."

Supreme Court decisions give weight to interpretations of the Comptroller in matters related to national banks. The Comptroller of the Currency has ruled that "federal law preempts state law when the federal law merely authorizes national banks to engage in activities that a state law expressly forbids." Sections 6.1-5 and 6.1-32.35 of the Virginia Banking Act prohibit a national bank from serving in a fiduciary capacity without having a physical presence in Virginia. The Comptroller, in reviewing the activities of a national bank in Michigan, specifically determined that federal law preempts §§ 6.1-5 and 6.1-32.35. In addition, the Comptroller has determined that, "[t]o the extent that [§§ 6.1-5 and 6.1-32.35] conflict with the authority to engage in fiduciary activities under section 92a, they are ... preempted." Therefore, it is my opinion that § 92a of the National Bank Act, as it relates to the fiduciary activities of national banks, preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act.
Accordingly, it is my opinion that § 92a of the National Bank Act preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act to the extent that the state statutes prohibit a national bank supervised and regulated by the Comptroller of the Currency from serving as executor, administrator, or trustee in Virginia.

For the purposes of this opinion, the use of the word “trustee” is intended to include those activities also associated with a testamentary trustee.


"This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.


See Jones, 430 U.S. at 525-26 (citing U.S. CONST. art. VI).


See Jones, 430 U.S. at 525.


Barnett Bank, 517 U.S. at 33.

Id. at 34.

See supra note 15 and accompanying text.


Id. at *10.

OP. NO. 02-142

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — GARNISHMENT — PROCESS.
Courts of Record: Clerks, Clerks' Offices and Records.

Constitution of Virginia: Local Government (County and City Officers).

Circuit court clerk is not responsible for ensuring that garnishee is served before judgment debtor with garnishment summons.

The Honorable Edward Semonian
Clerk, Circuit Court of the City of Alexandria
February 13, 2003

Issue Presented

You ask whether a clerk of the circuit court has a responsibility to ensure that a garnishment summons is served on the garnishee before it is served on the judgment debtor as required by § 8.01-511.

Response

It is my opinion that § 8.01-511 does not impose a duty on a clerk of the circuit court to ensure that a garnishee is served with a garnishment summons before it is served on the judgment debtor.

Background

In cases involving a financial institution garnishment, you advise that violation of the service requirement of § 8.01-511 may result in a loss of recovery by the judgment creditor when the garnishee and judgment debtor are located in separate jurisdictions. With a bank account garnishment, if the judgment debtor is served first, he has an opportunity to withdraw his funds prior to receipt of the service by the financial institution garnishee. When the garnishment is first served on the garnishee, as required by statute, the garnishee freezes the judgment debtor's accounts before the debtor is served. Thus, the judgment debtor is prevented from withdrawing his funds.

Applicable Law and Discussion

Article VII, § 4 of the Constitution of Virginia provides that the duties of a circuit court clerk “shall be prescribed by general law or special act.” Section 17.1-214 provides:

The clerk of the circuit court from whose office may be issued any process, ... or any order or decree to be served on any person, shall, unless the party interested, or his attorney, direct otherwise, deliver the same to the sheriff of the county or city for which the court is held, if it is to be executed therein, and if it is to be executed in any other county or city, shall enclose the same to the sheriff thereof, properly addressed, put it in the post office and pay the postage thereon.

Section 8.01-511 provides that “[t]he summons and the notice and claim for exemption form required pursuant to § 8.01-512.4[2] shall be served on the garnishee, and shall be served on the judgment debtor promptly after service on the garnishee.”

Section 17.1-214 requires a circuit court clerk to deliver process to the sheriff of his locality for service. When a person is located outside the clerk's locality, it is the
clerk’s responsibility to mail the process to the appropriate sheriff for service.\textsuperscript{3} Section 8.01-511 directs the order in which the service of process is to be accomplished.

When only one jurisdiction is involved, the order of service generally is not an issue because one person is charged with serving the process. Problems arise when the judgment debtor and garnishee are located in different jurisdictions. Compliance is difficult because more than one sheriff, or other authorized person, is involved in the service of process. Therefore, in some instances, the judgment debtor may be served prior to the garnishee. This usually occurs when the sheriff serves the judgment debtor within the jurisdiction where the process originates and the garnishee to be served is in another jurisdiction.

Unfortunately, when more than one sheriff’s office is involved, \textsection 8.01-511 does not designate the party responsible for ensuring that the garnishee is served before the judgment debtor. Section 8.01-511, however, cannot be read to impose a duty on the circuit court clerk to ensure that process is served first on the garnishee. A clerk’s responsibility in this context is outlined in \textsection 17.1-214. Service of process clearly is a function of the sheriff or such other person authorized to serve process.\textsuperscript{4} Section 8.01-511 does not order the clerk to perform any additional duty or require the clerk to alter the manner in which process is issued in order to assure compliance. Once the clerk has prepared the process and presented it to the appropriate sheriff, or other authorized person, it is that person’s responsibility to execute the process.\textsuperscript{5} If the persons serving process are located in separate jurisdictions, there is no guarantee the garnishee will be served before the judgment debtor.

Although \textsection 8.01-511 does not allocate the responsibility between the persons serving process to ensure that the garnishee is served first, the judgment creditor has a remedy. If a judgment debtor and garnishee are located in separate jurisdictions and the creditor is concerned that the judgment debtor may be served before the garnishee, it is incumbent upon such creditor to protect himself and adopt steps to ensure the proper order of service. In this situation, a judgment creditor should arrange for a private process server to serve the garnishee first.

CONCLUSION

Accordingly, it is my opinion that \textsection 8.01-511 does not impose a duty on the clerk of a circuit court to ensure that a garnishee is served with a garnishment summons before it is served on the judgment debtor.

\textsuperscript{1}While a violation of \textsection 8.01-511 could also occur with a wage garnishment, the end result is not the same. Violation of the statute does not give the judgment debtor any advantage over the judgment creditor. If a judgment debtor elects to quit his job in order to avoid the garnishment, he may do so at any time.

\textsuperscript{2}Section 8.01-512.4 prohibits the issuance or service of a summons in garnishment “unless a notice of exemptions and claim for exemption form are attached.”
You ask whether certain individuals entitled to receive health benefits under the Line of Duty Act may receive those benefits on the basis of being included in the state and local health benefits programs.

RESPONSE

It is my opinion that certain individuals entitled to health benefits under the Line of Duty Act may receive those benefits through the state health benefits program.

BACKGROUND

You relate that the Department of Human Resource Management has been asked to include in the state health benefits program certain individuals awarded benefits under the Line of Duty Act. You cite several examples of awards of benefits under the Act.\(^1\) You note that these beneficiaries do not meet the separately established eligibility requirements for participation in the health benefits program.

APPLICABLE LAW AND DISCUSSION

Section 9.1-401(A) of the Line of Duty Act\(^2\) provides that "[t]he surviving spouse and any dependents of a deceased person shall be afforded continued health insurance coverage, the cost of which shall be paid in full out of the general fund of the state treasury." Section 9.1-401(B) provides similar benefits to disabled persons, their surviving spouses, and dependents. Under the Act, the State Comptroller makes the administrative determination of benefit awards or denials,\(^3\) subject to judicial review by aggrieved parties.\(^4\)
Item 277(A) of the 2003 Appropriation Act appropriates funds to pay for "group health insurance ... for the surviving spouses and dependents of certain public safety officer killed in the line of duty and for certain public safety officers disabled in the line of duty."  

Section 2.2-2818(A) directs the Department of Human Resource Management to "establish a plan ... for providing health insurance coverage ... for state employees and retired state employees .... The plan chosen shall provide means whereby coverage for the families or dependents of state employees may be purchased."

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning; however, "[w]here the language of a statute is clear and unambiguous rules of statutory construction are not required."

It is well accepted that statutes should not be read in isolation. Statutes relating to the same subject should be considered in pari materia. Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.

In this instance, you describe two distinct statutorily created programs intended to address two different concerns. The Line of Duty Act confers benefits on the survivors of certain enumerated public safety officers killed during the performance of their duties, and extends continued health coverage to public safety officers, and their dependents, who are disabled during the course and scope of employment. Under the Act, public safety officers eligible for benefits are those employed by both state and local entities, and include certain designated volunteers.

Although the Comptroller is directed to make the administrative determination of eligibility for awards of benefits under the Line of Duty Act, the Act provides no direction as to disbursement of the benefits. Rather, the Act merely requires that beneficiaries "shall be afforded continued health insurance coverage, the cost of which shall be paid in full out of the general fund of the state treasury."

The state health benefits program was promulgated pursuant to § 2.2-2818 to provide health insurance coverage to state employee, retired state employees, and the families or dependents of state employees. The Department of Human Resource Management is responsible for the administration of the health benefits program, including the determination of eligibility. Similarly, § 2.2-1204 directs the Department to establish and administer a health plan for employees of local governments, local officers, teachers, retirees, and their dependents.

The Line of Duty Act and the health benefits program are not in conflict. Under the clear and unambiguous language of the Act, the Commonwealth is obligated to provide continued health insurance coverage to the surviving spouse and any dependents of a deceased person covered by the Act, or to a disabled person, his surviving spouse, and any dependents. The appropriations made pursuant to Item 277 of the 2003 Appropriation Act may be used to "purchase" the benefits available from the state.
health benefits program for those entitled to line of duty coverage. This is consistent with the directive in the Line of Duty Act that "the cost of [such health insurance coverage] shall be paid in full out of the general fund of the state treasury." Therefore, while persons entitled to receive benefits awarded under the Act do not meet the eligibility requirements for participation in the existing state health benefits program, the Commonwealth is obligated to finance the cost of such health insurance and may do so through the state health benefits program or through alternative programs or the open insurance market.

CONCLUSION

Accordingly, it is my opinion that certain individuals entitled to health benefits under the Line of Duty Act may receive those benefits through the state health benefits program.

1. The examples you cite have the common characteristic of an award of benefits under the Line of Duty Act to individuals who are not otherwise eligible for coverage under the state health benefits program.


13. See id. (defining "deceased person," "disabled person").

14. "Beneficiary" means the spouse of a deceased person and such persons as are entitled to take under the will of a deceased person if testate, or as his heirs at law if intestate." Id.


16. See cite supra note 6.


retired employees of local constitutional officers, local governments and school boards and is
required to promulgate rules regarding such program." 1 VA. ADMIN. CODE 55, Agcy. Sum., supra
note 6. The Department allows local employers to participate in the state health benefits pro-
goram. See 1 VA. ADMIN. CODE 55-20-220 to 55-20-310 ("Local Employer Participation").
1Section 9.1-401(A).
2I comment only on the legal obligation of the Commonwealth to provide health benefits and
not on the administrative mechanism by which the Commonwealth satisfies that legal obligation.

OP. NO. 02-097
CONSTITUTION OF VIRGINIA: BOARD OF EDUCATION (SCHOOL BOARDS).
EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATION & SALARIES — GENERAL
POWERS AND DUTIES OF SCHOOL BOARDS.
Authority for school board to remove books from public school library for reasons
such as pervasive vulgarity, educational unsuitability, or age inappropriateness; decision requires school board to make factual determination.

THE HONORABLE FRANK D. HARGROVE SR.
MEMBER, HOUSE OF DELEGATES
APRIL 22, 2003

ISSUE PRESENTED
You ask whether a school board has the authority to remove from a public school
library books that convey illegal or unhealthy sexual practices in a positive manner.

RESPONSE
It is my opinion that a school board has the authority to remove books from a public
school library for reasons such as pervasive vulgarity, educational unsuitability, or
age inappropriateness based on its good faith educational judgment. Such decisions
regarding any particular materials, however, would require the school board to make
a factual determination.

BACKGROUND
You relate that it has come to your attention that an organized effort is underway to
promote unsafe, unhealthy, harmful, as well as illegal sexual practices, in the public
schools of the Commonwealth. You do not relate the precise nature of the materials at
issue or the purveyor of such materials.

APPLICABLE LAW AND DISCUSSION
Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 provide that "[t]he super-
vision of schools in each school division shall be vested in a school board." School
boards are charged with the care, management and control of school property.1

The Supreme Court of the United States has long recognized that "[p]ublic education
serves vital national interests in preparing the Nation’s youth for life in our increasingly
complex society and for the duties of citizenship in our [Constitutional] Republic."2
Public schools convey the information and tools required to achieve success and
self-reliance in society. They also inculcate in tomorrow’s leaders the “fundamental
values necessary to the maintenance of a democratic political system." The task given to government in providing public education is a weighty and critical one. Apart from providing education in basic curricula, public educators face great pressure to adopt, and at times to advance, social and political agendas. These agendas are sometimes inconsistent with the wishes of the parents of students and the will of the electorate expressed through their local government and school boards.

The education of the youth of this Nation is the responsibility of the parents of the students. In our system of government, many parents delegate that authority to public school teachers and to state and local school officials. It is at the local level, and not in the federal courts, that the best interests of students should be determined.

In *Board of Education v. Pico*, the Supreme Court of the United States reviewed a local board of education’s decision to remove certain morally objectionable books from a high school and junior high school library. The board’s decision was based on its belief that the books were “anti-American, anti-Christian, anti-Semitic, and just plain filthy.” Many of the books removed contained profanity and vulgarity. The Second Circuit reversed the district court’s granting of summary judgment to the school board on plaintiffs’ First Amendment claims. A sharply divided Court voted to affirm the Second Circuit’s decision to remand the case for a determination of the school board’s motives. A majority of the Court could not, however, agree on the degree of discretion available to school libraries. In short, the *Pico* Court did not render a majority opinion.

Justice Brennan wrote what is commonly referred to as the “plurality” opinion. The plurality determined that the First Amendment necessarily limits the government’s right to remove from a high school library materials based on their content. Justice Brennan reasoned that the right to receive information is inherent in the right to speak and that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”

Justice Brennan explained that this principle was particularly important given the special role of the school’s library as a locus for free and independent inquiry. At the same time, Justice Brennan recognized that public high schools play a crucial role in the preparation of individuals for participation as citizens. Justice Brennan, therefore, agreed with the petitioners that local school boards are entitled to great discretion “to establish and apply their curriculum in such a way as to transmit community values.” Accordingly, the plurality determined that “local school boards may not remove books … simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’” Justice Brennan noted that the school board might remove books that are not suited to educational purposes or those that contain pervasive vulgarity.

In his concurring opinion, Justice Blackmun focused not on the right to receive information recognized by the plurality, but on the school board’s discrimination against disfavored ideas. Justice Blackmun recognized that *Pico*’s facts invoke two significant, competing interests: (1) the mission of public schools to prepare students to be ci-
zens; and (2) the First Amendment's core proscription against content-based regulation of speech.\textsuperscript{23} Justice Blackmun noted that a state must normally demonstrate a compelling reason for content-based regulation, but that a more limited form of protection should apply to public education.\textsuperscript{24} Balancing the two principles at stake, Justice Blackmun concurred that the school board could not remove books based on mere disapproval of their content, but could limit its collection for reasons of educational suitability, budgetary constraint, offensive language, or age inappropriateness.\textsuperscript{25}

In his dissent, Chief Justice Burger concluded that any First Amendment right to receive speech does not affirmatively obligate the government to provide such speech in high school libraries.\textsuperscript{26} He reasoned that, although a state could not constitutionally prohibit a speaker from reaching an intended audience, nothing in the First Amendment requires public high schools to act as a conduit for particular speech.\textsuperscript{27} Chief Justice Burger explained that such an obligation would be inconsistent with public high schools' inculcative mission. That mission necessarily requires schools to make content-based choices among competing ideas in order to establish a curriculum and to educate students.\textsuperscript{28}

It is significant to note that all of the 	extit{Pico} Justices, including the dissenters, recognize that any discretion afforded to school libraries is uniquely tied to the public schools' role as educator.\textsuperscript{29} Of even more significance to your question is Justice Rehnquist's observation that high school libraries must be treated differently from public libraries.\textsuperscript{30} Indeed, Chief Justice Burger and Justice Rehnquist justified giving public schools broad discretion to remove books from the school library, in part by noting that such objectionable materials remained available in public libraries.\textsuperscript{31} Both before and after the 	extit{Pico} decision, lower courts faced with schoolbook bans generally have upheld school boards' decisions that remove books from the curriculum, but not from the school library.\textsuperscript{32}

	extit{Campbell v. St. Tammany Parish School Board} arose from a parent's complaint, which persuaded the school board to remove a book entitled "\textit{Voodoo & Hoodoo}" from all parish school libraries.\textsuperscript{33} The book traced the development of African tribal religion and contained "how-to" advice about spells, tricks, and hexes as ways to bring ill fortune to others or to bring about particular events.\textsuperscript{34} A fourteen-member school board voted in favor of removing the book, but stated no reasons for its decision.\textsuperscript{35} Earlier, the district court granted plaintiffs' motion for summary judgment and ordered the return of the book to all parish libraries.\textsuperscript{36} Relying on 	extit{Pico}, the district court found that the school board's removal was intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs.\textsuperscript{37} In reviewing the depositions of eight of the twelve school board members who voted in favor of removal, the Fifth Circuit found the factual record insufficiently developed and remanded the case for trial to determine "the true, decisive motivation behind the School Board's decision."\textsuperscript{38} The Fifth Circuit's decision was influenced by the fact that "many of the School Board members had not even read the book, or had read less than its entirety, before voting as they did."\textsuperscript{39} The
court also noted that the school board's noncurricular-based decision, coupled with the refusal to consider its own committees' recommendations, suggested that the board's decision might have been an attempt to "'strangle the free mind at its source.'" You do not relate the types of books that are at issue or whether the school board has considered any options other than removal of an objectionable book. These factors, and others, would be relevant to the constitutional analysis of any particular removal decision. Regardless, any determination whether a specific book may be banned from a school library necessarily requires a factual inquiry into the subject matter of the book. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. While factors such as educational suitability and quality are inherently subjective or judgmental in nature, neither the Constitution of the United States nor the Pico decision prohibits good-faith educational judgments by school boards based upon such factors.

**CONCLUSION**

Accordingly, it is my opinion that a school board has the authority to remove books from a public school library for reasons such as pervasive vulgarity, educational unsuitability, or age inappropriateness based on its good faith educational judgment. Such decisions regarding any particular materials, however, would require the school board to make a factual determination.

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1See Va. Code Ann. § 22.1-79(2), (3), (5) (Michie Repl. Vol. 2000) (authorizing school board to care for, manage and control school property, oversee conduct of public schools and ensure compliance with laws, and determine studies to be pursued and teaching methods). This opinion is limited to school libraries where the school board has retained complete or some control or authority over library operations. This opinion does not extend to purely public libraries operating on school property pursuant to agreements between a local school board and a library board pursuant to § 22.1-131.


4See, e.g., Kuhlmeier, 484 U.S. at 278 (noting that public educator's task is weighty and delicate, demanding particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so.)

5Id. at 273.

6Id. (noting that education is primarily responsibility of parents, teachers, and state and local school officials); Bd. of Educ. v. Rowley, 458 U.S. 176, 207-08 (1982) (placing primary responsibility of determining educational methods for handicapped children in state and local authorities and parents); Wood v. Strickland, 420 U.S. 308, 326 (1975) (noting that public education system necessarily relies on judgment of school administrators and school board members); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (noting that public education generally is under control of state and local authorities).

8Id. at 857 (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

9Id. at 907 (citing Pico v. Bd. of Educ., 638 F.2d 404, 419 n.1 (2d Cir. 1980).

10Id. at 860.

12The Pico plurality opinion states: "Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Id. at 871 (first emphasis added) (footnote omitted). You do not advise whether any decision has been made regarding removing books, and, if so, by whom. It is evident that the lawfulness of any removal decision will turn, in large part, on the motives for such removal.

13Compare 457 U.S. at 855 (plurality op.), with id. at 875-79 (Blackmun, J., concurring), and id. at 883-84 (White, J., concurring).

14The Supreme Court has noted that in cases for which there is no clear majority, a court should examine the "position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)), quoted in Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995). The Fifth Circuit noted that "Justice White's concurrence in Pico represents the narrowest grounds ..., and it does not reject the plurality's assessment of the constitutional limitations on school officials' discretion to remove books from a school library." Campbell, 64 F.3d at 189. Although the plurality in Pico does not have "precedential value," the Fifth Circuit noted that it would "provide useful guidance in determining the constitutional implications of removing books from a public school library." Id. (citing Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982)).

15Three Justices joined in the plurality opinion, one of whom concurred in part. Pico, 457 U.S. at 855.

18See id. at 869-71 (plurality op.).

17Id. at 866 (plurality op.) (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

18See id. at 868-69 (plurality op.). Justice Powell wrote a separate dissent in Pico to say that the plurality opinion is standardless and meaningless. See id. at 895 (Powell, J., dissenting). Justice Powell noted that "[e]ven the 'chancellor's foot' standard in ancient equity jurisdiction was never [as] fuzzy" as attempting to divine which books could be removed under the plurality opinion's standards. Id. (Powell, J., dissenting). Justice Powell's dissent, like Justice Rehnquist's, also took issue with how the plurality opinion characterizes the nature of a school library. "The plurality suggests that a school library derive special protection under the Constitution because the school library is a place in which students exercise unlimited choice. This suggestion is without support in law or fact. It is contradicted by this very case. The school board in this case does not view the school library as a place in which students pick from an unlimited range of books—some of which may be inappropriate for young people. Rather, the school library is analogous to an assigned reading list within which students may exercise a degree of choice." Id. at 895 n.2 (Powell, J., dissenting) (citations omitted). Justice Rehnquist noted that "elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role." Id. at 915 (Rehnquist, J., dissenting).

19Id. at 864 (plurality op.) (quoting Ambach, 441 U.S. at 76-77).

20Id. (citation omitted).


22Id. at 871.
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23See id. at 876-78 (Blackmun, J., concurring).
24See id. at 877.
25See id. at 879-80.
26See id. at 887-89 (Burger, C.J., dissenting).
27See id.
28See id. at 889.
29See id. at 863-64, 869-71 (plurality op.); id. at 876 (Blackmun, J., concurring); id. at 879 (Blackmun, J., concurring) ("Certainly, the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values."); cf. id. at 889 (Burger, C.J., dissenting) ("Whatever role the government might play as a conduit of information, schools in particular ought not to be made a slavish courier of the material of third parties.... How are 'fundamental values' to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum."); id. at 909-10 (Rehnquist, J., dissenting) ("When it acts as an educator, ... the government is engaged in inculcating social values and knowledge in relatively impressionable young people.... In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign."); id. at 921 (O'Connor, J., dissenting) ("[I]n this case the government is acting in its special role as educator."). In addition, the Court states: "It is well established that 'decency' is a permissible factor where 'educational suitability' motivates its consideration." Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 570 (1998).
30See Pico, 457 U.S. at 915 (Rehnquist, J., dissenting) ("Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry[.]").
31See id. at 892 (Burger, C.J., dissenting) ("Books may be acquired from ... public libraries, or other alternative sources unconnected with the unique environment of the local public schools."); id. at 915 (Rehnquist, J., dissenting) ("[T]he most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere.... The books may be borrowed from a public library[.]").
32Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976) (holding that action of school board in removing books from public high school library, because it deemed them distasteful, was unconstitutional); Case v. Unified Sch. Dist., 908 F. Supp. 864 (D. Kan. 1995) (removing lesbian romance novel from high school library, because school board's decision was based on personal disapproval of author's ideas, was in disregard of policy governing objectionable materials, and was done without discussion of less restrictive alternatives); Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989), aff'd, 921 F.2d 1047 (10th Cir. 1990) (holding that removal of Bible from school library was unconstitutional; however, removal of religiously themed books from classroom library was justified by Establishment Clause concerns); Sheck v. Baileyville Sch. Comm., 530 F. Supp. 679 (D. Me. 1982) (holding that students and their parents were entitled to preliminary injunction against school committee for banning library book for its "objectionable" language); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) (finding that removal of "MS magazine" from high school library because of its "political" content was unconstitutional); Right to Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703 (D. Mass. 1978) (holding that school committee's removal from high school library of anthology of writings containing poem with indecent, but nonobscene, language infringed on First Amendment rights of students and faculty). But see Virgil v. Sch. Bd., 862 F.2d 1517 (11th Cir. 1989) (holding that school board's decision to remove previously approved curriculum from elective course was constitutional; decision was based on vulgarity and sexually explicit content of material and was reasonably related to legitimate pedagogical concerns); Bicknell v. Vergennes Union High Sch. Bd. of Dirs., 638 F.2d 438 (2d Cir. 1980) (finding that school board did not violate students' First Amendment rights in removing books from school library on basis of vulgarity and indecent language); Presidents Council v. Cmty. Sch. Bd., 457 F.2d 289 (2d Cir. 1972) (holding that school board's removal of book about
Youth's life in Spanish Harlem from junior high school library and restricting its availability to parents was not unconstitutional.

64 F.3d at 185-86.

Id. at 185.

Id. at 187 (12-2 decision).

Id.


Campbell, 64 F.3d at 190.

Id.

Two separate committees, selected pursuant to the school board's appeal procedures, recommended keeping the book, but with restricted access requiring parental permission. Id. at 186-87.

Id. at 190 (quoting Barnette, 319 U.S. at 637).


Pico noted that, "[i]n rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content." 457 U.S. at 869 (plurality op.).

OP. NO. 03-021

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS TO HOLD OFFICE) - (ELECTORAL BOARDS; REGISTRARS AND OFFICERS OF ELECTION).

ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION - REGISTRARS - LOCAL ELECTORAL BOARDS - CANDIDATES FOR OFFICE.

Familial relationship to general registrar does not prohibit spouse or family member from running for, or holding, public office.

THE HONORABLE GARY A. REESE
MEMBER, HOUSE OF DELEGATES
MARCH 31, 2003

ISSUE PRESENTED

You ask whether any restrictions exist against a spouse or family member of a general registrar running for public office.

RESPONSE

It is my opinion that a familial relationship to a general registrar does not prohibit his spouse or family member from running for, or holding, public office.

APPLICABLE LAW AND DISCUSSION

Article II, §8 of the Constitution of Virginia requires the electoral board in each county and city to appoint a general registrar for its county or city. Section 8 also prohibits dual officeholding by a general registrar. Sections 24.2-109, 24.2-110 and 24.2-114 set forth the provisions governing the appointment, removal, qualifications, and duties of a general registrar.
Article II, § 5 provides the general qualifications for a person to hold elective office. Article II, § 5(c) provides that the General Assembly may impose requirements "to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision." Sections 24.2-500 and 24.2-505 set forth the requirements for candidates to stand for public office.

A 1971 opinion of the Attorney General concludes that the spouse of a county supervisor, or of any county officer, may be appointed general registrar.¹ I find no constitutional or statutory provision that renders the conclusion of the 1971 opinion incorrect.² I note, however, that § 24.2-110 prohibits a general registrar from "serv[ing] as a paid or volunteer worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of his jurisdiction."

CONCLUSION

Accordingly, it is my opinion that a familial relationship to a general registrar does not prohibit a spouse or family member from running for, or holding, public office.

²Please note that § 24.2-106, which governs the appointment of electoral board members, prohibits a circuit court judge from appointing to the electoral board the spouse of an electoral board member or a general registrar for the county or city. See also § 24.2-110 (prohibiting electoral board from appointing to office of general registrar “any person who is the spouse of an electoral board member or any person, or the spouse of any person, who is the parent, grandparent, sibling, child, or grandchild of an electoral board member”).

OP. NO. 03-053
CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).

Whether nonprofit entity is 'benevolent' entity for property tax exemption purposes is factual determination to be made by local governing body, after consideration of attendant facts.

MR. JOHN H. TATE, JR.
COUNTY ATTORNEY FOR SMYTH COUNTY
JULY 31, 2003

ISSUE PRESENTED

You ask whether the Smyth County Board of Supervisors may grant tax-exempt status to the Thomas Bridge Water Corporation, a privately held nonprofit corporation providing water service to certain residents of the county, pursuant to Article X, § 6(a)(6) and § 58.1-3651.

RESPONSE

It is my opinion that whether a nonprofit entity is a “benevolent” entity for the purposes of Article X, § 6(a)(6) is a factual determination to be made by the local governing
body, after a careful consideration of all the attendant facts consistent with the procedures in § 58.1-3651.

BACKGROUND

You relate that the Thomas Bridge Water Corporation is a public service water system serving approximately 1,407 users in Smyth County. The corporation was chartered in 1965. You advise that although the officers and directors are authorized to receive payment for their services, they receive no compensation other than a fee of $50 per board meeting. A shareholder's stock in the corporation reverts to the corporation in the event of a sale of the stockholder's property and the stockholder no longer is a personal customer of the corporation.

You relate that Smyth County provides water service to the towns of Marion, Chilhowie, and Saltville. Additionally, the Rye Valley Water Authority serves part of the county, and the local governing bodies control the other water systems in the county. The county does not tax these systems or the locality that operates them.

APPLICABLE LAW AND DISCUSSION

Pursuant to Article XII, § 1 of the Constitution of Virginia, the 2002 and 2001 Sessions of the General Assembly agreed to an amendment to Article X, § 6(a)(6), relating to property made exempt from taxation “by classification or designation by ... an ordinance adopted by the local governing body” “on and after January 1, 2003.” The voters ratified the amendment to § 6(a)(6) at the general election held on November 5, 2002 (“ratified amendment”). Prior to ratification, Article X, § 6(a)(6) required that property tax exemptions be granted by “a three-fourths vote ... of the General Assembly.”

The ratified amendment to Article X, § 6 provides:

(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

....

(6) Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly an ordinance adopted by the local governing body and subject to such restrictions and conditions as may be prescribed provided by general law.

The 2003 Session of the General Assembly added Article 4.1 in Chapter 36 of Title 58.1, consisting of § 58.1-3651. Section 58.1-3651(A) limits property tax exemptions to “the real or personal property, or both, owned by a nonprofit organization that uses such property for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes.” Section 58.1-3651(B) establishes certain
requirements for notifying the public of a hearing regarding the proposed adoption of
an ordinance exempting property pursuant to subsection A, and sets forth questions
to be considered by the local governing body before adopting such an ordinance.
Section 58.1-3651(C) provides that “[e]xemptions of property from taxation under this
article shall be strictly construed in accordance with Article X, Section 6 (f) of the
Constitution of Virginia.”

A 1976 opinion of the Attorney General concludes that under § 6(a)(6), the General
Assembly could exempt the Thomas Bridge property from local property taxes. The
opinion recognizes the authority of the General Assembly to enact legislation to exempt property used for “‘charitable or benevolent’” purposes. The power to make such determinations is now vested in the local governing body. Section 58.1-3651
governs the procedures for making such determinations. To the extent, the General
Assembly could deem Thomas Bridge a “charitable or benevolent” entity for the
purposes of § 6(a)(6), so may the Smyth County Board of Supervisors.

The 1976 opinion recognizes that the General Assembly could deem an organization “benevolent” for the purposes of tax exemption. Similarly, local governing bodies are now authorized to make such determinations based on a reasonable definition of the term. Of course, a local governing body may not arbitrarily exercise such discretion and adopt a definition of “benevolent” so broad as to give the word no meaning.

Whether the Thomas Bridge Water Corporation is a benevolent entity for the purposes of § 6(a)(6) is a determination to be made by the Smyth County Board of Supervisors consistent with the procedures in § 58.1-3651. Section 58.1-3651(B)(1)-(8) requires the governing body to consider a series of questions in determining whether to grant an exemption. Nothing in § 58.1-3651 requires a governing body to answer each of the considerations listed in subsection B in the affirmative. Presumably, these factors assist in making the determination whether “[p]roperty [is] used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes.” Such a determination necessarily is fact dependent. After careful consideration of all the attendant facts, should the board of supervisors decide that such an entity meets the definition of “benevolent,” it is authorized to grant the tax-exempt status.

For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. Consequently, I am not authorized to opine on whether the Thomas Bridge Water Corporation is, in fact, a “benevolent” entity for the purposes of § 6(a)(6).

CONCLUSION

Accordingly, it is my opinion that whether a nonprofit entity is a “benevolent” entity for the purposes of Article X, § 6(a)(6) is a factual determination to be made by the
local governing body, after a careful consideration of all the attendant facts consistent with the procedures in § 58.1-3651.


2A "general election" is held "on the Tuesday after the first Monday in November ... for the purpose of filling offices regularly scheduled by law to be filled at those times." VA. CODE ANN. § 24.2-101 (LexisNexis Supp. 2003) (defining "general election," as that term is used in Title 24.2, which governs elections held in the Commonwealth).

3See 2002 Va. Acts ch. 630, § 1, supra note 1, at 896 (directing officers of election to "take the sense of the qualified voters upon the ratification or rejection of the proposed amendment to [Article X, § 6]" at the November 5, 2002 election).

42002 Va. Acts, supra note 1, at 1999-2000, 896; 2001 Va. Acts, supra note 1, at 1075 (providing for submission to voters of proposed amendment to Article X, § 6(a)(6), replacing language requiring that exemptions be granted by "a three-fourths vote of the members elected to each house of the General Assembly," with "an ordinance adopted by the local governing body," subject to restrictions and conditions as "provided by general law").


62003 Va. Acts ch. 1032, at 1696, 1696-97; see also id. § 3, at 1697 (declaring that Chapter 1032 "is in force on and after January 1, 2003").


82003 Va. Acts ch. 1032, at 1696, 1696-97; see also id. § 3, at 1697 (declaring that Chapter 1032 "is in force on and after January 1, 2003").

9See 2002 Va. Acts ch. 630, § 1, supra note 1, at 896 (directing officers of election to "take the sense of the qualified voters upon the ratification or rejection of the proposed amendment to [Article X, § 6]" at the November 5, 2002 election).


12The ability of a taxpayer to test the legality of expenditures by a local government is premised on the "peculiar relation of the corporate taxpayer to the [municipal] corporation [that] makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" ASARCO, Inc. v. Kadish, 490 U.S. 605, 613 (1989) (quoting Massachusetts v. Mellon, 262 U.S. 447, 486-87 (1923)). Thus, a local taxpayer may have standing to challenge the granting of a tax exemption where such exemption is improperly granted as a procedural or substantive matter. See generally Burk v. Porter, 222 Va. 795, 284 S.E.2d 602 (1981) (determining that taxpayers had standing to seek in equity accounting and reimbursement of expenditures from members of county board of supervisors for allegedly unauthorized travel); Armstrong v. County of Henrico, 212 Va. 66, 76-77, 182 S.E.2d 35, 43 (1971) (determining that taxpayers had standing to challenge legality of authority delegated by sanitary district to county to impose rates and connection charges for countywide water and sewerage systems); Gordon v. Bd. of Supvrs., 207 Va. 827, 153 S.E.2d 270 (1967) (determining that taxpayer landowners' had right to test legality of authority of county board of supervisors to lend money to airport authority for costs preliminary to construction of airport); Appalachian Elec. Power Co. v. Town of Galax, 173 Va. 329, 4 S.E.2d 390 (1939) (determining that taxpayers had standing to resort to equity to prevent allegedly illegal issuance of local bonds to finance construction of electric generating plant). Cf. Sauer v. Monroe, 171 Va. 421, 199 S.E. 487 (1938) (determining that taxpayer, who has suffered no special damage, may not sue on behalf of municipality to recover money he contends has been illegally disbursed, without first requesting proper authorities to sue or showing that such request would have been unavailing).

13VA. CONST. art. X, § 6(a)(6).
OP. NO. 03-049

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY) — FUTURE CHANGES (AMENDMENTS) — LEGISLATURE (GENERAL LAWS).

TAXATION: TAX EXEMPT PROPERTY.

Local property tax exemptions granted by General Assembly prior to January 1, 2003, either by designation or classification, are valid and are not repealed by ratified amendment to Article X, § 6(a)(6). Authority of General Assembly to repeal classification or designation tax exemptions granted prior to January 1, 2003.

THE HONORABLE WILLIAM J. HOWELL
SPEAKER OF THE HOUSE OF DELEGATES
AUGUST 5, 2003

ISSUES PRESENTED

You inquire regarding the effect of the November 2002 amendment to Article X, § 6(a)(6) of the Constitution of Virginia, relating to local property tax exemptions granted by the General Assembly, either by classification or by designation, prior to January 1, 2003. Specifically, you ask whether exemptions from local property taxation granted to organizations, either by a designation or classification exemption statute prior to January 1, 2003, continue to be valid, or whether the amendment to Article X, § 6(a)(6) repeals such exemptions. You also inquire whether the General Assembly, or a locality acting under an ordinance adopted pursuant to Article X, § 6(a)(6), has the authority to repeal exemptions granted prior to January 1, 2003.

RESPONSE

It is my opinion that local property tax exemptions granted by the General Assembly prior to January 1, 2003, either by designation or classification, remain valid and are not repealed by the ratified amendment to Article X, § 6(a)(6). It is further my opinion that only the General Assembly has authority to repeal classification or designation tax exemptions granted prior to January 1, 2003.

APPLICABLE LAW AND DISCUSSION

Pursuant to Article XII, § 1 of the Constitution of Virginia, the 2002 and 2001 Sessions of the General Assembly agreed to an amendment to Article X, § 6(a)(6), relating to property made exempt from taxation "by classification or designation by ... an ordinance adopted by the local governing body" on and after January 1, 2003. The voters ratified the amendment to § 6(a)(6) at the general election held on November 5, 2002 ("ratified amendment"). Prior to ratification, Article X, § 6(a)(6) required that property tax exemptions be granted by "a three-fourths vote ... of the General Assembly." The General Assembly grants exemptions from local property taxation either by general classification or by specific designation.

The ratified amendment to Article X, § 6 provides:
(a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

(6) Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly, an ordinance adopted by the local governing body and subject to such restrictions and conditions as may be prescribed provided by general law.

The 2003 Session of the General Assembly added Article 4.1 in Chapter 36 of Title 58.1, consisting of § 58.1-3651.8 Section 58.1-3651(A) limits property tax exemptions to "the real or personal property, or both, owned by a nonprofit organization that uses such property for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes." Section 58.1-3651(B) establishes certain requirements for notifying the public of a hearing regarding the proposed adoption of an ordinance exempting property pursuant to subsection A, and sets forth questions to be considered by the local governing body before adopting such an ordinance. Section 58.1-3651(D) provides, in part:

Nothing in this section or in any ordinance adopted pursuant to this section shall affect the validity of a classification exemption claimed by an organization, or a designation exemption granted by the General Assembly, prior to January 1, 2003, that was still effective on December 31, 2002, pursuant to Article 3 (§ 58.1-3609 et seq.) or 4 (§ 58.1-3650 et seq.) of [Chapter 36], and no locality shall recognize a classification exemption first claimed by an organization pursuant to Article 3 (§ 58.1-3609 et seq.) of [Chapter 36] after January 1, 2003. [A designation] exemption granted pursuant to Article 4 (§ 58.1-3650 et seq.) of [Chapter 36] may be revoked in accordance with the provisions of § 58.1-3605.

You ask whether the ratified amendment to Article X, § 6(a)(6) repeals designation and classification property tax exemptions granted prior to January 1, 2003. "Questions of constitutional construction are in the main governed by the same general rules as those applied in statutory construction." 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." Furthermore, """"every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it."""" It is the duty of the court in construing the Constitution to give effect to an express provision, rather than to an implication."
Article X, § 6(a)(6) now permits local governing bodies to grant property tax exemptions, by ordinance, within the parameters established by the General Assembly. Prior to ratification, these exemptions were granted only by “a three-fourths vote of the members elected to each house of the General Assembly.” 10 The amendment is plain and unambiguous. The ratified amendment to § 6(a)(6) contains no language repealing existing property tax exemptions.

Moreover, the continued validity of the prior property tax exemptions is not inconsistent with the ratified amendment. 14 Some courts suggest that the test for an inconsistency to invalidate a previously enacted statute is whether the legislature still could enact the statute after the constitutional amendment takes effect. 16 Under this test, a substantive inconsistency would invalidate a previously enacted statute. For example, a statute prohibiting a certain tax exemption would not survive new constitutional language specifically permitting the exemption. In Article X, § 6(a)(6), however, there is no substantive difference in the language that existed prior to the ratified amendment, i.e., permitting property tax exemptions for organizations that use their property for religious, charitable and other similar purposes. The inconsistency in this case is merely procedural, in the sense that the exemptions existing prior to January 1, 2003, were granted by the General Assembly and not by localities. Therefore, there is nothing in the ratified amendment that repeals any property tax exemption existing prior to January 1, 2003.

Furthermore, the Act placing the amendment on the ballot for the November 2002 general election provides that, “[i]f a majority of those voting vote in favor of the amendment, it shall become effective on January 1, 2003.” 11 This language is prospective and does not suggest that property tax exemptions existing at the time of the amendment would be subject to repeal or that the continued validity of those exemptions is inconsistent with the amendment. Interpreting the amendment to § 6(a)(6) to include a repeal of previously granted exemptions would require an enlargement of the amending language without any grounds to do so. Therefore, the ratified amendment to § 6(a)(6) does not repeal exemptions granted prior to January 1, 2003.

Additionally, I find nothing in § 58.1-3651 that repeals any existing property tax exemptions. Article X, § 6(a)(6) allows a local governing body to grant property tax exemptions, by ordinance, subject to parameters established by the General Assembly. Section 58.1-3651 sets forth those parameters. In addition, § 58.1-3651(D) prohibits a locality from revoking a property tax exemption “granted by the General Assembly, prior to January 1, 2003, that was still effective on December 31, 2002, pursuant to [§ 58.1-3609 or § 58.1-3650].”

Sections 58.1-3609 and 58.1-3650 grant a large majority of the property tax exemptions. 18 Other statutory provisions, however, provide property tax exemptions by designation or classification. 19 Although § 58.1-3651 makes specific reference to §§ 58.1-3609 and 58.1-3650, there is no indication that the General Assembly intended to repeal any existing property tax exemption. “‘Repeal of a statute by implication is not favored,
and, indeed, there is a presumption against a legislative intent to repeal "where express terms are not used."20 As noted previously, there is no language in § 58.1-3651 repealing any existing property tax exemptions. There are no express terms repealing any existing property tax exemptions and no language that would overcome a presumption against repeal by implication; therefore, neither Article X, § 6(a)(6) nor § 58.1-3651 repeals property tax exemptions granted by the General Assembly prior to January 1, 2003.

You next ask whether a local governing body or the General Assembly may repeal an exemption granted prior to January 1, 2003. "The Dillon Rule of strict construction controls our determination of the powers of local governing bodies. This rule 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."21 The ratified amendment to Article X, § 6(a)(6) makes no reference to any authority on the part of a locality to repeal any property tax exemption previously established by the General Assembly. Additionally, as noted above, § 6(a)(6) does not affect exemptions granted by the General Assembly prior to January 1, 2003. Therefore, Article X, § 6(a)(6) contains no explicit or implicit power by which a locality may repeal previous tax exemptions granted by the General Assembly. The General Assembly is vested with the power to repeal any law that it previously has passed.22 Therefore, the General Assembly has the sole authority to repeal property tax exemptions granted prior to January 1, 2003.

CONCLUSION

It is my opinion that local property tax exemptions granted by the General Assembly prior to January 1, 2003, either by designation or classification, remain valid and are not repealed by the ratified amendment to Article X, § 6(a)(6). It is further my opinion that only the General Assembly has authority to repeal classification or designation tax exemptions granted prior to January 1, 2003.

3 A "general election" is held "on the Tuesday after the first Monday in November ... for the purpose of filling offices regularly scheduled by law to be filled at those times." VA. CODE ANN. § 24.2-101 (LexisNexis Supp. 2003) (defining "general election," as that term is used in Title 24.2, which governs elections held in the Commonwealth).
4 See 2002 Va. Acts ch. 630, § 1, supra note 1, at 896 (directing officers of election to "take the sense of the qualified voters upon the ratification or rejection of the proposed amendment to [Article X, § 6]" at the November 5, 2002 election).
5 2002 Va. Acts, supra note 1, at 2000, 896; 2001 Va. Acts, supra note 1, at 1075 (providing for submission to voters of proposed amendment to Article X, § 6(a)(6), replacing language requiring that exemptions be granted by "a three-fourths vote of the members elected to each house of the General Assembly," with "an ordinance adopted by the local governing body," subject to restrictions and conditions as "provided by general law").


2003 Va. Acts ch. 1032, at 1696, 1696-97; see also id. § 3, at 1697 (declaring that Chapter 1032 "is in force on and after January 1, 2003").


Id. at 945-46, 172 S.E. at 889.

See cites supra note 5.

See Swift & Co. v. City of Newport News, 105 Va. 108, 115, 52 S.E. 821, 824 (1906) (noting that only where prior law is inconsistent with new constitution or amendment is existing law nullified).


Agnew, 253 N.W.2d at 184; Stokes, 17 Ohio App. 2d at 251, 246 N.E.2d at 611-12.


Section 58.1-3650 provides an exemption for the individually designated properties listed in Article 4, Chapter 36 of Title 58.1, §§ 58.1-3650.1 to 58.1-3650.1001.

See, e.g., §§ 58.1-3606, 58.1-3607 (exempting property from taxation by classification and designation, respectively).


See VA. CONST. art. IV, § 15.

OP. NO. 03-029
COUNTIES, CITIES AND TOWNS: BUDGETS, AUDITS AND REPORTS — FRANCHISES, PUBLIC PROPERTY, UTILITIES.

Authority for town of Warrenton to transfer surplus water and sewer utility funds to town's general fund for construction of recreation center, provided utility is not independent entity.

MR. JAMES P. FISHER
TOWN ATTORNEY FOR THE TOWN OF WARRENTON
JUNE 3, 2003
ISSUE PRESENTED
You ask whether the town of Warrenton has the authority to use surplus revenues from water and sewer utility fees to fund a portion of the construction costs for a recreation center at the St. Leonard's Farm property. You specifically inquire whether the town is prohibited or restricted in its use of such surplus or whether it may transfer the surplus to the town's general fund for general town expenditures.

RESPONSE
It is my opinion that the town of Warrenton has the authority to transfer surplus water and sewer utility funds to the town's general fund for use in constructing a recreation center, provided that such utility is not an independent entity.

BACKGROUND
You relate that the town of Warrenton's water and sewer fund has accrued substantial surplus revenues that exceed the reserves needed for operating and capital expenses within the reasonably near future.

You explain that the town of Warrenton recently authorized the construction of a recreational center that will serve both the town residents and those in surrounding areas of Fauquier County. The town has acquired the land for the facility; however, the building and related improvements will cost approximately $8 million. The town council may operate the recreational center as a self-supporting operation through the imposition of fees for use of the facility. With respect to the capital costs, the town council desires to obtain approximately $2 million from the utility fund surplus to reduce the debt service.

APPLICABLE LAW AND DISCUSSION
"It is a frequently recited proposition that a municipality is authorized to perform both 'governmental' and 'proprietary' functions. Governmental functions ... are powers and duties to be performed exclusively for the public welfare." Stated another way, a governmental function involves "the exercise of an entity's political, discretionary, or legislative authority." A function is governmental if it is "directly tied to the health, safety, and welfare of the citizens." The regulation of traffic, or a similar activity intended to protect the general public safety, is a governmental function of a municipality. The routine maintenance of a municipality's streets, however, is a proprietary function.

"[T]he operation of a water department for the purpose of supplying water for domestic and commercial purposes [generally] is a private or proprietary right." "In the performance of a purely proprietary function, a municipality may consider factors of corporate benefit and pecuniary profit." In addition, a municipality generally has no affirmative duty, except that which is undertaken by contract, to furnish water and sewer service to users outside its territorial limits. When a municipal corporation provides utility services outside its territorial limits, it is also performing a proprietary, not a governmental, function.
Section 15.2-2111 authorizes a locality to operate and regulate water and sewer systems. Section 15.2-2111 provides:

Any locality may exercise its powers to regulate sewage collection, treatment or disposal service and water service notwithstanding any anticompetitive effect. Such regulation may include the establishment of an exclusive service area for any sewage or water system, including a system owned or operated by the locality, the fixing of rates or charges for any sewage or water service, and the prohibition, restriction or regulation of competition between entities providing sewage or water service.

No power herein granted shall alter or amend the powers or the duties of any present or future authority created pursuant to the Virginia Water and Waste Authorities Act (§ 15.2-5100 et seq.) nor confer any right or responsibility upon the governing body of any locality which would supersede or be inconsistent with any of the duties or responsibilities of the State Water Control Board. 1101

Section 15.2-2111 clearly authorizes a locality to regulate sewer or water systems and expressly includes within the locality’s power “the fixing of rates or charges for any sewage or water service.” A 1997 opinion of the Attorney General concludes that a locality is authorized to establish, operate and maintain water and sewer systems and to fix fees and charges for use of the system. 11 The opinion also notes that, in the absence of a statutory standard for determining charges, the fees and charges fixed by the locality are subject only to the implicit requirement of reasonableness. 12 Furthermore, a 1998 opinion recognizes that a locality, pursuant to the authority extended by § 15.2-2111, may set water rates by regulating the rates of a small water public utility system, subject to the ultimate review of the State Corporation Commission. 13 It is, therefore, clear that the town of Warrenton may set fees and charges for use of a water and sewer utility, subject only to the implicit requirement of reasonableness. 14

Budgeting is a planning process, required by the General Assembly, by which localities anticipate revenue needs and make decisions about the priority of programs and level of services to be provided. 15 Budgets adopted by local governing bodies are, therefore, for planning and informative purposes and are statutorily distinguished from appropriations. 16 The appropriations process is the mechanism by which the governing body makes funds available for spending on those programs and operations it plans to support. 18 The local governing body may disburse money only pursuant to an appropriation for a contemplated expenditure. 19 Thus, adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose. 20 In addition, when a locality develops a surplus in one fiscal year, it may appropriate and expend such surplus funds in the following fiscal year. 21

In a 1982 opinion, the Attorney General responds to an inquiry regarding whether funds of other independent agencies within a town government, such as the fire department and airport commission, may be transferred to the town’s general fund. 22
The opinion concludes that, if the organizations are, in fact, independent entities, such transfers and repayments of funds by agreement would constitute loans to the town, to be repaid from the collection of revenues in the current year. You do not indicate whether the water and sewer utility in the town is an independent entity. Assuming that the water and sewer utility is not an independent entity, I find no prohibition against the transfer of surplus revenues to the town’s general fund for use in constructing the recreation center.

CONCLUSION

Accordingly, it is my opinion that the town of Warrenton has the authority to transfer surplus water and sewer utility funds to the town’s general fund for use in constructing a recreation center, provided that such utility is not an independent entity.

4 See, e.g., Transp., Inc. v. City of Falls Church, 219 Va. 1004, 1006, 254 S.E.2d 62, 64 (1979).
9 See Light, 168 Va. at 209, 190 S.E. at 287 (citing Mt. Jackson, 151 Va. at 404, 145 S.E. at 357); 11 McQuillin § 31.10, supra note 8.
12 Id. at 77.
13 1998 Op. Va. Att’y Gen. 117, 119 (determining that, when locality fixes amount of increase for public utility under § 15.2-2111, such fee will not control if either affected customers, utility itself, or State Corporation Commission chooses to hold hearing on amount of rate change pursuant to § 56-265.13:6(A), which authorizes Commission to determine amount of fee increase).
14 In your written opinion, you conclude that the town of Warrenton may set rates that result in net revenue or a profit. Given the implicit requirement of reasonableness in setting fees and charges for the use of a town water and sewer utility, however, it is difficult to discern how the surplus you describe has been accumulated. 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).
You ask whether the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective persons or entities ("borrowers") seeking tax-exempt bond financing to require borrowers to make payment to the Authority for private activity bond allocations not used by borrowers.

RESPONSE

It is my opinion that the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective borrowers that require payment to the Authority for private activity bond allocations unused as a result of the prospective borrowers not proceeding with the transaction.¹

APPLICABLE LAW AND DISCUSSION

Sections 15.2-4900 through 15.2-4920 comprise the Industrial Development and Revenue Bond Act. The Act authorizes local governing bodies to create industrial development authorities by ordinance.² The intent of the General Assembly in authorizing the creation of industrial development authorities is to allow such authorities to "make loans³³... to promote industry and develop trade by inducing manufacturing, industrial, governmental, nonprofit and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth."⁴ Section 15.2-4905 authorizes industrial development authorities "[t]o make loans ... to any person, partnership, association, corporation, business, or governmental entity in furtherance of the purposes of [the Industrial Development and Revenue Bond Act],"⁵ and "[t]o enter into contracts"⁶ and issue bonds.⁷ Section 15.2-4901 provides that the Act is to be liberally
construed in conformity with the stated intentions of the legislature. Finally, § 15.2-4901 expresses the intent of the General Assembly to vest industrial development authorities with all powers necessary to enable them to accomplish the purposes for which they are created. Such “powers shall be exercised for the benefit of the inhabitants of the Commonwealth” through the increase of commerce.

You relate that the Industrial Development Authority of the Town of Bridgewater, in the exercise of its powers, issues tax-exempt bonds and lends the proceeds to private businesses, subject to certain conditions. You further relate that, as a condition precedent to obtaining tax-exempt status for certain private activity bonds, the Authority must obtain an allocation. Finally, you indicate that because allocations are limited, the Authority is concerned that it may forfeit an opportunity to expand commerce where an allocation is obtained for a prospective borrower that fails to utilize it, while another potential borrower is unable to gain access to tax-exempt bonds because the necessary allocation is not available.

You ask whether the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective borrowers that require a payment for obtaining an allocation that remains unused and unavailable. Section 15.2-4905 specifically provides the Authority with the power to enter into contracts. Such contracts must be within the Authority’s powers and purposes as set forth in §§ 15.2-4901 and 15.2-4905. Section 15.2-4905 provides that the Authority may issue bonds and lend the proceeds of such bonds. Finally, § 15.2-4901 provides that the Authority should exercise its powers to promote commerce for the benefit of the Commonwealth’s populace. It is well-settled that where the language of a statute is clear and unambiguous, it is unnecessary to resort to rules of statutory construction. It is clear that the Authority may enter into contracts regarding the issuance of bonds and the lending of bond proceeds. Further, commerce is promoted by ensuring that a borrower is sufficiently committed to a particular project. The Authority may ascertain this commitment based on the willingness of prospective borrowers to enter into contracts that require payment of any unused private activity bond allocations. Therefore, it is my opinion that the Authority may enter into contracts with prospective borrowers related to the issuance of bonds and lending of bond proceeds that require payment for lost allocation.

CONCLUSION

Accordingly, it is my opinion that the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective borrowers that require payment to the Authority for private activity bond allocations unused as a result of the prospective borrowers not proceeding with the transaction.

1 This opinion is limited to state law considerations and does not consider any limitation that local law may place on the Industrial Development Authority of the Town of Bridgewater. See § 15.2-4903(A), (B) (LexisNexis Repl. Vol. 2003) (authorizing ordinance creating industrial development authority to limit number of facilities authority may finance).
Supra note 1.

Loans means any loans made by the authority in furtherance of the purposes of [the Industrial Development and Revenue Bond Act] from the proceeds of the issuance and sale of the authority’s bonds ....” Section 15.2-4902 (LexisNexis Repl. Vol. 2003).


Section 15.2-4905(3).

Section 15.2-4905(7).


Section 15.2-4901.


See § 15.2-5000 (defining “private activity bond” as “part or all of any bond ... required to obtain an allocation from the state’s volume cap pursuant to § 146 of the Internal Revenue Code of 1986, as amended, in order to be tax exempt”); see also VA. DEP’T OF BUS. ASSISTANCE, VA. SMALL BUS. FIN. AUTH., VIRGINIA PRIVATE ACTIVITY BOND ALLOCATION GUIDELINES, available at http://www.dbstructuredata.state.va.us/financing/bondallocation/guidelines [hereinafter GUIDELINES].

See § 15.2-5000 (defining “state ceiling” as maximum amount of private activity bonds that may be issued in calendar year as limited by § 146 of Internal Revenue Code of 1986, as amended); GUIDELINES § 3.4, supra note 12.

Section 15.2-4905(7), (13).


Most industrial development authorities impose fees in connection with the issuance of bonds where the bond proceeds are loaned to a private borrower. See Indus. Dev. Auth. v. Bd. of Suprs., 263 Va. 349, 559 S.E.2d 621 (2002) (discussing application of fee upon refinancing when facility is located in one jurisdiction and bonds for refinancing are issued by industrial development authority of separate jurisdiction).

OP. NO. 03-109
COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

General Assembly must enact express statutory authorization for local governing body to deny rezoning request solely on basis of lack of adequate public facilities and services to meet needs generated by development of rezoned property.

THE HONORABLE JOHN C. WATKINS
MEMBER, SENATE OF VIRGINIA
DECEMBER 15, 2003

ISSUE PRESENTED

You ask whether statutory authority is required for a local governing body to deny a rezoning request solely on the basis of the lack of adequate public facilities and services to meet the needs generated by development of rezoned property.
RESPONSE

It is my opinion that the General Assembly must enact express statutory authorization to permit a local governing body to deny a rezoning request *solely* on the basis of inadequate public facilities.

BACKGROUND

You advise that the General Assembly has considered legislation dealing with the ability of local governing bodies to adopt adequate public facilities ordinances. You note that a 2002 opinion of the Attorney General appears to empower localities to require adequate public facilities prior to rezoning or development of property as part of the local comprehensive plan. You relate that § 15.2-2286, which describes the permitted provisions that may be included in zoning ordinances, does not appear to authorize localities to require that adequate public facilities be in place prior to the rezoning or development of property. You believe that § 15.2-2286 enables a local governing body to consider the manner in which facilities and services will be provided as one consideration among many; however, § 15.2-2286 does not create a basis for a locality to require that developers provide adequate public facilities or defer development until such services are provided.

APPLICABLE LAW AND DISCUSSION

A 2002 opinion of the Attorney General concludes that a locality may adopt, as part of its comprehensive plan, a voluntary proffer policy that considers certain criteria in an adequate public facilities requirement before applications for rezoning may be approved. The 2002 opinion is based on the specific fact that a city proffer policy anticipates, but does not require, that three specific proffers be considered in evaluating the merits of each specific rezoning request. Furthermore, the underlying facts upon which the 2002 opinion is based require the governing body also to consider all other factors relevant to land use decisions and act upon the rezoning request in the best interest of the public. The 2002 opinion is necessarily limited to a general discussion of the authority of a Virginia locality to adopt, as part of a comprehensive plan, a voluntary proffer policy that considers several criteria in an adequate public facilities requirement before applications for rezoning may be approved. The criteria include the following:

1. The impact of a 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 object criteria.

Finally, the 2002 opinion is premised on the express assumption that any standard for determining whether public facilities serving a particular proposed development are
adequate is extensive and comprehensive. Such standard is not articulated in the 2002 opinion.

In Board of Supervisors of Powhatan County v. Reed’s Landing Corporation, the Supreme Court of Virginia held that, under § 15.1-491.2:1, the predecessor statute to § 15.2-2298, a local governing body is “not empowered to require a specified proffer as a condition precedent to a rezoning.” The Court determined that the evidence supported the trial court’s conclusion that the sole reason the governing body denied the developer’s rezoning request was the developer’s refusal to make a cash proffer fixed by the county board of supervisors. Accordingly, the Court determined that the trial court correctly ruled that the subject proffer was not voluntary within the meaning of the statute, and that the governing body imposed an unlawful condition precedent on the developer.

In the enabling zoning legislation, “the General Assembly … has undertaken to achieve … a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights.” To this end, all zoning and planning authority of local government is derived from the enabling legislation contained in Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327. Section 15.2-2286 enumerates various permissible provisions that may be included in local zoning ordinances. Sections 15.2-2296 through 15.2-2302 clearly authorize a conditional zoning process in certain specified localities that includes a provision in the zoning ordinances for the voluntary written proffering “of reasonable conditions” as part of a rezoning or an amendment to a zoning map. There is, however, no express statutory authorization that expressly grants to localities an ability specifically to require developers to provide adequate public facilities or to defer development until such services are provided.

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.” “[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.”

Statutory authorization is clearly required to permit a local governing body to deny a rezoning request based solely on the lack of adequate public facilities to serve any development of rezoned property. While the nature of the public services to be provided to new development is certainly one of many considerations of local governing bodies in reviewing rezoning requests, I am of the opinion that neither the manner nor the timing in which public services will be provided may serve as the sole basis for a locality to require that developers provide adequate public facilities or defer development until such facilities and services are provided.

CONCLUSION

Accordingly, I must conclude that the General Assembly must enact express statutory authorization for a local governing body to deny a rezoning request solely on the
basis of the lack of adequate public facilities and services to meet the needs generated by the development of rezoned property.


The city proffer policy encourages the property owner to agree voluntarily (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. 2002 Op. Va. Att’y Gen., supra note 1, at 86.

3Id.

4Id. at 86-87.

5Id. at 89.

6Id. at 90 n.1.

7The 2002 opinion does not stand for the proposition that a locality may adopt an adequate public facilities requirement that constitutes the sole reason to deny a rezoning application. The 2002 opinion merely articulates what is already contemplated by the law, namely, that the provision of public services to be provided to a new development is one of many factors to be considered by a local governing body in its deliberations concerning a rezoning application.

8250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) (noting that former § 15.1-491.2:1 clearly states that proffers of conditions by zoning applicant must be made voluntarily).

9Id. at 398-99, 463 S.E.2d at 669

10Id. at 400, 463 S.E.2d at 670


RESPONSE

It is my opinion that Warren County is not authorized to include in its zoning ordinance a requirement that a property owner, whose property is rezoned for a use that is clearly permitted by the zoning classification, to submit a second zoning permit application for new buildings and structures to the planning commission or governing body, or both, for a second review before being issued a final zoning permit.

BACKGROUND

You relate that the Warren County zoning ordinance provides that certain defined uses are permitted as a matter of right in each zoning district. Further, you advise that the ordinance allows certain other defined uses only after the county board of supervisors grants a conditional use permit. Finally, you advise that the zoning ordinance provides as follows:

Zoning permit applications for new buildings and structures for a use by right in both the Commercial Zone and the Industrial Zone shall be approved by the Zoning Administrator relative to the completeness of the application and the inclusion of all plans and statements. The Planning Commission, satisfied that the requested use or structure(s) is consistent with the purpose and intent of this chapter as set forth in § 180-2 shall grant approval to the application and so inform the Board of Supervisors of their action. Should the Planning Commission deny approval, the applicant may appeal the decision to the Board of Supervisors.  

APPLICABLE AUTHORITIES AND DISCUSSION

The overriding goal of statutory interpretation is to discern and give effect to legislative intent. The Commonwealth follows the rule of strict construction of statutory provisions. "The powers of boards of supervisors are fixed by statute and are only such as are conferred expressly or by necessary implication." This rule is a corollary to Dillon's Rule, which provides that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable. "[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end." To determine whether the General Assembly has passed enabling legislation that permits localities to adopt a zoning ordinance with the provision you describe, the land use provisions of Title 15.2 must be considered. "[A] fundamental rule of statutory construction requires that ... the entire body of legislation and the statutory scheme [be reviewed] to determine the 'true intention of each part.'" I am required to "give the fullest possible effect to the legislative intent embodied in the entire statutory enactment." In the land use statutes, "the General Assembly ... has undertaken to achieve ... a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights."
The zoning enabling statutes are set out in Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316. Subdivisions A(4) and (7) of § 15.2-2286 expressly authorize zoning ordinance provisions governing the administration and amendment of the ordinance. Other statutory provisions require that specific procedures be followed when amending a zoning ordinance. These statutory requirements are mandatory and must be complied with as part of the rezoning process. The detailed procedures governing the day-to-day administration of a zoning ordinance, however, generally are contained within the zoning ordinance itself.

Section 15.2-2280 grants any locality the power to classify its territory into districts and to regulate the use of land and buildings within each district. In addition to the uses permitted by right in each district, § 15.2-2286(A)(3) authorizes “the granting of special exceptions under suitable regulations and safeguards.” Sections 15.2-2285 and 15.2-2286 prescribe the specific procedures that must be followed when a locality proposes to enact a zoning ordinance or adopt an amendment to such an ordinance. First, the governing body may initiate the proposal by adopting a written resolution stating the underlying public purpose. Second, the proposal must be referred to the local planning commission for review. Third, the commission must give public notice pursuant to § 15.2-2204, conduct a public hearing, and report its recommendations to the governing body. Fourth, upon receipt of the commission’s report, the governing body must give public notice and conduct its own public hearing. “By complying with these procedures, the governing body acquires the same authority to act upon a zoning proposal as it has to act upon other legislative matters.”

Where statutes prescribe procedural steps that must be followed, the required procedure normally is regarded as mandatory. Neither the express procedural requirements nor the purposes and authorized provisions of zoning ordinances specifically permit a governing body to insert additional steps that must be completed after the initial rezoning request is approved to a particular use, which use is clearly within those permitted by the zoning classification, such as requiring the submission of a second zoning permit application for new buildings and structures to the planning commission or governing body, or both, for review before issuance of a zoning permit. The General Assembly clearly intends that a locality require a landowner to run the rezoning legislative gauntlet only once to obtain a requested rezoning of his property.

CONCLUSION

I must, therefore, conclude that Warren County is not authorized to include in its zoning ordinance a requirement that a property owner, whose property is rezoned for a use that is clearly permitted by the zoning classification, to submit a second zoning permit application for new buildings and structures to the planning commission or governing body, or both, for a second review before being issued a final zoning permit.


See (citations omitted).


See also § 15.2-2283 (Michie Repl. Vol. 1997) (stating general purpose of zoning ordinances is to promote health, safety or general welfare of public).

Section 15.2-2286(A)(7) (providing further that local planning commission may initiate amendment by motion which states public purpose or land owner may petition for amendment).

Section 15.2-2285(B).

Section 15.2-2285(A).

Section 15.2-2285(C).


ISSUE PRESENTED
You ask whether a county may adopt an adequate public facilities ordinance¹ that would bind, directly or indirectly, future boards of supervisors to fund a capital improvement plan ("plan") at a specific level in conjunction with the authority to defer the approval of a proposed development for a specified number of years. Such a plan would bind the present and any future board of supervisors to fund capital improvements at a specific monetary amount over the specified number of years.

RESPONSE
It is my opinion that the Constitution of Virginia and applicable state statutes currently do not allow a local board of supervisors to adopt an adequate public facilities ordinance that binds, directly or indirectly, the current or any future board of supervisors to fund a capital improvements program at a specific level without submitting the matter to the qualified voters for approval pursuant to the requirements of Article VII, § 10(b) of the Constitution of Virginia.

BACKGROUND
As cochairman of a legislative subcommittee that is investigating legislation dealing with the authorization of counties to adopt adequate public facilities ordinances, you seek clarification regarding the legislative authority of counties that may utilize such ordinances. You advise that the subcommittee is considering several legislative models that would authorize counties to adopt adequate public facilities ordinances. These models generally provide that standards for what constitutes adequate public facilities will be established in each ordinance in each authorized county. The ordinance also would provide for the review of any proposed development projects to determine whether such standards have been met and such adequacy exists in that particular county. You relate that, typically, the models provide a mechanism whereby the county is authorized to defer approval of a proposed project, such as a subdivision plan or site plan, for some number of years² with the assurance that the county in the interim will fund and implement a capital improvements plan to construct specific infrastructure needed to support the development when it is approved and undertaken in the future. The models to which you refer require an assurance that the county will fund and implement a capital improvements plan that is binding on the county. Such a binding monetary obligation on the county, therefore, constitutes a debt of the county.

APPLICABLE LAW AND DISCUSSION
Virginia's land use and zoning enabling statutes are detailed in Chapter 22 of Title 15.2.³ 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 implementing the local land use regulation process, including local planning commissions. A local planning commission is required to prepare and recommend subdivision ordinances and amendments to such ordinances to the governing body of the locality,⁴ to prepare and recommend a comprehensive plan for development of the area, and to specify the procedures for putting the plan into effect.⁵ In addition, the planning
commission may recommend amendments to zoning ordinances; may have made, for approval by the governing body, an official map showing existing and proposed public streets, waterways and public areas; and may prepare a five-year capital improvement program for the locality based on the comprehensive plan.

Under the current statutory scheme, the local governing body may direct the local planning commission to prepare and submit annually a capital outlay program, covering "a period not to exceed the ensuing five years," which may be used as the basis for developing a plan of current capital expenditures. The capital outlay program is reviewed annually and projects may be shifted from one year to another as the need arises. As each fiscal year passes, another fiscal year is added to the end of the capital outlay program. Through this process of annual review, the governing body can prepare for future construction needs. It can minimize the difficulty of providing money for the locality's capital growth requirements by setting aside a portion of the costs in reserve each year. The governing body also can anticipate the impact of capital projects on the locality's requirements for operating funds. Following hand-in-hand with capital expansion are increases in debt service, costs of additional personnel, and operation and maintenance expenditures that will be reflected in subsequent annual budgets.

Therefore, under the current statutory scheme, a capital budget is simply a plan for funding capital projects and a schedule of when such projects may be expected to be completed. It includes such construction as sewer and water systems, school and office buildings, parks and recreation facilities, sanitary landfills, and other projects requiring large capital outlays. Because capital budget items are nonrecurring expenses for major projects, they have no claim to legitimacy by precedent or tradition. Therefore, review of the capital budget focuses on the entire amount of each item considered for funding.

Article VII, § 10(b) of the Virginia Constitution limits the ability of a county to contract debt and otherwise incur financial obligations. Subject to certain exceptions, § 10(b) prohibits counties from contracting debt or establishing a fixed contractual obligation to make payments in future years, unless the proposed debt is authorized by general law and approved by the qualified voters of the county in a duly authorized referendum. The limitation imposed upon county debt by § 10(b) has been applied to unconditional long-term obligations requiring the payment of money. Contractual provisions which purport to bind a locality to a fixed obligation to make payments in future years generally are considered to be debts subject to the constitutional restrictions of Article VII, § 10.

The position of this Office, as stated in numerous prior opinions, is that a local governing body may not enter into any agreement which provides for payments of county funds in future years, unless the agreement first is submitted to the qualified voters of the locality for approval in a referendum authorized by general law, or the payments to be made in future years are subject to the condition that the local governing body appropriate funds during each year in which a payment is to be made. A "debt" is
described as establishing an unconditional long-term obligation to make payments in future years. The plan that you describe obligating a present and a future board of supervisors to fund capital improvements in conjunction with deferral of the approval of a proposed development for a specified number of years clearly constitutes a debt. Subject to certain exceptions in Article VII, § 10(b), the general law authorizing such a debt must provide that the question of such a debt must be submitted by referendum to the qualified voters of the county.

Prior opinions of this Office also consistently conclude that a local governing body currently does not have the power to take actions that irrevocably bind its successors in office, unless such binding action is expressly authorized by statute. No legislative body, federal, state or local, may limit the power of its successors to amend or repeal statutes or ordinances absent statutory authorization. Therefore, any adequate public facilities ordinance adopted by a board of supervisors to fund a capital improvements program at a specific level must necessarily be subject to later amendment or repeal by the governing body or its successors in office under current law.

CONCLUSION

Accordingly, I must conclude that the Constitution of Virginia and applicable state statutes currently do not allow a local board of supervisors to adopt an adequate public facilities ordinance that binds, directly or indirectly, the current or any future board of supervisors to fund a capital improvements program at a specific level without submitting the matter to the qualified voters for approval pursuant to the requirements of Article VII, § 10(b) of the Constitution of Virginia.

1In a separate opinion to you, dated December 15, 2003, I conclude that under current law, the provision of public services and facilities required by a new development is one of many factors a local governing body should consider in its deliberations concerning a rezoning application. See 2003 Va. Op. Att'y Gen. No. 03-109 (Dec. 15, 2003). I also conclude that the provision of public services and facilities required by a new development may not be the sole basis for the denial or deferral of an application for rezoning. Id. For the purposes of this opinion, I will assume that the General Assembly proposes to grant to a county the authority to adopt as the sole basis for the denial or deferral of a rezoning application the lack of public services and facilities required by a new development. I will also assume that the General Assembly desires to grant to a county the ability to obligate current and future boards of supervisors to a specific funding level in a capital improvement plan to guarantee public services and facilities at a specific level to accommodate all new development resulting from approval of a rezoning application.

2You advise that such period of time is usually five or more years.


4Sections 15.2-2251, 15.2-2253.

5Sections 15.2-2223 to 15.2-2232.

6Section 15.2-2286(A)(7).

7Section 15.2-2233.

8Section 15.2-2239.

9Section 15.2-2239 refers to capital improvement programs.

10Section 15.2-2239.
OP. NO. 03-092
COUNTIES, CITIES AND TOWNS: SERVICE DISTRICTS; TAXES AND ASSESSMENTS FOR LOCAL IMPROVEMENTS.
GENERAL ASSEMBLY: VIRGINIA CODE COMMISSION.

Authority for local governing body to adopt ordinance exempting from taxation property within expanded portion of downtown service district.

MR. WILLIAM M. HACKWORTH
CITY ATTORNEY FOR THE CITY OF ROANOKE
OCTOBER 31, 2003

ISSUES PRESENTED
You ask whether § 15.2-2402(1) permits the City of Roanoke to expand its downtown service district and exempt residential properties within the expanded area from the assessment of additional taxes. If not, you ask whether Article 1, Chapter 24 of Title 15.2 permits the city to repeal its existing ordinance and adopt a new ordinance expanding the geographic area of the downtown service district and exempting properties within the expanded area from additional taxation.

RESPONSE
It is my opinion that § 15.2-2402(1) does not permit the City of Roanoke to expand its downtown service district and exempt residential properties within the expanded area from additional taxation. Article 1, Chapter 24 of Title 15.2, however, permits the city to repeal its downtown service district ordinance and adopt an ordinance providing for expansion of the downtown service district's geographic area and exemption from additional taxation for properties within the expanded area.

APPLICABLE LAW AND DISCUSSION
You relate that the City of Roanoke created a downtown service district by ordinance adopted pursuant to §§ 15.1-18.2 and 15.1-18.3, the predecessor statutes to Article 1,
Chapter 24 of Title 15.2, §§ 15.2-2400 through 15.2-2403. For the purposes of this opinion, I shall assume that the city’s downtown service district was created in 1986, the year of adoption of the applicable city ordinance. You relate that the city seeks to expand the boundaries of the downtown service district, but desires to exempt any residential properties within the expanded area, since the additional taxes assessed in the district primarily are used to promote businesses within the district.

You note that the Attorney General concludes in a 1987 opinion that additional taxes imposed by cities that create service districts pursuant to § 15.1-18.3 must apply uniformly to all property or businesses in such district, and that cities may not exempt from the additional tax, either in whole or in part, certain property or businesses in the district. You observe that the 1990 Session of the General Assembly amended § 15.1-18.3 to provide that the ordinance or petition creating a service district shall “[s]et forth the name and describe the boundaries of the proposed district and any areas within the district that are to be excluded.”

Prior to July 1, 1990, § 15.1-18.2(a) permitted certain consolidated cities to maintain service districts to provide “additional or more complete services of government than are desired in the city as a whole.” Section 15.1-18.3 extended to counties, cities or towns the power to “designate service districts for the purposes set forth in subsection (a) of § 15.1-18.2.”

The 1990 Session of the General Assembly amended § 15.1-18.3 to provide that an ordinance for a service district must describe “any areas within the district that are to be excluded.” The 1997 Session of the General Assembly repealed § 15.1-18.3 as part of the recodification of Title 15.1; however, the substance of former § 15.1-18.3 has been relocated to §§ 15.2-2400 and 15.2-2403.

The 1997 Session of the General Assembly expressly repealed § 15.1-18.2 and added the new provisions of § 15.2-2402. Section 15.2-2402 provides:

Any ordinance or petition to create a service district shall:

1. Set forth the name and describe the boundaries of the proposed district and specify any areas within the district that are to be excluded;

2. Describe the purposes of the district and the facilities and services proposed within the district;

3. Describe a proposed plan for providing such facilities and services within the district; and

4. Describe the benefits which can be expected from the provision of such facilities and services within the district.

Section 30-152 pertains to recodification of titles in the Virginia Code and provides:

Whenever in a title revision or recodification bill an existing section of a title of the Code of Virginia is repealed and replaced with a
When the General Assembly amends a statutory provision, a presumption arises that the legislature intended to change existing law. A related presumption is that the amendment to a law is intended to have some meaning and is not intended to be unnecessary or vain. In addition, the plain language of a statute should be given its clear and unambiguous meaning. Section 30-152 clearly articulates that the recodification of a title shall expressly operate to repeal a previously existing uncodified enactment. This statutory provision is aligned with the general premise that a legislative enactment evinces the legislature’s intent to grant therein appropriate statutory authority. Consequently, § 15.2-2402(1) provides that an ordinance creating a service district after December 1, 1997, the effective date of the recodification of Title 15.1 as Title 15.2, shall specify areas within the district that are to be excluded from taxation. As stated, I assume for the purposes of responding to your inquiry that the city’s service district was created in 1986. Furthermore, you state that the city proposes to adopt an ordinance extending the existing service district rather than creating a new service district.

The language in § 15.2-2402(1) clearly provides that the ordinance creating the service district shall “specify any areas within the district that are to be excluded.” Ordinarily, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning. In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling. “Create” generally means “to bring into existence”; “make out of nothing and for the first time”; “constitute by an act of law or sovereignty.” You state that the city proposes to “extend” the existing service district. The term “extend” generally means “to cause to be of greater area or volume”; “increase the size of”; “make greater in extent.” Therefore, I must conclude that the city is not creating a service district by its expansion of the existing service district.

Section 15.2-1427(D) permits a locality to repeal an ordinance “in the same manner, or by the same procedure, in which ... ordinances are adopted.” “Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.” The General Assembly has placed no restriction on the repeal of ordinances adopted pursuant to Article 1, Chapter 24 of Title 15.2 that create service districts. Therefore, it is the clear intention of the General Assembly that a locality

renumbered section and that section so repealed was effective with an uncodified enactment, the repeal of that section, alone, shall not affect the uncodified enactment. The title revision or recodification bill shall expressly repeal the uncodified enactment in order for the enactment to be repealed. [Emphasis added.]
may repeal an ordinance creating a service district in the same manner as such ordinance is adopted.

CONCLUSION

Section 15.2-2402(1) does not permit the City of Roanoke to expand its downtown service district and exempt residential properties within the expanded area from additional taxation. Article 1, Chapter 24 of Title 15.2, however, permits the city to repeal its downtown service district ordinance and adopt an ordinance providing for expansion of the downtown service district's geographic area and exemption from additional taxation for properties within the expanded area.\(^3\)


\(^2\)See supra note 1.


\(^4\)1990 Va. Acts ch. 515, at 761, 763 (quoting § 15.1-18.3(1)).

\(^5\)Id. at 762 (quoting § 15.1-18.2(a)).

\(^6\)Id. at 763 (quoting § 15.1-18.3).

\(^7\)Id. (quoting § 15.1-18.3(1)).

\(^8\)See 1997 Va. Acts ch. 587, cl. 1, at 976; see id. cl. 13, at 1401. In 1997, the Virginia Code Commission recommended the recodification of Title 15.1, which had not been recodified since 1962, to resolve confusion caused by conflicting and outdated provisions, and to reorganize and simplify existing statutes into a more user-friendly Title 15.2. See 5 H. & S. Docs., Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia, S. Doc. No. 5, at i (1997).


\(^10\)See 1997 Va. Acts, supra note 8, at 1181; see also 5 H. & S. Docs., supra note 8, at 725.


\(^15\)1997 Va. Acts, supra note 8, at 1401 (enacting clause 14).

\(^16\)2A Norman J. Singer, Sutherland Statutory Construction § 47.33, at 369 (West 6th ed. 2000).

\(^17\)See McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970) (noting that ordinary meaning must be given to “lascivious” to determine legislative intent of word as used in statute).


\(^20\)Webster’s Third New International Dictionary of the English Language Unabridged 532 (1993).
You pose two questions with regard to the appointment of juvenile court service unit probation officers and supervisors by judges of a juvenile and domestic relations district court ("juvenile court"). First, you ask whether a judge has judicial immunity for acts involving the appointment of such employees. Second, you ask whether such an employee, aggrieved by a judge's exercise of his appointment or transfer authority, may pursue recourse through the state grievance procedure.

RESPONSE

It is my opinion that a juvenile court judge's power to appoint juvenile court service unit probation officers and supervisors is an administrative function for which a judge is not afforded judicial immunity. It is also my opinion that an aggrieved court service unit employee may pursue his remedies through the state grievance procedure, when applicable, with the sole exception that the chief judge may order the transfer of a court service unit employee for good cause, after notice and an opportunity to be heard pursuant to § 16.1-233(D).

BACKGROUND

You relate that juvenile probation officers of a court service unit are appointed by a judge of the juvenile court served by that unit. The appointment is made from a list of eligible persons certified by the Director of the Department of Juvenile Justice. No such employee may be assigned to or discharged from a state-operated court service unit without the mutual approval of the judge and Director. Further, supervisory officers of state-operated court service units are appointed by the chief judge of the
court served by that unit. The chief judge is also given the authority to transfer or demote such officers.

You further relate that juvenile probation officers and supervisors are employees of the Department of Juvenile Justice, an executive branch agency, and are generally afforded rights under the state grievance procedure for the resolution of employment disputes.

APPLICABLE LAW AND DISCUSSION

Section 16.1-233(A) provides:

Within funds appropriated for the purpose, it shall be a function of the Department [of Juvenile Justice] to develop and operate, except as hereinafter provided, probation, parole and other court services for juvenile and domestic relations district courts in order that all children coming within the jurisdiction of such courts throughout the Commonwealth shall receive the fullest protection of the court. To this end the Director [of the Department of Juvenile Justice] is empowered to establish court service units in his department. The Director shall appoint such employees as he may find to be necessary to carry out properly the responsibilities of the Department relative to the development, supervision and operation of probation, parole and other court services throughout the Commonwealth as set forth in [Chapter 11 of Title 16.1].

Section 16.1-235(A) provides for the development of state-operated court service units in counties or cities. Section 16.1-235(A) specifies that the judge(s) of the juvenile court served by such a unit "may from a list of eligibles certified by the Director appoint one or more suitable persons as probation and parole officers and related court service personnel in accordance with established qualifications and regulations."

Further, § 16.1-236 provides:

In any court where more than one probation or parole officer or other court services staff has been appointed under the provisions of this law, one or more probation or parole officers may be designated to serve in a supervisory position by the chief judge of the juvenile and domestic relations district court.

The transfer or demotion of supervisory officers of state court service units shall be made only for good cause shown, in accordance with Chapter 29 (§ 2.2-2900 et seq.) of Title 2.2. The transfer or demotion of supervisory officers of local court service units shall be made only for good cause shown, after due notice and opportunity to be heard.

The operation and supervision of court service units are functions of the Department of Juvenile Justice, and court service unit staff are Department employees. The
authority of a judge to appoint, assign, discharge, transfer or demote a Department employee in the court service unit is administrative in nature.

While judges have long been afforded absolute immunity from financial liability for their judicial acts, they do not enjoy the same level of protection for all of their functions. In determining whether the actions of a government official fit within the "tradition of absolute immunity, or only the more general standard of qualified immunity, [courts apply] a 'functional approach,'... which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" 3

In Forrester v. White, 4 the Supreme Court of the United States considered whether an Illinois state court judge had absolute immunity from damages under a claim that he demoted and discharged a female probation officer because of her gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. 5 The Court distinguishes between "truly judicial acts," for which immunity is appropriate, and "acts that simply happen to have been done by judges." 6 The Court held that the judge's decision to demote and discharge the court employee is administrative and not judicial in nature. 7

In holding that the judge is not entitled to claim judicial immunity for administrative acts, the Court observes that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." 8 Therefore, a juvenile court judge's powers to appoint, transfer or remove juvenile probation officers and supervisors are administrative functions and are not afforded judicial immunity.

You next ask whether a Department of Juvenile Justice employee, aggrieved by a judge's exercise of his appointing authority, may pursue recourse through the state's grievance procedure. Chapter 29 of Title 2.2 contains the Virginia Personnel Act. 9 The Virginia Personnel Act provides for a system of "objective methods of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of state employment." 10 State employees, unless otherwise exempt, 11 are covered by the state grievance procedure contained in Chapter 30 of Title 2.2. 12 Therefore, with one statutory exception, the Department's court service unit personnel are protected by the Virginia Personnel Act and the state grievance procedure. The lone exception to this general rule concerns the transfer of a juvenile probation officer by a judge for "good cause."

Section 16.1-233(D) provides:

No person shall be assigned to or discharged from the state-operated court service staff of a juvenile and domestic relations district court except as provided in Chapter 29 of Title 2.2, nor without the prior mutual approval of the judge thereof and the Director. However, the chief judge of any such court shall be empowered, for good cause, after due notice and opportunity to be heard, to order the transfer of any person from the court service staff of his court, and the Director shall likewise be empowered to order such transfer or separation subject only to the limitations of Chapter 29 of Title 2.2. [Emphasis added.]
The first sentence of § 16.1-233(D) provides the general rule that the Virginia Personnel Act applies to the assignment or termination of state-operated court service staff of a juvenile court. The second sentence of § 16.1-233(D) provides an exception to this general rule. Specifically, a chief judge is “empowered, for good cause, after due notice and opportunity to be heard, to order the transfer of any person from the court service staff of his court.” Section 16.1-233(D) allows a chief judge to transfer a person from his court, provided that the due process provisions of notice and opportunity to be heard are afforded to the individual. In a transfer by a chief judge under § 16.1-233(D), the notice and opportunity to be heard provisions are the only administrative grievance procedures provided to court service staff. The Director of the Department of Juvenile Justice also may order the transfer or separation of an individual from a particular unit; however, unlike the chief judge, this action is subject to the Virginia Personnel Act.

CONCLUSION

Accordingly, it is my opinion that a juvenile court judge’s power to appoint juvenile court service unit probation officers and supervisors is an administrative function for which a judge is not afforded judicial immunity. It is also my opinion that an aggrieved court service unit employee may pursue his remedies through the state grievance procedure, when applicable, with the sole exception that the chief judge may order the transfer of a court service unit employee for good cause, after notice and an opportunity to be heard pursuant to § 16.1-233(D).

4484 U.S. at 219.
5Id.
6Id. at 227.
7Id. at 229.
8Id. at 228; see also Ex parte Virginia, 100 U.S. 339 (1880) (holding that county judge does not have absolute immunity for criminal charge of racial discrimination in selecting jurors); Sup. Ct. of Va. v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) (holding there is no judicial immunity for promulgating attorneys’ code of conduct).
11Neither § 2.2-2905 nor § 2.2-3002 includes court service unit staff among those exempt from the Virginia Personnel Act or the state grievance procedure.
13Section 16.1-233(D).
14To the extent the specific transfer procedure granted a judge in § 16.1-233(D) conflicts with the Virginia Personnel Act, the provisions of § 16.1-233(D) control. An accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general. See Va. Nat’l Bank v. Harris, 220 Va. 336, 257 S.E.2d 867
OP. NO. 03-059

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS — CIRCUIT COURTS.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).
COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES.

Circuit court clerks, under their statutory duty to establish system that satisfies statutory requirement for maintaining records, have discretion, but no obligation, to provide deputy clerk in courtroom during civil proceedings.

THE HONORABLE JUDY L. WORTHINGTON
CLERK, CIRCUIT COURT OF CHESTERFIELD COUNTY
AUGUST 14, 2003

ISSUE PRESENTED

You ask whether a circuit court clerk is obligated to assign a deputy circuit court clerk to the courtroom during civil proceedings before the court.

RESPONSE

It is my opinion that circuit court clerks, under their duty to establish a system that satisfies the statutory purpose for maintaining their records, have the discretion, but no obligation, to provide a deputy clerk in the courtroom during civil proceedings.

BACKGROUND

For the purposes of this opinion, I assume that it is not always possible for you to provide a deputy clerk to serve as the courtroom clerk during civil proceedings, because other demands have been placed on your office for the assignment of personnel elsewhere.

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, circuit court clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.

Prior opinions of the Attorney General note 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. Nonetheless, as an elected constitutional officer, considerable deference must be given to the decisions made by a clerk of the circuit court, unless such decisions are contrary to law. 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 of a clerk of court.
light of the duties of a circuit court clerk as established by the General Assembly, any function that a clerk or deputy clerk would perform in a courtroom would be to maintain the records of the clerk. Prior opinions of the Attorney General consistently conclude that, in the absence of a constitutional or statutory provision to the contrary, constitutional officers have exclusive control over the operation of their offices, including the selection and supervision of personnel in the positions assigned to the clerk. Accordingly, absent a legislative mandate to the contrary, deference is to be shown to the clerk in establishing a system that satisfies the statutory purpose for maintaining the records, including whether a clerk or deputy clerk is present in the courtroom for civil proceedings.

It is my opinion that, in view of the general statutory responsibilities assigned to circuit court clerks, they are not obligated to ensure the presence of a deputy clerk in the courtroom during civil proceedings. When the General Assembly intends to enact a mandatory requirement in this regard, it knows how to express its intention. For instance, § 16.1-69.40 requires clerks of courts not of record to “develop, implement and administer procedures necessary for the efficient operation of the clerk’s office ... and discharge such other duties as may be prescribed by the judge.” In setting forth the duties and responsibilities of the clerks of courts of record, however, the General Assembly has not required such clerks to perform duties that may be prescribed by a judge.

In light of the existing statutory provisions, absent a legislative mandate to the contrary, it falls within the discretion of the clerk of a court of record to determine whether a deputy clerk is to be present in the courtroom for civil proceedings. To conclude otherwise would significantly restrict the ability of circuit court clerks to address changing and competing demands for personnel and resources in their jurisdiction.

CONCLUSION

Accordingly, I must conclude that circuit court clerks, under their statutory duty to establish a system that satisfies the statutory requirement for maintaining records, have the discretion, but no obligation, to provide a deputy clerk in the courtroom during civil proceedings.

1 See also VA. CODE ANN. § 15.2-1600(A) (LexisNexis Repl. Vol. 2003).


OP. NO. 03-044
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS.

Active-duty member of Armed Forces whose permanent duty station is located within Virginia, but who dwells in another state, is 'resident' of Commonwealth for purposes of purchasing firearm. Section 18.2-308.2:2 and regulations promulgated by Department of Criminal Justice Services are not in conflict with Federal Gun Control Act.

MR. LEONARD G. COOKE
DIRECTOR, DEPARTMENT OF CRIMINAL JUSTICE SERVICES
AUGUST 15, 2003

ISSUE PRESENTED

You request an interpretation of regulations promulgated by the Department of Criminal Justice Services regarding § 18.2-308.2:2, governing criminal history record information checks for firearm purchases. Specifically, you ask whether a member of the United States Armed Forces who is permanently stationed in Virginia, but resides in another state, may be considered a Virginia resident for the purpose of purchasing a firearm in the Commonwealth.

RESPONSE

It is my opinion that a member of the United States Armed Forces, serving on active duty, whose permanent duty station is located within Virginia, but who dwells in another state, is a "resident" of the Commonwealth for purposes of purchasing a firearm. Section 18.2-308.2:2 and the Department regulations are not in conflict with the Federal Gun Control Act.

BACKGROUND

You relate that a Texas resident who is a member of the United States Armed Forces assigned to a permanent duty station at Fort Belvoir, Virginia, but who resides in Maryland, has been denied the purchase of a handgun. You further relate that this denial was based on a regulation that requires dealers to deny the transfer of a handgun to a non-Virginia resident in accordance with § 922(b)(3) of the Gun Control Act, which makes it unlawful to sell a firearm to a nonresident.

APPLICABLE LAW AND DISCUSSION

Section 922(b)(3) of the Federal Gun Control Act of 1968, as amended, makes it unlawful for a licensed importer, manufacturer, dealer, or collector to sell or deliver a firearm to any person who does not reside in the state in which the licensee's place of business is located. Section 921(b), however, provides that, for the purposes of the Gun Control Act, "a member of the Armed Forces on active duty is a resident of the
State in which his permanent duty station is located." Thus, while § 922(b)(3) prohibits the sale of firearms to nonresidents of a state, § 921(b) provides members of the Armed Forces with the ability to purchase firearms within the state in which their permanent duty station is located, by classifying them as residents of that state.

Section 18.2-308.2:2(B. 1) mandates that licensed firearms dealers obtain a criminal history record information check from the Department of State Police prior to effecting a sale, rental, trade or transfer of a firearm to a Virginia resident. Section 18.2-308.2:2 conforms to the Gun Control Act by recognizing the resident status of members of the Armed Forces who are permanently stationed in Virginia. Specifically, § 18.2-308.2:2(B. 1) accommodates members of the Armed Forces by enabling them to establish personal identification and residence by providing a photo-identification form issued by the United States Department of Defense together with their permanent orders. Section 18.2-308.2:2(H) directs "[t]he Department of Criminal Justice Services [to] promulgate regulations to ensure the identity, confidentiality and security of all records and data provided by the Department of State Police pursuant to this section." Like the statute authorizing them, the regulations promulgated by the Department of Criminal Justice Services ("Department regulations") are drafted to accommodate for the residency status of members of the Armed Forces who are permanently stationed in Virginia.

You relate that an Armed Forces member was denied the purchase of a handgun, on the basis of the Department regulations, despite the fact that his permanent duty station is located in Virginia. The regulation requires a dealer to "[d]eny the transfer of a handgun to a non-Virginia resident in accordance with 18 U.S.C. § 922(b)(3)." This reference to § 922(b)(3) of the Gun Control Act, which makes it unlawful to sell a firearm to a person who does not "reside in" the state in which the dealer's place of business is located, does not present a conflict. Further, it does not necessitate the denial of a firearms sale to a member of the Armed Forces who is permanently stationed in Virginia but who does not actually reside in Virginia.

It is a well-accepted principle of statutory construction that statutes should not be read in isolation. Statutes relating to the same subject should be considered in pari materia. Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent. Section 922(b)(3) is part of, not independent from, the chapter in which it is located. Its language, including the words "reside in," is subject to the requirement of § 921(b) of the Gun Control Act, which provides that, "[f]or the purposes of this chapter ..., a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located." The words "reside in," as they appear in § 922(b)(3), must be construed consistently with this requirement. Because § 921(b) ensures that a member of the Armed Forces is a resident of the state in which his permanent duty station is located, it logically follows that such a member "resides in" that state for the purposes of § 922(b)(3). Any interpretation to the contrary would violate a basic principle of statutory construction that statutes, particularly those
within the same statutory scheme, are to be construed harmoniously, and not in conflict with one another, whenever possible.\textsuperscript{12}

CONCLUSION

Accordingly, it is my opinion that a member of the United States Armed Forces, serving on active duty, whose permanent duty station is located within Virginia, but who dwells in another state, is a “resident” of the Commonwealth for purposes of purchasing a firearm. Section 18.2-308.2:2 and the Department regulations are not in conflict with the Federal Gun Control Act.


\textsuperscript{2}See 6 VA. ADMIN. CODE ch. 130, §§ 20-130-10 to 20-130-100. (West 2003) (“Regulations Governing the Privacy and Security of Criminal History Record Information Checks for Firearm Purchases”) [hereinafter Department regulations].

\textsuperscript{3}See 6 VA. ADMIN. CODE § 20-130-60(C)(1)(a); id. § 20-130-20 (defining “resident of Virginia”).


\textsuperscript{5}6 VA. ADMIN. CODE § 20-130-40(3).

\textsuperscript{6}Note that if a conflict did, in fact, exist, any portion of the regulations in conflict with the statute authorizing them would be invalid. See Commonwealth ex rei. State Water Control Bd. v. Appalachian Power Co., 9 Va. App. 254, 262, 386 S.E.2d 633, 637 (1989) (“[W]hen an agency fails to conform to required statutory authority when enacting its regulations, ... [t]he regulation[s are] invalid and the agency's effort to enforce [them] exceeds its statutory authority." (Footnote omitted.).) Further, Article VI of the Constitution of the United States would invalidate any provision conflicting with federal law.


\textsuperscript{10}See supra note 1.

\textsuperscript{11}Turner v. Commonwealth, 226 Va. 456, 461, 309 S.E.2d 337, 339 (1983) (“[S]tatutes relating to the same subject should be read and construed together.”); see also United States v. Cent. Pac. R.R. Co., 118 U.S. 235, 239 (1886) (holding that acts relating to same subject are to be construed together).

\textsuperscript{12}United Savi. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” (Citations omitted.).)
OP. NO. 03-083
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY — OTHER ILLEGAL WEAPONS.
EDUCATION: PUPILS — DISCIPLINE — GENERAL POWERS AND DUTIES OF SCHOOL BOARDS — SCHOOL BOARDS; SELECTION, QUALIFICATION & SALARIES.
CONSTITUTION OF VIRGINIA: EDUCATION (SCHOOL BOARDS).
Authority for school board to discipline student who possesses unloaded firearm in locked vehicle trunk on school property or at school-sponsored activity.

THE HONORABLE KEVIN G MILLER
MEMBER, SENATE OF VIRGINIA
OCTOBER 15, 2003

ISSUE PRESENTED
You ask whether a school board has authority to discipline a student whose action is in conformance with the language of Chapter 619 of the 2003 Acts of Assembly, which amends § 18.2-308.1(B) pertaining to the possession of an unloaded firearm.

RESPONSE
It is my opinion that a school board has authority to discipline, in the context of the complete analysis of this opinion, a student whose action is in conformance with the language of Chapter 619 of the 2003 Acts of Assembly (the “2003 amendment”), which amends and reenacts § 18.2-308.1(B), pertaining to the possession of an unloaded firearm in a locked vehicle trunk.

APPLICABLE LAW AND DISCUSSION
Section 18.2-308.1(A) provides that any person possessing a stun weapon or other weapon on school property “shall be guilty of a Class I misdemeanor.” The first paragraph of § 18.2-308.1(B) provides that any person who possesses a firearm “shall be guilty of a Class 6 felony,” unless the exemptions in the second paragraph apply. The 2003 Session of the General Assembly amended the second paragraph of § 18.2-308.1(B) to provide:

The exemptions set out in § 18.2-308 shall apply, mutatis mutandis, to the provisions of this section. The provisions of this section shall not apply to (i) persons who possess such weapon or weapons as a part of the school’s curriculum or activities, (ii) a person possessing a knife customarily used for food preparation or service and using it for such purpose, (iii) persons who possess such weapon or weapons as a part of any program sponsored or facilitated by either the school or any organization authorized by the school to conduct its programs either on or off the school premises, (iv) any law-enforcement officer while engaged in his duties as such, (v) any person who possesses a knife or blade which he uses customarily in his trade, or (vi) a person who possesses an unloaded firearm which that is in a closed container, or a knife having a metal blade, in or upon a motor vehicle, or an unloaded shotgun or rifle in a
firearms rack in or upon a motor vehicle. For the purposes of this paragraph, "weapon" includes a knife having a metal blade of three inches or longer and "closed container" includes a locked vehicle trunk.\(^3\)

The 2003 amendment substituted "firearm that" for "firearm which"\(^4\) in clause (vi) of the first sentence, and added "and 'closed container' includes a locked vehicle trunk"\(^5\) to the end of the second sentence in § 18.2-308.1(B) quoted above. I must, therefore, conclude that your reference to "action of a student" suggests that such student possesses an unloaded firearm in a locked vehicle trunk on school property or at a school-sponsored activity.

The rules of statutory construction that govern my response to this inquiry include the well-accepted rule that statutes relating to the same subject should not be read in isolation.\(^6\) Such statutes should be considered in pari materia.\(^7\) Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.\(^8\)

Section 22.1-277.07(A) is a statutory provision on this same subject and relates to the same matter of your inquiry. The 1995 Session of the General Assembly enacted § 22.1-277.07\(^9\) in response to the requirements of the Gun Free Schools Act of 1994.\(^10\) Section 22.1-277.07 provides, in part:

A. In compliance with the federal Improving America's Schools Act of 1994 (Part F-Gun-Free Schools Act of 1994), a school board shall expel from school attendance for a period of not less than one year any student whom such school board has determined, in accordance with the procedures set forth in [Article 3, Chapter 14 of Title 22.1], to have brought a firearm onto school property or to a school-sponsored activity as prohibited by § 18.2-308.1, or to have brought a firearm as defined in subsection D or an air rifle or BB gun on school property or to a school-sponsored activity....

"Firearm" means any weapon prohibited on school property or at a school-sponsored activity pursuant to § 18.2-308.1, or (i) any weapon, including a starter gun, that will, or is designed or may readily be converted to, expel single or multiple projectiles by the action of an explosion of a combustible material; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or firearm silencer; or (iv) any destructive device. "Firearm" shall not include any weapon in which ammunition may be discharged by pneumatic pressure.

The interaction between §§ 18.2-308.1(B) and 22.1-277.07(A) is not a model of clarity. Section 22.1-277.07(A) directs local school boards to expel any person bringing a firearm onto school property as prohibited by § 18.2-308.1. Section 18.2-308.1 does not
prohibit a person from having an unloaded firearm in a closed container, including a locked vehicle trunk, on school property. Consequently, a student who possesses an unloaded firearm in such a manner is not violating the firearm prohibition in § 22.1-277.07(A) and, therefore, is not subject to mandatory expulsion. Section 22.1-277.07(A), however, also prohibits the possession of a firearm as defined in § 22.1-277.07(D). Section 22.1-277.07(D) defines “firearm” with reference to the prohibitions in § 18.2-308.1 and further defines the term in such a way as to include firearms previously excluded by reference to § 18.2-308.1. Although trying to reconcile these circular definitions is academically challenging, the exercise does not lend itself to clearly determining what the General Assembly intended by the words it used in the two statutes.

Article VIII, § 7 of the Constitution of Virginia vests “[t]he supervision of schools in each school division … in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.”11 Section 22.1-79 details the powers and duties of a school board. Section 22.1-71 confers upon the school board “all the powers and … duties, obligations and responsibilities imposed upon school boards by law.” Furthermore, § 22.1-78 permits school boards to adopt bylaws and regulations, not inconsistent with state statutes and regulations of the Board of Education, for its own government, for the management of its official business and for the supervision of schools, including but not limited to the proper discipline of students, including their conduct going to and returning from school.

Section 22.1-277(A) provides that “[p]upils may be suspended or expelled from attendance at school for sufficient cause.”

The 1993 Session of the General Assembly amended § 22.1-278 to require the State Board of Education to establish guidelines and develop model student conduct policies to aid local school boards with the implementation of such policies.12 In 1994, the State Board developed and distributed to local school boards its Student Conduct Policy Guidelines.13 The State Board revised its guidelines in 2001 to update federal and state legislation affecting student conduct and safety while on school property and attending school-sponsored activities.14 The State Board guidelines contain components of a student conduct policy that are designed to provide a framework for acceptable student conduct within the educational environment.15 The philosophy statement suggested by the State Board for developing such guidelines is to encourage the healthy growth and development of each student in a learning environment that is free from conflict, threats of conflict or danger, and undue disruption.16 The State Board also recommends a policy statement for student conduct that responds to issues such as school safety and security, alcohol and other drug use, weapons possession, and other issues pertaining to meeting the educational and safety needs of all students.17
The Supreme Court of the United States acknowledges "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" in the case of New Jersey v. T.L.O. The Court specifically noted the following:

Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.

The Supreme Court of Virginia also has had occasion to observe that school authorities may impose reasonable disciplinary measures in the absence of written regulations. The basis for this authority is found in the inherent power of school authorities to maintain order and discipline in the schools. A 1975 opinion of the Attorney General recognizes that a local school board has broad authority over the discipline of its students. In addition, a 1983 opinion acknowledges that, in implementing such authority, the school board may establish a code of student conduct and reasonable penalties for violating the code. It may empower the division superintendent to take necessary and appropriate actions to maintain discipline and order in the schools, including the penalties of expulsion and suspension.

For many purposes, school authorities, therefore, act in loco parentis with reference to the school children charged to their care for educational purposes. In addition, school authorities in the Commonwealth have the responsibility to provide fair access to an education for every child. A learning environment is required that encourages the growth and development of every child free from conflict, threats of conflict or danger, and undue disruption of the educational process.

As long as the regulations of the school authorities are not inconsistent with the 2003 amendment, school authorities are authorized to promulgate reasonable regulations that may result in the discipline of a student whose action is in conformance with the language of the 2003 amendment pertaining to the possession of an unloaded firearm. Section 22.1-277.07(A) authorizes, but does not require, a school board to expel a student who brings a firearm onto school property or to a school-sponsored activity as prohibited by § 18.2-308.1.
The 2003 amendment permits a student to possess a firearm "that" is unloaded and in a "closed container," which "includes a locked vehicle trunk," on school property or at a school-sponsored activity. The 2003 amendment, however, does not restrict the discretion of a school board to consider discipline for such a student that includes expulsion. Section 22.1-277(A) permits a student to be expelled from school "for sufficient cause." A 1989 opinion of the Attorney General observes that local school boards have significant authority over the supervision of schools and the discipline of students. The opinion concludes that the general authority to supervise schools and enforce student discipline authorizes school boards to adopt a policy requiring the periodic drug testing of students who seek readmission to school following their suspension or expulsion for violating school policies or state laws prohibiting the possession, consumption or distribution of controlled substances, subject to constitutional limitations. Because of its significant authority over the supervision of schools and discipline of students, a school board may, subject to constitutional limitations, similarly adopt a policy with regard to possessing firearms on school property or at a school-sponsored activity.

A school board may not, however, have a per se rule expelling all students whose actions are in conformity with the 2003 amendment. Student conduct in conformance with the 2003 amendment, however, coupled with some other behavior, may give rise to "sufficient cause" for suspension or expulsion under § 22.1-277(A). Whether any particular conduct constitutes "sufficient cause," in addition to possessing a firearm in accordance with the 2003 amendment, is a factual determination. Such a determination requires, at a minimum, a careful consideration of the nature of the incident, a review of the individual student's disciplinary record, and a reasonable belief that the expulsion is required by a totality of the facts and circumstances surrounding such possession.

CONCLUSION

Accordingly, I am of the opinion that a school board has authority to discipline, in the context of the complete analysis herein, a student whose action is in conformance with the language of Chapter 619 of the 2003 Acts of Assembly, which amends and reenacts § 18.2-308.1(B), pertaining to the possession of an unloaded firearm in a locked vehicle trunk.

1The authorized punishments for a Class I misdemeanor are "confine in jail for not more than twelve months and a fine of not more than $2,500, either or both." VA. CODE ANN. § 18.2-11(a) (LexisNexis Supp. 2003).
2The authorized punishments for a Class 6 felony are "a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both." Section 18.2-10(f) (LexisNexis Supp. 2003).
32003 Va. Acts chs. 976, 619, at 1508, 1509, 797, 798, respectively.
42003 Va. Acts ch. 976, supra note 3, at 1509.


In pari materia is the Latin phrase meaning "[o]n the same subject; relating to the same matter." BLACK's LAW DICTIONARY 794 (7th ed. 1999).


11 See also Va. Code Ann. § 22.1-28 (Michie Repl. Vol. 2000) ("The supervision of schools in each school division shall be vested in a school board selected as provided in [Chapter 5 of Title 22.1] or as otherwise provided by law.").

12 1993 Va. Acts ch. 819, at 1185, 1187; id. ch. 856, at 1241, 1243; id. ch. 889, at 1343, 1345.


14 Id. at *1.

15 Id. at *13.

16 Id. at *13-14.

17 Id. at *14-15.


19 Id. at 339-40 (citations omitted) (quoting Goss v. Lopez, 419 U.S. 565, 580 (1975)).


23 Id. at 449.

24 See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (citing cases that recognize obvious concern of school authorities acting in loco parentis to protect children from exposure to sexually explicit or lewd speech).


26 A school administrator, pursuant to school board policy, or a school board may, however, determine, based on the facts of a particular situation, that special circumstances exist and no disciplinary action or another disciplinary action or another term of expulsion is appropriate. A school board may promulgate guidelines for determining what constitutes special circumstances. In addition, a school board may, by regulation, authorize the division superintendent or his designee to conduct
a preliminary review of such cases to determine whether a disciplinary action other than expulsion is appropriate. Such regulations shall ensure that, if a determination is made that another disciplinary action is appropriate, any such subsequent disciplinary action is to be taken in accordance with the procedures set forth in Article 3, Chapter 14 of Title 22.1. "Va. Code Ann. § 22.1-277.07(A) (LexisNexis Repl. Vol. 2003)."

272003 Va. Acts chs. 976, 619, supra note 3, at 1509, 798, respectively (quoting § 18.2-308.1(B)).

281989 Op. Va. Att'y Gen. 204, 204; see also Va. Const. art. VIII, § 7; § 22.1-79; tit. 22.1, ch. 14, art. 3 ("Discipline").


30A local school board must consider the implications of any such regulations on the rights secured to citizens under the Second, Fourth, and Fourteenth Amendments to the Constitution of the United States and Article I, § 13 of the Constitution of Virginia. Additionally, the authority to discipline a student is not absolute. In determining what regulations are "reasonable," local school authorities may not ignore the consideration specifically given by the General Assembly to students bringing an unloaded firearm in a locked vehicle onto school property (see § 18.2-308.1(B)). There is a distinct difference between a student preparing for an after-school hunting trip and a student who conducts himself in such a manner that school officials reasonably conclude that he might act irresponsibly or dangerously. Thus, in developing "reasonable regulations," local school authorities should consider numerous factors and the totality of the circumstances, rather than promulgating and implementing a regulation based solely on the fact that a student has an unloaded firearm in a locked vehicle trunk on school property. Failure of local school authorities to do so would be inconsistent with the language of the 2003 amendment.

31I note, however, that if a student possesses a firearm in such a manner that is not in conformance with the exceptions in § 22.1-277.07 or § 18.2-308.1, then that student is subject to the expulsion provisions of §§ 22.1-277.07(A) and 22.1-277(A).

32I am aware that some argue that, by enacting the 2003 amendment, the General Assembly intended to allow students to possess firearms in accordance with § 18.2-308.1(B) and not be punished for doing so. If this was the intent of the General Assembly, such intent is not manifest given the required reconciliation of the statutory scheme outlined in this opinion. Had the intent of the General Assembly been to permit students to possess firearms in conformance with the 2003 amendment without any punishment, it would specifically have provided such in the 2003 amendment, or it would have amended the statutes dealing with a local school board's authority to expel or suspend students and clearly removed this authority from them. See Op. Va. Att'y Gen.: 2002 at 233, 237; 2001 at 28, 30; 1999 at 10, 11; 1998 at 87, 88; 1996 at 54, 55.

OP. NO. 03-064

CRIMINAL PROCEDURE: ARREST.

Law-enforcement officer may not enter dwelling without warrant or consent of dwelling owner for purpose of serving misdemeanor summons.

THE HONORABLE GARY W. WATERS
SHERIFF FOR THE CITY OF PORTSMOUTH
SEPTEMBER 16, 2003

ISSUE PRESENTED

You ask whether law-enforcement officers have authority to enter a dwelling without a warrant for the purpose of serving a summons for a misdemeanor, if they know the individual they are seeking to serve is within the dwelling.
RESPONSE

It is my opinion that a law-enforcement officer may not enter a dwelling without a warrant or consent of the dwelling owner for the purpose of serving a summons for a misdemeanor.

BACKGROUND

You relate that a deputy sheriff charged with serving a summons on an individual for failure to pay child support observed the individual inside the dwelling, opened the door, and served the summons.

APPLICABLE LAW AND DISCUSSION

Section 19.2-76 requires that "[a] warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally." Section 19.2-77 provides that, "whenever a person shall flee from an officer attempting to arrest him, such officer, with or without a warrant, may pursue such person anywhere in the Commonwealth and, when actually in close pursuit, may arrest him wherever he is found." Because the General Assembly made the close pursuit statute applicable only to an officer attempting to arrest a suspect, § 19.2-77 does not encompass the effort to execute a summons.

The Supreme Court of the United States and courts in Virginia consistently have recognized that, under the Fourth Amendment, a firm line is drawn at the threshold of a home, which may not be crossed without a warrant, absent exigent circumstances. These courts have recognized that close pursuit is an exigent circumstance that may permit an officer to pursue a suspect into a residence where he otherwise would not be permitted to go.

A 1980 opinion of the Attorney General concludes that, absent exigent circumstances, an arrest warrant must be obtained as a prerequisite to entering the home of an accused to effectuate a felony arrest. Under the facts you present, a summons was issued instead of an arrest warrant. Although such a summons, if served, would commence misdemeanor proceedings against the person served, the summons is not, for all purposes, an adequate substitute for an arrest or a search warrant. The issuance of a misdemeanor summons does not constitute a judicial determination that the right of privacy in a home is required to yield to an officer's purpose.

Although the question you ask has not been answered directly by Virginia's courts under the facts you present, other courts considering similar cases have reached the conclusion that, absent exigency, an officer may not enter private premises without a warrant in order to arrest on a charging instrument or to serve papers.

CONCLUSION

The officer's duty to serve a misdemeanor summons does not create an exigency similar to those considered by the federal and state courts in circumstances where they have approved warrantless entry to effectuate a felony arrest. Accordingly, absent
consent of a dwelling owner, a law-enforcement officer must obtain a warrant before entering a dwelling for the purpose of serving a summons for a misdemeanor.


2The Fourth Amendment to the Constitution of the United States, made applicable to states by the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."


7See, e.g., United States v. Bradley, 922 F.2d 1290, 1295 (6th Cir. 1991) (holding that warrantless arrest of defendant in his home on felony indictment was unconstitutional), overruled on other grounds, United States v. McGlockin, 8 F.3d 1037 (1993); Gateway 2000, Inc. v. Limoges, 552 N.W.2d 591 (S.D. 1996) (ruling that corporation had justifiable expectation of privacy in nonpublic employee work areas, and was entitled to injunction against officers entering nonpublic employee areas to serve papers on employees); In re: Walters, 229 N.C. 111, 47 S.E.2d 709 (1948) (holding that respondent did not commit contempt of court in refusing to permit officers to enter home without search warrant for purpose of serving civil process on third party).

OP. NO. 03-025
CRIMINAL PROCEDURE: ARREST — BAIL AND RECOGNIZANCES — TRIAL AND ITS INCIDENTS.

No authority for chief of police or Commonwealth's attorney to withdraw or dismiss lawfully issued arrest warrant or summons, to 'unarrest' person lawfully arrested on warrant or summons, or for Commonwealth's attorney to dismiss misdemeanor or felony charge leading to lawful arrest of accused, without showing good cause to court.

THE HONORABLE RALPH B. ROBERTSON
JUDGE, RICHMOND GENERAL DISTRICT COURT, CRIMINAL DIVISION
MAY 30, 2003

ISSUE PRESENTED

You ask whether the chief of police or the Commonwealth's attorney may withdraw or dismiss a lawfully issued arrest warrant or summons, without judicial approval. You also ask whether a police officer or a Commonwealth's attorney may "unarrest" a person who is lawfully arrested. Finally, you ask whether a Commonwealth's attorney has the discretionary authority to dismiss any misdemeanor or felony charge that led to the arrest, without showing good cause to the court.
RESPONSE

It is my opinion that neither a chief of police nor a Commonwealth’s attorney has the authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant or summons. It is also my opinion that there is no authority or process by which a police officer or a Commonwealth’s attorney may “unarrest” a person who is lawfully arrested on a warrant or summons. It is further my opinion that a Commonwealth’s attorney has no authority to dismiss any misdemeanor or felony charge that led to the lawful arrest of an accused, without a showing of good cause to the court.

BACKGROUND

You relate a hypothetical situation where a police officer executes a lawful arrest warrant or summons for an alleged misdemeanor or felony and the following separate scenarios occur: (1) the chief of police dismisses the warrant or summons and releases the individual prior to a court appearance; (2) a Commonwealth’s attorney dismisses or withdraws the warrant or summons without judicial authority; or (3) the Commonwealth’s attorney dismisses the misdemeanor or felony charge without giving the court a reason for such dismissal.

APPLICABLE LAW AND DISCUSSION

You first ask whether the chief of police or the Commonwealth’s attorney may withdraw or dismiss a lawfully issued warrant or summons, without judicial approval. “A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning.” 1 Section 19.2-72 provides that an arrest warrant shall “command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the offense was allegedly committed.” (Emphasis added.) Section 19.2-73 applies to misdemeanors and provides that “[a]ny person on whom [a misdemeanor] summons is served shall appear on the date set forth in same, and if such person fails to appear in such court at such time and on such date then he shall be treated in accordance with the provisions of § 19.2-128.” 2 (Emphasis added.)

Section 19.2-72 plainly requires that an accused for whom an arrest warrant is issued shall be brought before the appropriate court. Similarly, § 19.2-73 requires the person served with a misdemeanor summons to “appear” in court. Thus, there is no authority for disposing of an arrest warrant or summons without judicial action. 3

Section 19.2-76.1 further illustrates that judicial action is necessary to dismiss a warrant or summons in the context you describe. Section 19.2-76.1 directs the chief law-enforcement officer of each jurisdiction to prepare quarterly reports listing “unexecuted felony and misdemeanor arrest warrants, summonses, capiases or other unexecuted criminal processes.” “Upon receipt of the report and the warrants listed therein,” the Commonwealth’s attorney must petition the circuit court to destroy the unexecuted documents. 4 Since judicial authority is needed to destroy unexecuted warrants and summonses, logic dictates that executed warrants and summonses may not be withdrawn or dismissed without judicial authority. 5
A 1975 opinion of the Attorney General determined that a magistrate may not withdraw a warrant after it has been issued. Additionally, the 1975 opinion relied on a 1938 opinion of this Office concluding that a justice of the peace may not withdraw a warrant after its issuance. Both opinions relied on the language in the applicable statutes requiring warrants to be returned to the appropriate court for action thereon. Likewise, a warrant or summons issued pursuant to § 19.2-72 or § 19.2-73 requires judicial action for disposition. Therefore, neither the chief of police nor the Commonwealth’s attorney has the authority to unilaterally withdraw or dismiss a warrant or summons.

You next ask whether a Commonwealth’s attorney, or a police officer, may “unarrest” a person who is lawfully arrested on a warrant or issuance of a summons. I find no authority or process in the Code for such an action. Once arrested on an arrest warrant or summons, the person must appear in court before the warrant or summons may be dismissed. If the court, however, subsequently dismisses the charge, the person may seek to have the records expunged.

Finally, you ask whether a Commonwealth’s attorney has the discretion to dismiss misdemeanor or felony charges without a showing of cause to the court. Section 19.2-265.3 provides that “[n]olle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown.” (Emphasis added.) A nolle prosequi discontinues the case and operates as a dismissal without prejudice when entered before jeopardy has attached. A dismissal based on the merits of the case, however, bars further prosecution. The plain language of § 19.2-265.3 requires a Commonwealth’s attorney to show good cause to nolle prosequi a pending charge. Whether a Commonwealth’s attorney has demonstrated to the court “good cause” for the nolle prosequi is a determination that is within the discretion of the court.

CONCLUSION

Accordingly, it is my opinion that neither a chief of police nor a Commonwealth’s attorney has the authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant or summons. It is also my opinion that there is no authority or process by which a police officer or a Commonwealth’s attorney may “unarrest” a person who is lawfully arrested on a warrant or summons. It is further my opinion that a Commonwealth’s attorney has no authority to dismiss any misdemeanor or felony charge that led to the lawful arrest of an accused, without a showing of good cause to the court.

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1Loudoun County Dep’t of Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).
2Section 19.2-128 prescribes penalties for persons released pursuant to Chapter 9 of Title 19.2 or § 19.2-319 or on a summons pursuant to § 19.2-73 or § 19.2-74, and for alleged or convicted felons or misdemeanants whose execution of sentence is suspended pursuant to § 19.2-319, who willfully fail to appear before any court or judicial officer as required.
3Please note that such action by a Commonwealth’s attorney may create an ethical violation. A former Commonwealth’s attorney amended an arrest warrant, without the knowledge or consent of the court, by reducing the felony charge to a misdemeanor, in contravention of the Rules of the Supreme Court, and was directed to write a letter of apology to the court. See Morrissey v. Va. State Bar ex rel. Third Dist. Comm., 260 Va. 472, 479, 538 S.E.2d 677, 680-81 (2000).

I note also that, in instances where service is not executed, judicial action is necessary to recall process. The Office of the Executive Secretary of the Supreme Court of Virginia has prepared an official form, which requires a judge's signature, to use in such situations. See VA. SUP. CT. Recall of Process Form DC-323 (rev. July 1, 1993), available at http://www.courts.state.va.us/forms/district/dc323.pdf.


8 See § 19.2-392.2 (LexisNexis Supp. 2002) (providing for expungement of police and court records when person charged with commission of crime is acquitted, nolle prosequi is taken, or charge is otherwise dismissed).

9 "Nolle prosequi," a Latin term used as a verb, means "[t]o abandon (a suit or prosecution); to have (a case) dismissed." BLACK'S LAW DICTIONARY 1070 (7th ed. 1999). Used as a noun, nolle prosequi means "[a] docket entry showing that ... the prosecutor has abandoned the action." Id.


11 See Cantrell v. Commonwealth, 7 Va. App. 269, 281, 373 S.E.2d 328, 333 (1988) (noting general rule that nolle prosequi, entered before jeopardy attaches, does not act as acquittal and does not bar further prosecution of offense); see also Neff v. Commonwealth, 39 Va. App. 13, 569 S.E.2d 72 (2002) (holding that doctrines of double jeopardy and res judicata did not bar Neff's indictment in circuit court on same charge previously dismissed by that court, and that district court dismissal of charge was equivalent of nolle prosequi, in that it did not address Neff's guilt or innocence and did not constitute decision on merits).


OP. NO. 03-094

CRIMINAL PROCEDURE: EVIDENCE AND WITNESSES.

Authority for trial court in criminal case to order donation or destruction of human biological evidence where no appeal is timely filed, unless court imposes death sentence or defendant files motion to store, retain, and preserve such evidence. Court may order donation or destruction of evidence received in criminal case on appeal after exhaustion of all appellate remedies. Felon not sentenced to death must file motion to store human biological evidence before court disposes of such evidence; court is not required to wait indefinitely for motion to be filed.

THE HONORABLE YVONNE G. SMITH
CLERK, CIRCUIT COURT OF HENRICO COUNTY
OCTOBER 31, 2003

ISSUE PRESENTED

You ask whether a clerk of the circuit court is required to keep all human biological evidence for an indefinite period of time, or whether the court may order the destruction
of such evidence in accordance with § 19.2-270.4(A), assuming that a motion is not made pursuant to § 19.2-270.4:1(A).

RESPONSE

It is my opinion that, unless a court imposes a death sentence or a defendant files a motion pursuant to § 19.2-270.4:1(A) to store, retain, and preserve human biological evidence, the trial court, in a criminal case that has not been appealed, may order the donation or destruction of such evidence after the time period for appeal of the final judgment has expired. The court may order the donation or destruction of human biological evidence received in a criminal case on appeal after all appellate remedies have been exhausted. A felon who has not been sentenced to death by a circuit court must file a motion pursuant to § 19.2-270.4:1(A) before the court disposes of the human biological evidence, in accordance with § 19.2-270.4(A), in order to preserve such evidence. The court is not required to wait indefinitely for a motion to be filed pursuant to § 19.2-270.4:1(A).

APPLICABLE LAW AND DISCUSSION

It is well accepted that statutes should not be read in isolation. Statutes relating to the same subject should be considered in pari materia. Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent. The General Assembly enacted § 19.2-270.4:1 as “a precursor step to the procedures for requesting a Writ of Actual Innocence.” The requirements of § 19.2-270.4:1 may be applied in harmony with the requirements of § 19.2-270.4, the pre-existing statute governing the disposal of evidence. Together, the two statutes “protect the efficacy of the appellate process, as well as the need to preserve evidence for use in the event of a retrial or other proceeding allowed by law.”

Section 19.2-270.4 governs the disposal of evidence, “[e]xcept as provided in § 19.2-270.4:1.” Section 19.2-270.4:1(A) and (B) specifies two conditions regarding its applicability in a particular case. If either of these conditions is present, the provisions of the statute are applicable. If these conditions are not present, then § 19.2-270.4 applies. Consequently, there would never be a conflict over which statute is applicable in a given case.

Section 19.2-270.4:1(A) provides that, “upon motion of a person convicted of a felony but not sentenced to death ..., the court shall order the storage, preservation, and retention of specifically identified human biological evidence or representative samples ... for a period of up to fifteen years from the time of conviction.” Section 19.2-270.4:1(B) is applicable only “[i]n the case of a person sentenced to death.” Under that circumstance, the court must “order any human biological evidence or representative samples to be transferred ... to the Division of Forensic Science” for storage and maintenance “until the judgment is executed.” If neither of these events occurs, § 19.2-270.4:1 does not apply.
When the conditions of § 19.2-270.4:1(A) or (B) are not applicable, § 19.2-270.4 governs the disposal of evidence in a criminal case. Section 19.2-270.4(A) allows the trial court to order the “donation or destruction” of evidence “(i) at any time after the expiration of the time for filing an appeal from the final judgment of the court if no appeal is taken or (ii) if an appeal is taken, at any time after exhaustion of all appellate remedies.” The application of § 19.2-270.4 is not constrained by the language of § 19.2-270.4:1.

When read together, the two statutes are not in conflict. Unless § 19.2-270.4:1 is triggered by an event specified within that statute, it does not apply, and the evidence may be donated or destroyed in accordance with § 19.2-270.4(A).

CONCLUSION

Accordingly, it is my opinion that, unless a court imposes a death sentence or a defendant files a motion pursuant to § 19.2-270.4:1(A) to store, retain, and preserve human biological evidence, the trial court, in a criminal case that has not been appealed, may order the donation or destruction of such evidence after the time period for appeal of the final judgment has expired. The court may order the donation or destruction of human biological evidence received in a criminal case on appeal after all appellate remedies have been exhausted. A felon who has not been sentenced to death by a circuit court must file a motion pursuant to § 19.2-270.4:1(A) before the court disposes of the human biological evidence, in accordance with § 19.2-270.4(A), in order to preserve such evidence. The court is not required to wait indefinitely for a motion to be filed pursuant to § 19.2-270.4:1(A).
ISSUE PRESENTED

You inquire regarding the taking of deoxyribonucleic acid ("DNA") samples from persons arrested for certain violent offenses. Specifically, you ask whether § 19.2-310.3:1 permits the use of force to obtain a DNA sample from an arrestee who refuses to cooperate.

RESPONSE

It is my opinion that § 19.2-310.2:1 requires a person lawfully arrested for a violent felony to provide a saliva or tissue sample for DNA analysis. Reasonable force may be used, if necessary, to obtain a DNA sample from such an arrestee who refuses to comply with the applicable DNA statutes.

APPLICABLE LAW AND DISCUSSION

Section 19.2-310.2:1 requires persons arrested for certain violent felonies to provide a DNA saliva or tissue sample prior to their release from custody. Section 19.2-310.2:1 stipulates that a DNA sample shall be taken only after a magistrate has determined that probable cause existed for the arrest. The purpose of a DNA sample is "to determine identification characteristics specific to the individual whose sample is being analyzed."

The Division of Forensic Science, or its designated entity, analyzes the sample, which the Division maintains in a DNA data bank. Section 19.2-310.5 governs the availability of access to the results of a DNA analysis and comparison of identification characteristics from samples in the database.

Section 19.2-310.2:1 requires the clerk of court to notify the Division of Forensic Science of the final disposition of the criminal case. Section 19.2-310.2:1 further provides that, "[i]f the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, the Division shall destroy the sample and all records thereof." Section 19.2-310.3:1 requires that the DNA sample be taken prior to the release from custody of the arrestee at a place designated by the magistrate. Samples are to be taken "in accordance with procedures adopted by the Division," in the manner prescribed by § 19.2-310.3:1(A).

The taking of DNA samples does not violate an arrestee's federal or state constitutional rights. The Commonwealth has a legitimate interest in the identification of an individual arrested on probable cause.

An arrestee typically is required to provide identifying information such as fingerprints and photographs during the "booking" process. Fingerprints have long been accepted as a legitimate means of obtaining identification from an arrestee. The stated objective of § 19.2-310.2:1 is "to determine identification characteristics specific to the person." The procedure for taking a DNA saliva or tissue sample is less intrusive than taking a blood sample from a convicted felon. In fact, the procedure is more analogous to fingerprinting and photographing.
A threshold issue in "use of force" cases is whether the degree of force employed is necessary to protect a legitimate state interest and is "objectively reasonable" under the totality of the circumstances. The taking of a DNA saliva or tissue sample satisfies a legitimate state interest in identifying arrestees. Thus, the use of force requiring a person who otherwise refuses to provide a DNA sample is permissible when it is reasonably based on a totality of the circumstances. Any determination as to what is "reasonable" in any given circumstance necessarily depends on the facts. The reasonableness of the force used, however, must be consistent with the objective of identifying an arrestee, as well as the safety and reliability of the "booking" process. Moreover, if a DNA sample is not obtained as required by § 19.2-310.3:1, the arrestee may be held in custody until he complies or the court otherwise directs.

CONCLUSION

Accordingly, it is my opinion that § 19.2-310.2:1 requires a person lawfully arrested for a violent felony to provide a saliva or tissue sample for DNA analysis. Reasonable force may be used, if necessary, to obtain a DNA sample from such an arrestee who refuses to comply with the applicable DNA statutes.

1A violent felony is deemed an "act of violence," as that term is defined in § 19.2-297.1, or a felony committed in violation of §§ 18.2-89 through 18.2-92. VA. CODE ANN. § 19.2-310.2:1 (LexisNexis Supp. 2002).
2Section 19.2-310.4 (LexisNexis Supp. 2002).
3Sections 19.2-310.2:1, 19.2-310.4.
5"The chief magistrate for each jurisdiction shall coordinate with the chief law enforcement officer(s) in the jurisdiction to designate the place(s) where saliva and tissue samples are to be taken when persons are arrested for qualifying offenses. The samples shall be collected during booking by the sheriff's office, police department or regional jail responsible for booking upon arrest." 19:10 Va. Regs. Reg. 1511, 1512 (2003) (to be codified at 6 VA. ADMIN. CODE 20-210-60).
6The 2002 Session of the General Assembly charged the Division of Forensic Science with the duty of adopting regulations pursuant to the Administrative Process Act to implement the Commonwealth's DNA statutes. 2002 Va. Acts ch. 753, cl. 2, at 1258, 1259; id. ch. 773, cl. 2, at 1286, 1287. See 19:10 Va. Regs. Reg. supra note 5, at 1512 (to be codified at 6 VA. ADMIN. CODE, pt. 4, 20-210-60 to 20-210-100 (procedures for taking saliva or tissue samples)).
8See id. at 672, 529 S.E.2d at 779 (citing Jones v. Murray, 962 F.2d.302, 307 (4th Cir. 1992) (finding that minor intrusion of taking blood samples from inmates is outweighed by Commonwealth's interest in identification of felons)).
9See § 19.2-390(A.1) (LexisNexis Supp. 2002) (requiring that state officials or agencies and local officials, having power to arrest for felony, provide report to Central Criminal Records Exchange, which "shall be accompanied by fingerprints" of arrestee); § 19.2-392(A) (Michie Repl. Vol. 2000) (providing that police with arrest powers "may take" fingerprints and photographs of (1) arrestees charged with felonies or certain misdemeanors, or (2) persons pleading or found guilty of certain misdemeanors).
10See Jones, 962 F.2d at 306-07 (citing Davis v. Mississippi, 394 U.S. 721, 727 (1969)).
You ask whether epidermal cells taken from a person’s body constitute “tissue” as that term is used in Article 1.1, Chapter 18 of Title 19.2, §§ 19.2-310.2 through 19.2-310.7.

RESPONSE

It is my opinion that the term “tissue” as used in §§ 19.2-310.2 through 19.2-310.7 includes epidermal cells taken from a person’s body.

BACKGROUND

You relate that a company has developed a new technology for acquiring deoxyribonucleic acid (“DNA”) samples from individuals. Specifically, the new procedure obtains epidermal cells off the tip of a person’s finger. The cells are used to establish a DNA fingerprint of the individual for identification purposes. You state that the procedure is similar to current fingerprinting methods. You inquire whether the cells procured in this process would constitute “tissue” as that word is used in §§ 19.2-310.2 through 19.2-310.7.

APPLICABLE LAW AND DISCUSSION

Article 1.1, Chapter 18 of Title 19.2, §§ 19.2-310.2 through 19.2-310.7, sets forth the laws governing the taking, storage and use of DNA by the Commonwealth in certain criminal proceedings.

You seek guidance regarding the meaning of “tissue” for purposes of §§ 19.2-310.2 through 19.2-310.7. Specifically, you ask whether “tissue” includes epidermal cells taken from a person’s body. Where a statute is expressed in plain and unambiguous terms, whether general or limited, the legislature is assumed to mean what it plainly has expressed, and no room is left for construction. Generally, when a particular word in a statute is not defined therein, the word must be given its ordinary meaning.
word “tissue” is not defined in Title 19.2. It is, therefore, appropriate to give the word its ordinary meaning.

The word “tissue” is defined as “[a] group or collection of similar cells and their intercellular substance that act together in the performance of a particular function. The primary tissues are epithelial, connective, skeletal, muscular, glandular, and nervous.”

A person’s “skin” consists of “[t]he layer of tissue between the body and its environment…. It consists of two major divisions: the epidermis … and the dermis.”

Epithelial tissue is also referred to as epithelium. The “epithelium” is defined as “[t]he layer of cells forming the epidermis of the skin and the surface layer of mucous and serous membranes.”

Thus, epidermal cells collected through the process you describe clearly are “tissue” as that word is used in §§ 19.2-310.2 through 19.2-310.7.

CONCLUSION

Accordingly, it is my opinion that the term “tissue” as used in §§ 19.2-310.2 through 19.2-310.7 includes epidermal cells taken from a person’s body.

1A “DNA fingerprint” is “[a] distinctive pattern of bands formed by repeating sequences of base pairs of satellite DNA. These patterns are different in every individual. The technique of identifying the pattern, known as DNA fingerprinting, can be helpful in establishing the origin of tissues and body fluids and is used in forensic medicine.” Taber’s Cyclopedic Medical Dictionary 565 (18th ed. 1997).

2Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).


4Taber’s Cyclopedic Medical Dictionary supra note 1, at 1958.

5Id. at 1768.

6Id. at 1959.

7Id. at 662.
the defendant. Section 19.2-299 authorizes defense counsel to advise and review the contents of the report with the defendant.

**APPLICABLE LAW AND DISCUSSION**

Section 19.2-299(A) directs a probation officer who prepares a presentence report on a defendant as authorized therein to furnish a copy of the report “at least five days prior to sentencing to counsel for the accused and the attorney for the Commonwealth for their permanent use.” Section 19.2-299(A) further provides:

The probation officer shall be available to testify from this report in open court in the presence of the accused, who shall have been advised of its contents and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter. The report of the investigating officer shall at all times be kept confidential by each recipient, and shall be filed as a part of the record in the case. Any report so filed shall be sealed upon the entry of the sentencing order by the court and made available only by court order, except that such reports or copies thereof shall be available at any time to any criminal justice agency, as defined in § 9.1-101, of this or any other state or of the United States; to any agency where the accused is referred for treatment by the court or by probation and parole services; and to counsel for any person who has been indicted jointly for the same felony as the person subject to the report. [Emphasis added.]

The purpose of providing the defense with a copy of the presentence report five days before sentencing is to give counsel the opportunity to review it with the defendant and to prepare a response, if needed, to items contained in the report. Section 19.2-299(A) specifically imposes upon counsel the affirmative duty to advise the defendant of the contents of the report, but notably does not authorize counsel to copy or distribute the report. “When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.”

Section 19.2-299 is replete with provisions intended to ensure that, while the defendant will be aware of the contents of the report, copies of the report will not be available in any way for unrestricted circulation. The purpose of these confidentiality provisions is not merely to protect the defendant’s personal privacy interests. Presentence reports frequently contain the criminal history of codefendants, the criminal history or other sensitive personal information of the defendant’s family members, and may contain highly personal information concerning the victims of the crime. Each of the individuals in the presentence report has privacy interests independent of those of the defendant. It is for these reasons that § 19.2-299 prohibits the defendant from having his own personal copy of the report. Thus, a defendant may not disseminate such information without regard to the welfare and privacy interests of the other people concerned.
CONCLUSION

Accordingly, it is my opinion that it is a violation of § 19.2-299 for a defense attorney to copy a defendant's presentence report or to provide the original or a copy of such report to the defendant. Section 19.2-299 authorizes defense counsel to advise and review the contents of the report with the defendant.


OP. NO. 03-097
CRIMINAL PROCEDURE: TRIAL AND ITS INCIDENTS – VENUE.

Jurisdiction of Waverly police department in criminal cases involving offenses against Commonwealth extends 1 mile beyond town corporate limits. Because corporate authorities have no jurisdiction to enforce town ordinances outside corporate limits of town, town of Waverly is not entitled to fines collected for violations of state law occurring outside its corporate limits.

THE HONORABLE E. CARTER NETTLES, JR.
COMMONWEALTH’S ATTORNEY FOR SUSSEX COUNTY
DECEMBER 2, 2003

ISSUES PRESENTED

You ask whether a town police officer lawfully may issue a traffic summons within a one-mile radius of the town’s corporate limits for violation of a town ordinance. You also ask whether the town is entitled to the fines collected for town ordinance violations that occur outside its corporate limits.

RESPONSE

It is my opinion that the jurisdiction of the Waverly police department in criminal cases involving offenses against the Commonwealth extends one mile beyond the corporate limits of the town of Waverly. The jurisdiction of the police department, however, does not include the authority to enforce town ordinances outside the corporate limits of the town. Since the town’s police department may not enforce town ordinances outside the corporate limits of the town, the town of Waverly is not entitled to any fines collected for violations of state law occurring outside its corporate limits.

BACKGROUND

You relate that Waverly police officers issue summonses for speeding violations detected by radar outside the corporate limits of the town. A Waverly police officer typically checks a block on the Virginia Uniform Summons indicating a violation of the town ordinance. Both the section number of the town ordinance and the jurisdiction of offense (indicating the town of Waverly) are preprinted on the summons.

The use of a summons form containing such preprinted information generally is not improper, provided that the Waverly police department either confines its traffic
enforcement to the corporate limits of the town or corrects the preprinted information pertaining to the town of Waverly. You believe, however, that the use of such forms poses a significant risk of error when the town police department uses the exception granted by § 19.2-250(A) to patrol or to enforce state law within one mile beyond the town corporate limits.  

APPLICABLE LAW AND DISCUSSION

Section 19.2-250 limits the jurisdiction of corporate authorities in criminal matters in adjoining jurisdictions. Section 19.2-250(A) provides:

> Notwithstanding any other provision of [Article 2, Chapter 15 of Title 19.2] and except as provided in subsection B hereof, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the Commonwealth one mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.

A 2001 opinion of the Attorney General concludes that determination of jurisdiction pursuant to § 19.2-250(A) rests on whether the population density of the county in which a town is located exceeds 300 inhabitants per square mile. Because the population density of Loudoun County exceeds 300 inhabitants per square mile, the prior opinion concludes that the jurisdiction of the town of Purcellville police department was limited to 300 yards beyond the corporate limits of the town.

In the case of the town of Waverly, the same analysis requires the opposite conclusion. The population density of Sussex County, in which the town of Waverly is located, is 25.5 inhabitants per square mile, which is under the threshold of 300 inhabitants per square mile prescribed in § 19.2-250(A). Accordingly, the jurisdiction of the Waverly police department to enforce state law extends one mile beyond the corporate limits of the town.

This grant of jurisdiction to corporate authorities, however, is limited by its terms to "criminal cases involving offenses against the Commonwealth." Section 19.2-250(A) does not expand the jurisdictional reach of local ordinances or confer on local police departments any authority to enforce those ordinances outside the corporate limits of the towns that they serve. Indeed, if the General Assembly had done otherwise, the problem of conflicting ordinances would arise in the one-mile radius at issue. The Supreme Court of Virginia has held that local ordinances have no effect beyond the corporate limits of a town.
CONCLUSION

Accordingly, it is my opinion that the jurisdiction of the Waverly police department in criminal cases involving offenses against the Commonwealth extends one mile beyond the corporate limits of the town of Waverly. The jurisdiction of the police department, however, does not include the authority to enforce town ordinances outside the corporate limits of the town. Since the Waverly police department may not enforce town ordinances outside the corporate limits of the town, the town of Waverly is not entitled to any fines collected for violations of state law occurring outside its corporate limits.

1. Note, however, that § 19.2-77 permits an officer attempting to arrest a person for a crime committed within his jurisdiction to pursue that person into another jurisdiction for the purpose of effectuating an arrest.
2. A Commonwealth’s attorney’s request 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).


4. Id. at 120.
5. See U.S. Census Bureau State & County QuickFacts for Sussex County, Va., available at http://quickfacts.census.gov. “Population” means “the population ... as shown by the United States census last preceding the time at which any provision dependent upon population is being applied, or the time as of which it is being construed, to the end that there will be ... flexibility.” VA. CODE ANN. § 1-13.22 (LexisNexis Repl. Vol. 2001).

8. See supra note 1.

OP. NO. 03-082
DOMESTIC RELATIONS: MARRIAGE GENERALLY.
GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Persons appointed as marriage celebrants before July 1, 2003, are not limited to performing marriages in their resident jurisdiction. Persons appointed by court order on or after July 1, 2003, are limited to performing marriages in their resident jurisdiction; change of residence to another jurisdiction terminates person’s authority to perform marriages in former resident jurisdiction.

THE HONORABLE MICHAEL D. WOLFE
CLERK, CIRCUIT COURT OF ALLEGHANY COUNTY
OCTOBER 10, 2003

ISSUES PRESENTED

You ask several questions regarding changes made to § 20-25 during the 2003 Session of the General Assembly. You first ask whether persons appointed before July 1, 2003,
to perform marriages are still authorized to perform marriages throughout the Commonwealth. In the case of persons appointed as marriage celebrants after July 1, 2003, you ask (1) whether such celebrants are authorized to perform marriages in any jurisdiction in which a judge sits or only in the jurisdiction in which they reside; and (2) whether, upon changing residence to another jurisdiction, a celebrant (a) must be appointed a celebrant in the new jurisdiction, and (b) has authority to perform marriages in the former jurisdiction of appointment.

RESPONSE

It is my opinion that marriage celebrants are governed by the law applicable at the time of appointment. Before July 1, 2003, § 20-25 permitted the performance of ceremonies by celebrants throughout the Commonwealth. Persons appointed to perform marriages on or after July 1, 2003, (1) are limited to performing marriages in the jurisdiction in which they reside; and (2) upon changing residence to another jurisdiction, a celebrant (a) must be appointed a celebrant in the new jurisdiction, and (b) has no authority to perform marriages in the former jurisdiction of appointment.

APPLICABLE LAW AND DISCUSSION

Prior to July 1, 2003, § 20-25 provided that

\[ \text{[t]he circuit courts of the Commonwealth, the clerks of which are} \]
\[ \text{authorized to issue marriage licenses, shall appoint one or more} \]
\[ \text{persons, resident in the county or city for which such court is held,} \]
\[ \text{to celebrate the rites of marriage, and upon any person, so appointed,} \]
\[ \text{giving bond in the penalty of $500 with surety, shall make a like} \]
\[ \text{order as provided in § 20-23 authorizing him to celebrate the rites of} \]
\[ \text{marriage in the Commonwealth.} \]

The 2003 Session of the General Assembly amended and reenacted § 20-25 to provide:

\[ \text{"Any circuit court judge may issue an order authorizing one or more persons, resident} \]
\[ \text{in the jurisdiction in which the judge sits, to celebrate the rites of marriage in such} \]
\[ \text{jurisdiction."} \]

Your first question relates to the impact of the 2003 amendment on marriage celebrants appointed before July 1, 2003.

Section 1-13.39:3 provides:

\[ \text{Whenever the word "reenacted" is used in the ... enactment of a} \]
\[ \text{bill ..., it shall mean that the changes enacted to a section of the} \]
\[ \text{Code of Virginia ... are in addition to the existing substantive provi-} \]
\[ \text{sions in that section ..., and are effective prospectively unless the} \]
\[ \text{bill expressly provides that such changes are effective retroactively} \]
\[ \text{on a specified date."} \]

The Supreme Court of Virginia has noted that its analysis of legislation employing the word "reenacted" in stating the contents of the bill "is guided by the fundamental principles of statutory construction that retroactive laws are not favored, and that a
statute is always construed to operate prospectively unless a contrary legislative intent is manifest.4

The 2003 Session of the General Assembly reenacted § 20-25 without any express provision or manifest legislative intent that the amendments apply retroactively. Accordingly, marriage celebrants appointed before July 1, 2003, under the language in § 20-25, providing that they may "celebrate the rites of marriage in the Commonwealth,"5 may continue to do so under the law applicable at the time of appointment.

You next ask whether appointments on or after July 1, 2003, are delineated by the jurisdiction of the judge or the person appointed. "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."6 The language in § 20-25, "resident in the jurisdiction in which the judge sits," immediately follows "persons" rather than "judge" and, therefore, limits "persons" who may be appointed to perform marriages to their resident jurisdiction. The authorization in § 20-25 "to celebrate the rites of marriage in such jurisdiction,"7 as the final clause in the first sentence, also relates to the residence of the person so appointed. While a circuit judge's jurisdiction may extend to multiple localities, a person may only reside in a single jurisdiction.7

Having determined that persons appointed on or after July 1, 2003, are limited to performing marriages in their resident jurisdiction, your final questions address the right of a celebrant to continue performing marriages upon a change of residence. Prior to 1985, celebrants were limited to performing marriages in their "county or city" of residence.8 Section 20-25 is "an exercise by the General Assembly of its legislative power to delegate the authority to celebrate marriages,"9 and may restrict or expand the jurisdiction of celebrants in the exercise of that power. As persons appointed on or after July 1, 2003, are limited to their resident jurisdiction for both appointment by the court and the celebration of marriage, their authority terminates upon a change of residence to another jurisdiction.

CONCLUSION

Persons appointed as marriages celebrants under § 20-25 before July 1, 2003, may continue to perform marriages throughout the Commonwealth and are not limited by the 2003 amendment to that statute to their resident jurisdiction. Persons appointed by court order on or after July 1, 2003, are limited to performing marriages in their resident jurisdiction, and a change of residence to another jurisdiction will terminate the authority of a celebrant to perform marriages in the former resident jurisdiction.

3 The provisions of § 1-13.39:3 are intended to reverse the ruling in Rubio v. Rubio, 33 Va. App. 74, 531 S.E.2d 612 (2000) (holding that statute authorizing termination or modification of spousal support upon proof that payee and another person have been habitually cohabiting in marriage-like relationship for year or more, beginning on or occurring after July 1, 1997, does not apply retroactively to pre-July 1, 1998 decrees).
OP. NO. 03-041

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC. - ESTABLISHMENT OF CHARTER SCHOOLS.

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT.

Authority for public charter school to contract with local school board, institution of higher education, or third party for use of building and grounds owned by limited liability company in which participant in charter school application has ownership interest. No authority for Board of Education to grant waiver should proposed contractual arrangement or individual's ownership interest in limited liability company violate Conflict of Interests Act.

THE HONORABLE JOHN A. ROLLISON, III
MEMBER, HOUSE OF DELEGATES
AUGUST 19, 2003

ISSUES PRESENTED

You ask whether § 22.1-212.6(C) permits a school system to enter into a contract with a limited liability company formed by a participant in an application for a charter school. You also ask whether it would be a violation of the State and Local Government Conflict of Interests Act for the individual to work for, and participate in the management of, the charter school while owning an interest in the limited liability company that will contract with the school board to provide a facility for the charter school. Lastly, you inquire whether the Board of Education may grant a waiver if the proposed arrangement between the school board, charter school and limited liability company violates the State and Local Government Conflict of Interests Act.

RESPONSE

It is my opinion that a public charter school is authorized to contract with a local school board, an institution of higher education, or a third party for the use of a building and grounds. You do not relate the specific contractual arrangements for the use of the building and grounds owned by the limited liability company, but nothing suggests that the public charter school is without authority to contract for such use. Although a participant in the charter school application has an ownership interest in the limited liability company, nothing suggests that the contemplated contracts will be anything other than agreements among distinct legal entities.
It is further my opinion that the facts are insufficient for me to determine whether the proposed contractual arrangement between the school board and the limited liability company, and the individual's ownership interest in the limited liability company violates the State and Local Government Conflict of Interests Act. If such a prohibition did exist, however, the public charter school laws do not authorize the Board of Education to grant a waiver.

BACKGROUND
You advise that a group of individuals have requested school board approval of an application for a public charter school. A participant in the charter school application occupies several roles with respect to the proposed school, serving as founder, president, headmistress, and member of the board of directors. As headmistress, the individual's responsibilities include financial accounting and reports. You relate that the individual has formed, and has an ownership interest in, a limited liability company that has purchased real estate on which will be constructed the building to house the public charter school. You also advise that, under the proposed arrangement, the school board will pay rent to the limited liability company for use of the building as a charter school.

APPLICABLE LAW AND DISCUSSION
Sections 22.1-212.5 through 22.1-212.16 comprise the statutory scheme governing the establishment of charter schools ("public charter school laws"). Section 22.1-212.5(A) provides that public charter schools may be established in Virginia to

(i) stimulate the development of innovative programs within public education; (ii) provide opportunities for innovative instruction and assessment; (iii) provide parents and students with more options within their school divisions; (iv) provide teachers with a vehicle for establishing schools with alternative innovative instruction and school scheduling, management and structure; (v) encourage the use of performance-based educational programs; (vi) establish high standards for both teachers and administrators; and (vii) develop models for replication in other public schools ....

To encourage the innovative approaches for which public charter schools are created, the General Assembly has granted schools relief in § 22.1-212.6(B) from certain state and local requirements:

Pursuant to a charter contract and as specified in § 22.1-212.7, a public charter school may operate free from specified school division policies and state regulations, and, as public schools, shall be subject to the requirements of the Standards of Quality, including the Standards of Learning and the Standards of Accreditation.

An approved charter school application constitutes a contract between the public charter school and local school board, and it must address the scope of relief from state and local requirements.¹ Section 22.1-212.7 requires that a contract
reflect all agreements regarding the release of the public charter school from school division policies. Such contract ... shall reflect all requests for release of the public charter school from state regulations, consistent with the requirements of subsection B of § 22.1-212.6. The local school board or relevant school boards, on behalf of the public charter school, shall request such releases from the Board of Education.

You ask whether a waiver exists that would permit the proposed arrangement, whereby the school board will pay the limited liability company for the use of the building and grounds to be occupied by the public charter school. Section 22.1-212.6(C) permits a public charter school to contract with “a school division, the governing body of a public institution of higher education, or any third party for the use of a school building and grounds.” Your query does not specify the precise nature of the contractual arrangements contemplated under this proposal. If the public charter school were to contract with the school division for the use of the building, such contract is expressly authorized under § 22.1-212.6(C).

Implied in your question is whether the limited liability company qualifies as a “third party” under § 22.1-212.6(C) if the public charter school were to contract with the company for the use of the building. I assume that the limited liability company you describe has been organized in accordance with the Virginia Limited Liability Company Act. Section 13.1-1002 defines “limited liability company” as “an entity that is organized and existing under [the Virginia Limited Liability Company Act].” The Supreme Court of Virginia has determined that a limited liability company is an unincorporated association with a registered agent and office. It is an independent entity which can sue and be sued and its members are not personally liable for the debt or actions of the company. In contrast to a partnership, a limited liability company in Virginia is an entity separate from its members and, thus, the transfer of property from a member to the limited liability company is more than a change in the form of ownership; it is a transfer from one entity or person to another.

The facts you provide do not suggest that the proposed contractual arrangement will be anything other than agreements among distinct legal entities. Accordingly, the facts presented do not demonstrate any impediment to such an arrangement among the public charter school, school board, and limited liability company.

You next ask whether the State and Local Government Conflict of Interests Act, §§ 2.2-3100 through 2.2-3127, is applicable to a charter school employee who owns an interest in a limited liability company that will provide a facility to the charter school. You believe that the General Assembly’s intention in enacting the charter school laws was to relieve charter schools from as many regulations as possible.
The State and Local Government Conflict of Interests Act contains three types of restrictions on the conduct of state and local government officers and employees. First, the Act describes generally prohibited and unlawful conduct applicable to all state and local government officers and employees. Second, the Act “proscribes certain conduct relating to contracts by state and local government officers and employees.” Third, the Act “proscribes certain conduct by state and local government officers and employees having a personal interest in a transaction.”

You have requested an opinion pursuant to § 2.2-505. I note that this opinion does not operate as a conflict of interests advisory opinion under § 2.2-3126. Section 2.2-3126(A)(3) authorizes the Attorney General to render advisory opinions to state officers and employees. Section 2.2-3126(B) authorizes Commonwealth’s attorneys to render advisory opinions to local employees and officials. If a Commonwealth’s attorney determines that a particular action would violate the conflict of interests laws, “the officer or employee affected … may request that the Attorney General review the opinion. A conflicting opinion by the Attorney General shall act to revoke the opinion of the attorney for the Commonwealth.” A state or local officer or employee shall not be prosecuted for a knowing violation of the conflict of interests laws if the alleged violation results in his good faith reliance on a written opinion of the Attorney General or Commonwealth’s attorney. Consequently, an opinion rendered pursuant to § 2.2-505 does not operate as an opinion having the same effect as a conflict of interests advisory opinion rendered pursuant to § 2.2-3126 and should not be relied upon for such purposes. All conflict of interests advisory opinions are fact-dependent, and such opinions are limited to the facts that are fully disclosed.

Employees of public charter schools are deemed employees of the local school board granting the charter. Accordingly, public charter school employees are subject to the requirements of the State and Local Government Conflict of Interests Act. You indicate that the individual intends to be the president, headmistress, and a member of the board of management of the school. As an employee of the charter school, the individual is deemed to be an employee of the local school board granting the charter and is, therefore, subject to the Act.

Section 2.2-3109(A) provides that “[n]o … employee of any governmental agency of local government shall have a personal interest in a contract with the agency of which he is an … employee other than his own contract of employment.” Section 2.2-3101 defines “personal interest in a contract” as “a personal interest that an … employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business that is a party to the contract.” Under the Act, a “business” includes “a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit.” A limited liability company is an unincorporated association organized and existing under the Virginia Limited Liability Company Act. A limited liability company, therefore, is a “business” within the meaning of the State and Local Government Conflict of Interests Act.
Section 2.2-3101 defines “personal interest” as a financial benefit or liability accruing to an employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, $10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, $10,000 annually; (iv) ownership of real or personal property if the interest exceeds $10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of (i) or (iv) above.

As an “employee” subject to the Act, § 2.2-3109(A) would prohibit the individual from having a “personal interest in a contract” with the local school board. Your letter suggests that the school board and the limited liability company will have a contract for the lease of the school building and grounds. Assuming that is the case, the individual would have a prohibited interest in the contract if her interest in the limited liability company meets any of the criteria in the Act’s definition of “personal interest.” You do not indicate the level of the individual’s ownership interest in the limited liability company. Consequently, I am without sufficient facts to determine whether a prohibited personal interest may exist. I note, however, that § 2.2-3110(A)(1) may apply to this situation. Section 2.2-3110(A) provides that the prohibited conduct relating to contracts shall not apply to:

1. The sale, lease or exchange of real property between an employee and a governmental agency, provided the employee does not participate in any way as such employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of the governmental agency or by the administrative head thereof.

I am without sufficient facts to determine whether § 2.2-3110(A)(1) applies in this circumstance.

You also inquire whether the public charter school laws, which authorize relief for public charter schools from certain state requirements, override a prohibited conflict of interests. The applicable statutes, §§ 22.1-212.6(B) and 22.1-212.7, concern relief given by the Board of Education from “state regulations.” The public charter school
laws do not define the term "regulation"; however, its ordinary meaning is consonant with that contained in the Administrative Process Act, which defines "regulation" as "any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws." The provisions of the State and Local Government Conflict of Interests Act are not "regulations" within the ordinary meaning of the term. It is reasonable to conclude that the Board of Education has the power to exempt public charter schools from the requirements of its own regulations, but nothing in the public charter school laws suggests that the Board may waive the requirements of state law, let alone state laws unrelated to the Board's authority.

CONCLUSION

Accordingly, it is my opinion that a public charter school is authorized to contract with a local school board, an institution of higher education, or a third party for the use of a building and grounds. You do not relate the specific contractual arrangements for the use of the building and grounds owned by the limited liability company, but nothing suggests that the public charter school is without authority to contract for such use. Although a participant in the charter school application has an ownership interest in the limited liability company, nothing suggests that the contemplated contracts will be anything other than agreements among distinct legal entities.

It is further my opinion that the facts are insufficient for me to determine whether the proposed contractual arrangement between the school board and the limited liability company, and the individual's ownership interest in the limited liability company violates the State and Local Government Conflict of Interests Act. If such a prohibition did exist, however, the public charter school laws do not authorize the Board of Education to grant a waiver.

2"[A] public charter school operated by two or more school boards and chartered directly by the participating school boards" is defined in § 22.1-212.5(B) as a "regional public charter school."
4Hagan v. Adams Prop. Assocs., 253 Va. 217, 220, 482 S.E.2d 805, 807 (1997) (citations omitted) (holding that transfer of real property from its owners to limited liability company in which owners were members was "sale" entitling realtor to commission on gross sales amount).
6Section 2.2-3105 (LexisNexis Supp. 2003).
7Section 2.2-3111 (LexisNexis Repl. Vol. 2001).
8Section 2.2-3126(B) (LexisNexis Supp. 2003).
9Compare § 2.2-3121(A) and (B) (LexisNexis Supp. 2003) (providing that state officer or employee, or local officer or employee, shall not be prosecuted for knowing violation of State and Local Government Conflict of Interests Act if alleged violation resulted from good faith reliance on written opinion of Attorney General, or Commonwealth's attorney, respectively).
10Id. (noting that written opinions of Attorney General and Commonwealth's attorneys are made "after a full disclosure of the facts").
"Employee' means all persons employed by a governmental ... agency ...." Section 2.2-3101 (LexisNexis Supp. 2003). "Governmental agency' means each component part of the legislative, executive or judicial branches of state and local government, including ... each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers of duties." Id.


Section 2.2-3101.


Section 2.2-4001 (LexisNexis Supp. 2003).

OP. NO. 03-048

EDUCATION: PUPILS - COMPULSORY SCHOOL ATTENDANCE.

CONSTITUTION OF VIRGINIA: EDUCATION (COMPULSORY EDUCATION).

Whether particular organization is 'private, denominational, or parochial school' under Virginia’s compulsory attendance statute requires factual review that is inappropriate for Attorney General.

THE HONORABLE LINDA T. PULLER
MEMBER, SENATE OF VIRGINIA
OCTOBER 31, 2003

ISSUE PRESENTED

You ask whether enrollment of a student in a private learning program satisfies the requirements of Virginia's compulsory attendance statute. In the alternative, you inquire concerning the requirements for a program to qualify as a "school" under the compulsory attendance statute.

RESPONSE

Virginia law does not define "school" for purposes of the compulsory school attendance laws. Accordingly, it is my opinion that whether a particular organization is a "private, denominational or parochial school" within the meaning of Virginia’s compulsory attendance statute is a factual determination. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.1

BACKGROUND

You relate that several parents in Fairfax County have removed their children, who are special education students, from the Fairfax County Public Schools and have enrolled them in private learning programs. You advise that some of these programs do not offer a "full" curriculum or permit a parent to enroll a child in a specific part of the program. You note that while some of these organizations provide extensive educational services, they are not "schools." You relate that other programs provide fewer services but claim to be "schools." You also relate that some of these programs are not certified or accredited as "schools" by the political subdivision in which they are located or by regional accrediting bodies. You do not state whether the Board of Education
has licensed the private learning programs as "schools for students with disabilities," as required by § 22.1-323.

**APPLICABLE LAW AND DISCUSSION**

Section 22.1-254(A), Virginia's compulsory attendance statute, provides, in part:

> Except as otherwise provided in [Article 1, Chapter 14 of Title 22.1], every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home instruction of such child as described in § 22.1-254.1.

As prescribed in the regulations of the Board of Education, the requirements of this section may also be satisfied by sending a child to an alternative program of study or work/study offered by a public, private, denominational or parochial school or by a public or private degree-granting institution of higher education.

The statutes governing the compulsory school attendance laws do not define the term "school." Absent a statutory definition, words are given their ordinary meaning. The term "school" means "an organization that provides instruction" or "[a]n institution of learning and education, esp[ecially] for children." Such general definitions of so common a term provide little guidance in ascertaining whether a particular organization is a "school" within the meaning of Virginia's compulsory attendance statute.

The Supreme Court of Virginia has determined that home instruction does not constitute a "private school" for purposes of compulsory attendance. Virginia courts have not otherwise considered whether a particular institution is a "school" within the meaning of the compulsory school attendance laws. Courts in other states, however, have considered the question weighing various factors to determine whether a given arrangement is a "school." Naturally, the provisions of a compulsory attendance statute directly impact a court's analysis.

Some courts have considered statutes like Virginia's that contain no statutory definition of "school" and provide little guidance otherwise. The Supreme Court of Washington observed that "to attend a private school"

means more than home instruction; it means the same character of school as the public school, a regular, organized and existing institution making a business of instructing children of school age in the
required studies and for the full time required by the laws of this state.... This provision of law is not to be determined by the place where the school is maintained, nor the individuality or number of the pupils who attend it. It is to be determined by the purpose, intent and character of the endeavor.\(^{13}\)

A Kansas court, considering a requirement similar to Virginia's, noted that the subject child did not attend school for the requisite period.\(^{14}\) An Indiana court, also interpreting a similar statute, noted that the instruction period for the sole student was the same as that for children in public school.\(^{15}\) The Indiana court also examined at length the qualifications of the instructor, a former schoolteacher.\(^{16}\)

Whether a particular organization constitutes a "school" for purposes of compulsory attendance is a fact-specific determination. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.\(^{17}\) The particular facts that might influence a court, however, include whether the institution presents itself as a school, whether the instructional periods satisfy statutory requirements, whether the curriculum and teachers are of adequate quality\(^{18}\) and whether the Board of Education has licensed the institution as a "school for students with disabilities."\(^{19}\)

Your question is further complicated by its special education aspect. The Individuals with Disabilities Education Act\(^{20}\) is designed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."\(^{21}\) The primary mechanism for determining and implementing a "free appropriate public education" under the Act is the "individualized education program,"\(^{22}\) which identifies the educational needs of a particular student and the means by which those needs are met. Your request describes the actions of several parents utilizing a private service, without specifying the services required in the "individualized education program" or the manner in which the private service may meet the children's needs. The facts you provide do not afford a sufficient basis to determine whether the organization about which you inquire is a school. In any event, such a conclusion requires a factual determination. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.\(^{23}\)

**CONCLUSION**

Virginia law does not define "school" for purposes of the compulsory school attendance laws. Accordingly, it is my opinion that whether a particular organization is a "private, denominational or parochial school" within the meaning of Virginia's compulsory attendance statute is a factual determination. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.\(^{24}\)
1' See cites infra note 18.

2" 'School for students with disabilities' means a privately owned and operated preschool, school, industrial institution or educational organization, no matter how titled, maintained or conducting classes for the purpose of offering instruction, for a consideration, profit or tuition, to persons with mental retardation, visual impairment, speech/language disorders, hearing impairments, specific learning disabilities, physical disabilities, emotional disturbance, severe disabilities, or multiple disabilities." VA. CODE ANN. § 22.1-319 (LexisNexis Repl. Vol. 2003).

Section 22.1-323(A) specifies that "[n]o person shall open, operate or conduct any school in this Commonwealth without a license or certificate to operate such school issued by the Board of Education."

3See § 22.1-16 (LexisNexis Repl. Vol. 2003) (authorizing Board of Education to promulgate regulations necessary to carry out provisions of Title 22.1).

The Board of Education's "Rules Governing Alternative Education" require that the local school board approve courses offered by alternative education programs. See 8 VA. ADMIN. CODE 20-330-10 (West 2002). You indicate that the local school board has not approved the programs about which you inquire as "schools." For purposes of this opinion, I assume that the courses have not received local approval either.

4Tit. 22.1, ch. 14, art. 1, §§ 22.1-254 to 22.1-269.1 (LexisNexis Repl. Vol. 2003); see also VA. CONST. art. VIII, § 3 ("The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law.").


6MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1042 (10th ed. 2000).

7BLACK'S LAW DICTIONARY 1346 (7th ed. 1999).

8See Grigg v. Commonwealth, 224 Va. 356, 363-64, 297 S.E.2d 799, 802-03 (1982) (finding that General Assembly's creation of two distinct categories of exemption from compulsory school attendance—private schools and home instruction—clearly indicates intent that categories operate independently); see also § 22.1-254(A) (LexisNexis Repl. Vol. 2003) (providing that home instruction of child by parent or guardian is not "classified or defined as a private, denominational or parochial school").

9See, e.g., Burrow v. State, 669 S.W.2d 441, 443 (Ark. 1984) (noting that instruction of child in home by parent, without teacher qualifications, using correspondence school curriculum, does not constitute "school"); State v. Counort, 124 P. 910, 911 (Wash. 1912) (holding that instruction of child by parent, who is competent to instruct child, does not satisfy statutory requirement of attendance at private school). But see People v. Levisen, 90 N.E.2d 213 (Ill. 1950) (holding that home schooling constitutes "private school" where parents provide children with education that is equal or superior to that taught in public schools).

10See, e.g., Levisen, 90 N.E.2d at 214-15; State v. Hershberger, 144 N.E.2d 693 (Ohio Ct. App. 1955) (noting that compulsory school attendance laws in both states require that private school instruction be equivalent to that received in public schools); see Allan E. Korpela, Annotation, What Constitutes a Private, Parochial, or Denominational School Within Statute Making Attendance at Such School a Compliance with Compulsory School Attendance Law, 65 A.L.R.3d 1222 (1975 & Supp. 2003) (discussing various statutory requirements and judicial analyses in several jurisdictions). Section 22.1-254(A), Virginia's compulsory attendance statute, specifies that a child of appropriate school age must be in an alternative school "during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools."

11Counort, 124 P. at 911-12.

12See State v. Garber, 419 P.2d 896, 900 (Kan. 1966) (interpreting statute requiring that attendance at private, denominational, or parochial schools be for same period as public school). In fact, one
morning a week the child studied at a school established by the Amish. *Id.* at 898. Of the remain-
ing weekdays, one hour was devoted to study at home and five hours were spent in vocational training. *Id.*

11See State v. Peterman, 70 N.E.550, 550-51 (Ind. App. 1904) (interpreting statute providing that terms of private or parochial schools should not be less than that of public schools).

11Id.


18See cases cited *supra* notes 12-16.

18See definition *supra* note 2.


24See cites *supra* note 18.

OP. NO. 03-023

ELECTIONS: CANDIDATES FOR OFFICE – NOMINATIONS OF CANDIDATES BY POLITICAL PARTIES.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (ORGANIZATION AND GOVERNMENT).

Petersburg city council candidate may be nominated by political party. State or local government employee who exercises no functions in connection with federally financed activity, and who is seeking election to city council as political party nominee or is opposed by party nominee, is not subject to Hatch Political Activity Act; such employee who exercises no functions in connection with federally financed activity, and who is nonpartisan candidate not opposed by partisan candidate in city council election where partisan candidates are seeking other election in other council wards, is not subject to Hatch Act. Federal employee, or state or local government employee who exercises function in connection with federally financed activity, generally is subject to Hatch Act and may not participate as partisan candidate in city council election. Federal employee, or state or local government employee who exercises function in connection with federally financed activity, should request determination from United States Office of Special Counsel as to whether Hatch Act prohibits specific political activity.

THE HONORABLE FENTON L. BLAND, JR.
MEMBER, HOUSE OF DELEGATES
JUNE 13, 2003

ISSUE PRESENTED

You ask whether a candidate for the Petersburg city council may be nominated by a political party. You also inquire regarding the application of the Hatch Political Activity Act to a federal, state or local government employee seeking election to the city council either as a political party nominee who is opposed by a party nominee, or as a nonpartisan candidate who is not opposed by a partisan candidate, but partisan candidates are seeking election in other council wards at the same time.
RESPONSE

It is my opinion that a candidate for the Petersburg city council may be nominated by a political party. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is seeking election to city council as a political party nominee or opposed by a party nominee, is not subject to the Hatch Political Activity Act. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is a nonpartisan candidate that is not opposed by a partisan candidate in a city council election where partisan candidates are seeking election in other council wards, is not subject to the Hatch Act.

A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, however, generally is subject to the Hatch Act and, therefore, may not participate as a partisan candidate in a city council election. A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, should request a determination from the United States Office of Special Counsel as to whether the Hatch Act prohibits a specific political activity.

BACKGROUND

You relate that the Petersburg city council is contemplating moving elections for council members from May to November. Questions have arisen as to the applicability of the Hatch Political Activity Act to such elections. The Hatch Act generally prohibits employees of the executive branch of federal government from seeking public office in partisan elections. The Hatch Act also restricts the political activity of individuals principally employed by state, county or municipal executive agencies in connection with programs financed in whole or in part by federal loans or grants.

APPLICABLE AUTHORITIES AND DISCUSSION

Article VII, § 2 of the Constitution of Virginia provides that “[t]he General Assembly may ... provide by special act for the ... powers of any county, city, town, or regional government.” A charter provision that establishes the powers of a local government is special legislation. The charter for the city of Petersburg provides that “[c]andidates for the office of councilman may be nominated by petition or by general law.” An applicable rule of statutory construction is that the use of the word “may” in such legislation implies that the provision is discretionary, and not mandatory. Consequently, under the Petersburg charter, a city council candidate may be nominated by filing with the circuit court clerk, “a petition signed by not less than one hundred twenty-five qualified voters of the ward from which the candidate seeks election.”

Such a candidate also may be nominated in the manner permitted by general law. “[A] general law ... applies to all who are similarly situated.” The general laws regarding nominations of candidates by political parties are set out in Article 3, Chapter 5 of Title 24.2, §§ 24.2-508 through 24.2-511. Sections 24.2-508 and 24.2-509 authorize a political party to select candidates by a primary or by some other method of nomination determined by the party. If the primary method is selected, the conduct of the primary
is subject to the provisions of the applicable election statutes. If a nonprimary method of nomination is selected, one of the alternate methods of nomination provided by the party plan must be used. Therefore, the General Assembly clearly permits a candidate for the Petersburg city council to be nominated by a political party.

The Hatch Political Activity Act provides that, under certain limited conditions, a state or local officer or employee may not "be a candidate for elective office" and, by implication, may not serve in an elective office. In general, the Hatch Act applies to officers or employees of a state or local government agency "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." The Hatch Act, by its own terms, does not apply to a state or local officer or employee "who exercises no functions in connection with that activity." Thus, the Hatch Act’s prohibitions apply only if the state or local employee exercises functions in connection with a federally financed activity. A prior opinion of the Attorney General concludes that, assuming the connection with a federally financed activity under the Hatch Political Activity Act is not present, a classified state employee may be a candidate for and, if elected, serve in the General Assembly. Consequently, an employee of a state or local government agency who exercises no functions in connection with a federally financed activity may be a candidate for election to, and, if elected, serve on, the Petersburg city council.

Under the Hatch Act, a federal employee and a state or local government employee exercising functions in connection with a federally financed activity must forego certain rights if they wish to participate in the political process. Despite the obvious exchange such a scheme forces federal, state or local employees having a connection with a federally financed activity to make, the Supreme Court of the United States has upheld the constitutionality of the Hatch Act’s restrictions.

In Clements v. Fashing, the United States Supreme Court upheld a state constitutional provision prohibiting certain officers from seeking other offices during the term for which they were elected. In United States Civil Service Commission v. National Association of Letter Carriers and Broadrick v. Oklahoma, the Court upheld regulations and statutes requiring dismissal of civil servants who become political candidates. In these two cases, the Court recognized the government’s interest in prohibiting its personnel from engaging in the clearly partisan activities deemed offensive to efficiency in the workplace, including becoming a partisan candidate for an elective office.

Generally, the Hatch Political Activities Act permits federal, state and local government employees to be candidates in nonpartisan elections. For purposes of the Act, § 1503 defines "political party" as "a party ... whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." Recently, the United States Office of Special Counsel issued an opinion related to nonpartisan elections. The opinion notes that state and local laws designating an election as nonpartisan creates "a rebuttable presumption that an election is nonpartisan." Changing the Petersburg city charter to prohibit partisan elections
would appear to create a rebuttable presumption, for purposes of the Hatch Act, that city council elections are nonpartisan. "Evidence showing that partisan politics actually enter the campaigns of the candidates may rebut this presumption." Consequently, although a candidate may not be a political party nominee who is opposed by a nonpartisan candidate, the actual election itself may become a partisan event depending on the circumstances of the campaign. Any such evidence of partisanship will necessarily be fact specific.

For many years, Attorneys General of Virginia have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. In addition, a 1987 opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.2-505, the Attorney General has declined to render such opinions when the request, among other matters, requires the interpretation of a matter reserved to another entity. Congress has given the United States Office of Special Counsel "exclusive authority to investigate allegations of political activity prohibited by the Hatch Act." In addition, the Office of Special Counsel also has exclusive authority to render advice concerning application of the Hatch Act to specific factual situations. I must, therefore, respectfully decline to render an opinion as to the appropriateness of a federal, state or local government employee, who exercises a function in connection with a federally financed activity, engaging in a partisan political activity. I am of the opinion that the United States Office of Special Counsel is the appropriate agency to make such determinations.

CONCLUSION

Accordingly, it is my opinion that a candidate for the Petersburg city council may be nominated by a political party. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is seeking election to city council as a political party nominee or is opposed by a party nominee, is not subject to the Hatch Political Activity Act. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is a nonpartisan candidate that is not opposed by a partisan candidate in a city council election where partisan candidates are seeking election in other council wards, is not subject to the Hatch Act.

A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, however, generally is subject to the Hatch Act and, therefore, may not participate as a partisan candidate in a city council election. A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, should request a determination from the United States Office of Special Counsel as to whether the Hatch Act prohibits a specific political activity.

"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." Masters v. Hart, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), quoted in Bd. of Supvs. v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); 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.


5 U.S.C.A. § 1501(4) (defining "state or local officer or employee").


457 U.S. 957 (1982). In Clements v. Fashing, the Supreme Court of the United States used the rational basis test traditionally applied in equal protection challenges. A court's determination of the standard of review to apply often will depend on whether the restriction will survive challenge. The cases considering restrictions on government employees' seeking or holding public office, however, are not altogether consistent in the standard of review applied. If the court applies a rational basis standard, the restriction will be upheld, unless there is no reasonable ground for imposing the restriction. If the court applies a strict scrutiny standard, the restriction will be upheld only if the government can establish a compelling state interest for imposing the restriction and can show that the restriction is narrowly tailored to achieve that interest. In adopting the rational basis test in Clements, the Court stated that equal protection challenges are subject to a stricter standard only if the challenged statute burdens a suspect class or a fundamental right. 457 U.S. at 963. The Court does not recognize candidacy as a fundamental right. Id. (citing Bullock v. Carter, 405 U.S. 134, 142-43 (1972)). The Court explained, however, that traditional equal protection principles may give way to a heightened standard, even absent a fundamental right, if the nature of the affected interest and the extent of the burden placed on candidates are significant. 457 U.S. at 965-66.

The constitutional provision operated to prohibit an elected officeholder from resigning before the end of his term to become a candidate for another office. 457 U.S. at 960 (quoting Tex. Const. art. III, § 19, applicable solely to candidacy for Texas legislature). A justice of the peace who wished to run for the state legislature challenged the restriction. Id. at 966. The state's interest rationally related to the restriction was to preserve the integrity of the office of justice of the peace by preventing abuse of discretion or neglect of duties and by discouraging justices from vacating their terms of office. Id. at 968.


The restrictions in both Letter Carriers and Broadrick v. Oklahoma were confined to partisan activities. The Hatch Act, which was challenged in Letter Carriers, prohibits federal employees' participation as independent candidates in partisan elections. See 413 U.S. at 550 (quoting 5 U.S.C.A. § 7324(a)(2), which prohibits federal employees from engaging in acts of political management or political campaigning). In Broadrick, the Court noted that, despite the broad language of the state statute prohibiting state employees from becoming candidates for any paid political office, both the State Personnel Board and the Oklahoma Attorney General interpreted the statute as prohibiting only clearly partisan political activity. 413 U.S. at 616-17.


Id. at *1.

Id. at *1-2.

"For example, if a candidate solicits or advertises the endorsement of a partisan political party or uses a political party's resources to further his or her campaign, these actions may transform a nonpartisan election into a partisan one." Id. at 2. Similarly, although an election may be nonpartisan in one ward and partisan in the other wards of the city, circumstances may arise in the "nonpartisan" ward that implicate Hatch Act prohibitions.


5 C.F.R. § 734.102(a) (2003); see id. § 1800.1(b)(1)-(2) (2003).

See 5 C.F.R. § 734.102(a), supra; see id. § 1800.3 (2003) (authorizing United States Office of Special Counsel "to issue advisory opinions only concerning Chapter 15 of Title 5, United States Code (dealing with political activity of State or local officers and employees) and Subchapter III of Chapter 73 of Title 5, United States Code (dealing with political activity of Federal officers and employees").


OP. NO. 03-020

ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS - VACANCIES IN ELECTED CONSTITUTIONAL AND LOCAL OFFICES.

COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS - QUALIFICATIONS; ELIGIBILITY, ETC., OF LOCAL ELECTED OFFICERS — LOCAL CONSTITUTIONAL OFFICERS, ETC. — COMMISSIONER OF THE REVENUE.

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS) — (QUALIFICATIONS TO HOLD ELECTIVE OFFICE).

Process by which chief deputy assumes duties of office vacated by commissioner of revenue is not 'appointment.' Qualifications necessary for chief deputy to hold local constitutional office he is entitled to assume.

THE HONORABLE ROBERT M.D. TURK
JUDGE, TWENTY-SEVENTH JUDICIAL CIRCUIT
MAY 19, 2003

ISSUE PRESENTED

You ask whether a chief deputy assuming the duties of the commissioner of the revenue under § 24.2-228.1 constitutes an "appointment" as that term is used in § 15.2-1525(A). Section 15.2-1525(A) requires every officer of a county or city to have resided within that locality for "thirty days next preceding his election or appointment."

RESPONSE

While the process by which a chief deputy assumes the duties of office vacated by the commissioner of the revenue under § 24.2-228.1(B) is not an "appointment," as
that word is used in § 15.2-1525(A), it is my opinion that the chief deputy must be qualified to hold the office he is entitled to assume. In order to be qualified to hold a local constitutional office, the chief deputy must be a resident of the locality served by that office.

BACKGROUND

You relate that the commissioner of the revenue for the city of Radford is retiring June 30, 2003. At that time, two-and-one-half years will remain for the commissioner's term of office. You relate that the chief deputy to the commissioner of the revenue is not a Radford city resident.

APPLICABLE LAW AND DISCUSSION

Section 24.2-228.1 sets forth the procedure for filling a vacancy in a local constitutional office. Section 24.2-228.1(A) provides that "[a] vacancy in any elected constitutional office ... shall be filled by special election." Section 24.2-228.1(B) describes the procedure for operating the office during the vacancy. Specifically, § 24.2-228.1(B) provides:

The highest ranking deputy officer, ... if there is such a deputy ... in the office, shall be vested with the powers and shall perform all of the duties of the office, and shall be entitled to all the privileges and protections afforded by law to elected or appointed constitutional officers, until the qualified voters fill the vacancy by election and the person so elected has qualified and taken the oath of office. In the event that (i) there is no deputy officer ... in the office or (ii) the highest-ranking deputy officer ... declines to serve, the court shall make an interim appointment to fill the vacancy pursuant to § 24.2-227 until the qualified voters fill the vacancy by election and the person so elected has qualified and taken the oath of office.

Your inquiry concerns whether § 15.2-1525 requires a chief deputy that assumes the responsibilities of the vacating officer to meet the residency requirements of the statute. Section 15.2-1525(A) provides that "[e]very city and town officer ... shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment in such city or town unless otherwise specifically provided by charter." Section 15.2-1525(B) provides that, "[n]otwithstanding the foregoing provisions, and except as other provisions of law may require otherwise, ... nonelected deputies of constitutional officers, shall not be required to reside in the jurisdiction in which they are appointed." For the purposes of § 15.2-1525, "[a]n appointed officer ... means a person appointed to temporarily fill an elected position." Section 15.2-1526 provides that, "[i]f any officer, required by § 15.2-1525 to be a resident at the time of his election or appointment of the county, city, town or district for which he is elected or appointed, ... remove therefrom, ... his office shall be deemed vacant."

The 2000 Session of the General Assembly changed the process by which vacancies in constitutional offices are filled. Prior to the enactment of § 24.2-228.1, the circuit court of the locality appointed a person to fill the vacancy until a special election was conducted.
Ordinarily, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning. In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling. Although § 15.2-1522 defines "appointed officer," it does not explain what constitutes an "appointment" for the purposes of § 15.2-1525. Therefore, I am required to give the term its ordinary meaning. The word "appointment" means "[t]he selection or designation of a person, by the person or persons having authority therefor, to fill an office or public function and discharge the duties of the same.... ‘Election’ to office usually refers to vote of people, whereas ‘appointment’ relates to designation by some individual or group." The ordinary meaning of “appointment” contemplates there being a person or entity selecting a person to fill a position. The General Assembly has demonstrated in §§ 24.2-228.1(B) and 24.2-228 that when it intends to use the word “appointment,” it clearly does so.

Under the process set forth in § 24.2-228.1(B), a chief deputy is not “appointed” by a person or an entity. Instead, the statute designates that the highest ranking deputy officer in the local constitutional office assumes the vacant office. This statutory process limits the appointive ability of a circuit court to circumstances where there is no deputy officer or the highest ranking deputy officer declines to serve.

Section 24.2-228.1(B) clearly discloses the General Assembly’s intent that the chief deputy, by operation of law, shall assume the vacated constitutional office until a special election is held to fill the remaining term. While the assumption of office by the chief deputy pursuant to § 24.2-228.1(B) is not an “appointment” as contemplated by § 15.2-1525, the deputy must nonetheless be qualified to hold the office he is assuming.

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 [the] Constitution.[8] In order to be “qualified to vote” for the office at issue, the person must be a resident of the locality that the constitutional officer serves. Article II, § 1 of the Constitution of Virginia provides:

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article....

The residence requirements shall be that each voter shall be a resident of the Commonwealth and of the precinct where he votes. Residence, for all purposes of qualification to vote, requires both domicile and a place of abode. [Emphasis added.]
Section 15.2-1601 provides that "[t]he officers required by § 15.2-1600 are subject to the residency, qualification for office, bonding, dual-office-holding requirements and prohibitions provided for in Chapter 15 of [Title 15.2]." Section 15.2-1636 provides that "[t]he voters in every county and city shall elect a commissioner of the revenue, unless otherwise provided by general law or special act." (Emphasis added.)

A 1992 opinion of the Attorney General notes that a citizen whose dwelling house falls entirely outside the corporate limits of a town cannot qualify for the elective offices of mayor or town council member. The Supreme Court of Virginia and opinions of the Attorney General involving elected city and county officials have similarly focused on the physical act of residence within the boundaries of the relevant jurisdiction. A nonresident of a locality is not eligible to hold an office within the locality, because the nonresident is ineligible to vote for the office. Therefore, a chief deputy who resides outside the locality is not eligible to assume the vacant office under § 24.2-228.1.

A statute is construed to promote its legislative purpose. It is an accepted principle of statutory construction that statutes relating to the same subject should be considered in pari materia in order to give full force and effect to each provision. When taken together, Article II, §§ 1 and 5 of the Virginia Constitution, and §§ 15.2-1525(A) and 15.2-1526 represent the policy of the Commonwealth that local elected officials should be residents of the locality they represent. "[A] public office is a public agency or trust created in the interest and for the benefit of the people." Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people. As such, the Virginia Constitution and Code require that individuals holding such offices should be residents of the locality they serve and elected by the people among whom they live.

CONCLUSION

While the process by which a chief deputy assumes the duties of office vacated by the commissioner of the revenue under § 24.2-228.1(B) is not an "appointment," as that word is used in § 15.2-1525(A), it is my opinion that the chief deputy must be qualified to hold the office he is entitled to assume. In order to be qualified to hold a local constitutional office, the chief deputy must be a resident of the locality served by that office.

1 You do not relate whether a specific charter provision provides for another time period. For the purposes of this opinion, I assume there is no such provision.
3 2000 Va. Acts ch. 787, at 1671, 1672; id. ch. 1070, at 2615, 2616 (adding in both chapters, § 24.2-228.1).
4 Id. at 1672-72, 2615, respectively (amending and reenacting §§ 24.2-226, 24.2-227).
When a vacancy occurs in a local governing body or an elected school board, the remaining members of the body or board, respectively, within forty-five days of the office becoming vacant, shall appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy. If a majority of the remaining members cannot agree, or do not act, the judges of the circuit court of the county or city shall make the appointment.

If a majority of the seats on any governing body or elected school board are vacant, the remaining members shall not make interim appointments and the vacancies shall be filled as provided in § 24.2-227.

B. When a vacancy occurs in the office of a mayor who is elected by the voters, the council shall make an interim appointment to fill the vacancy as provided in subsection A.

C. For the purposes of [Article 6, Chapter 2 of Title 24.2] and subsection D of § 22.1-57.3, local school boards comprised of elected and appointed members shall be deemed elected school boards.

VA. CONST. art. II, § 5 (emphasis added).

Section 15.2-1600(A) provides for the election of local constitutional officers—sheriffs, commissioners of the revenue, circuit court clerks, treasurers, and Commonwealth’s attorneys.


nomination or election to office filled by election in whole or in part by qualified voters of jurisdiction served by electoral board member or registrar; and (5) being paid or volunteering to solicit signatures for nominating petitions for candidates for public office in public building owned or leased by county or city served by electoral board (electoral board member only). Local electoral board members and general registrars should perform official duties in nonpartisan fashion. When not performing official duties, such officers may participate in partisan political activities not in conflict with prohibitions in §§ 24.2-106, 24.2-106.1, 24.2-110.

MR. WILLIAM B. HARVEY
SECRETARY, ALBEMARLE COUNTY ELECTORAL BOARD
OCTOBER 17, 2003

ISSUE PRESENTED

The issue presented is to what extent a local electoral board member and a general registrar may participate in partisan political activities.

RESPONSE

It is my opinion that § 24.2-106 prohibits the following political activities of a local electoral board member: (1) holding elective office while serving in his appointive office; (2) serving as chairman of a state, local or district level political party committee; and (3) serving as a paid worker for a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of the jurisdiction served by the electoral board member. Additionally, it is my opinion that local electoral board members are prohibited from being paid or from volunteering to solicit “signatures for nominating petitions for candidates for public office in any public building owned or leased by the county or city served by the electoral board.”

It is my opinion that § 24.2-110 prohibits the following political activities of a general registrar: (1) holding elective office while serving in his appointive office; (2) serving as chairman of a political party or as any other officer of a state, local or district level political party committee; and (3) serving as a paid or volunteer worker for a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of the jurisdiction served by the general registrar.

It is further my opinion that local electoral board members and general registrars should perform their official duties in a nonpartisan fashion. When not performing those duties, such officers may participate in partisan political activities that do not conflict with the prohibitions set forth in §§ 24.2-106, 24.2-106.1, and 24.2-110.

APPLICABLE LAW AND DISCUSSION

Article II, § 8 of the Constitution of Virginia requires each county and city to have an electoral board composed of three members. The Constitution also requires the electoral board in each county and city to “appoint the officers of election and general registrar for its county or city.” In the appointment of electoral boards and officers of election, “representation, as far as practicable, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and the next highest number of votes.” The Constitution also prohibits dual office-holding by a general registrar.
Sections 24.2-106 through 24.2-109 govern the appointment, removal, qualifications, and general duties of local electoral board members; §§ 24.2-109(A), 24.2-110, and 24.2-114 govern the appointment, removal, qualifications, and duties of a general registrar.

The 1995 Session of the General Assembly amended §§ 24.2-106 and 24.2-110 to prohibit certain partisan political activities by local electoral board members and registrars. Prior to this amendment, the Code was silent as to the partisan political activities of a local electoral board member and general registrar. Section 24.2-106 provides, in part:

No member of an electoral board shall be eligible to offer for or hold an office to be filled in whole or in part by qualified voters of his jurisdiction. If a member resigns to offer for or hold such office, the vacancy shall be filled as provided in this section.

No member of an electoral board shall serve as the chairman of a state, local or district level political party committee or as a paid worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of the jurisdiction of the electoral board. [Emphasis added.]

Section 24.2-110 provides, in part:

No general registrar shall be eligible to offer for or hold an office to be filled by election in whole or in part by the qualified voters of his jurisdiction at any election held during the time he serves as general registrar or for the six months thereafter.

No general registrar shall serve as the chairman of a political party or other officer of a state, local or district level political party committee. No general registrar shall serve as a paid or volunteer worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of his jurisdiction. The restrictions of this paragraph shall apply to paid assistant registrars but shall not apply to unpaid assistant registrars. [Emphasis added.]

A 1978 opinion of the Attorney General considers whether a local electoral board member may serve as a campaign manager of a candidate. As a generally accepted practice of political campaigns in the Commonwealth, campaign managers usually are compensated for their campaign management services. The 1978 opinion determined that there is no requirement that local electoral board members abstain from participation in partisan politics during their appointment. Consequently, the opinion concludes that there is no prohibition against a local electoral board member serving as a campaign manager for a candidate.
In 1995, the General Assembly amended § 24.2-106 to specifically prohibit certain partisan political activity by local electoral board members. When amending a statute, the General Assembly is presumed to have had knowledge of the Attorney General's interpretation of that statute in its existing form. 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 specifically addressed the 1978 opinion by adding language in 1995 specifically prohibiting certain partisan political activities of local electoral board members. To the extent the 1978 opinion concludes that a local electoral board member may be a paid campaign manager, the 1995 amendment to § 24.2-106 specifically prohibits a local electoral board member's service "as a paid worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of [his] jurisdiction."

The amendatory language enacted in 1995 in §§ 24.2-106 and 24.2-110, however, is limited in its scope. As the 1978 opinion recognizes, local electoral board members represent the political parties, and as such, the appointments are political in nature. Moreover, local electoral boards are required to make partisan selections, based on the previous election results, in appointing officers of election. Consequently, partisanship is present throughout the oversight of the Commonwealth's electoral system. The partisan nature of selecting participants to conduct elections, however, does not require those individuals to perform their duties in a partisan fashion.

The plain language of §§ 24.2-106 and 24.2-110 prohibits the holding of an elective office by a local electoral board member and a general registrar while serving in their official capacities in their appointive offices. Section 24.2-106 prohibits a local electoral board member from serving as chairman of a state, local or district level political party committee. Section 24.2-110 prohibits a general registrar from serving as the chairman of a political party or as any other officer of a state, local or district level political party committee.

You advise that you cannot identify any change in the applicable statutory provisions that bars a local electoral board member from accepting a paid campaign position. Where the language of a statute is free from ambiguity, its plain meaning will control. Sections 24.2-106 and 24.2-110 clearly and unequivocally prohibit a local electoral board member or a general registrar from working in a compensated position for a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of his county or city. Moreover, the plain language of § 24.2-110 prohibits a general registrar from working as a volunteer for "a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of his jurisdiction."

An "office filled by election in whole or in part by the qualified voters" of the subject jurisdiction includes all federal, state and local elective offices for which qualified
voters in the locality cast votes. For instance, this includes elections conducted in the State Senate and House of Delegates districts in which the county or city served by the electoral board member or registrar is located. Elections for President of the United States, United States Senate, Governor, Lieutenant Governor, and Attorney General are also included. The prohibitions in §§ 24.2-106 and 24.2-110 also extend to elections conducted in United States House of Representatives districts in which the locality served by the electoral board member or registrar is located.

A local electoral board member and a general registrar are not prohibited, however, from serving as either paid or volunteer workers for candidates for local office, the State Senate or House of Delegates, or the House of Representatives in localities that are not served by the electoral board member and the registrar and for which the qualified voters in their county or city do not cast votes. For instance, a registrar is permitted to work as a volunteer for a candidate for local office in a neighboring locality that is not served by that registrar. A general registrar is prohibited, however, from volunteering to work in a neighboring locality for a candidate for state or federal office if the qualified voters in the registrar’s locality also cast votes for that particular office. I note that the 2003 General Assembly again altered the conclusion of the 1978 opinion by enacting § 24.2-106.1, providing that “[n]o member of an electoral board or their office staff shall solicit or assist in the solicitation of signatures for nominating petitions for candidates for public office in any public building owned or leased by the county or city served by the electoral board.” Thus, this type of volunteer activity by an electoral board member is prohibited.

A local electoral board member or general registrar is not required to be apolitical while not serving in his official capacity. Additionally, §§ 24.2-106 and 24.2-110 do not prohibit a local electoral board member or a general registrar from contributing to and attending fund-raising events for any candidate or political party; however, § 24.2-110 does prohibit a general registrar from volunteering at certain candidate-sponsored fund-raising events. An electoral board member or general registrar still may participate in political party functions short of holding the elective offices proscribed by §§ 24.2-106 and 24.2-110. For instance, a general registrar and electoral board member may vote in a political party primary, attend regular party meetings, and participate in party conventions, canvasses, party auxiliaries, and the like.

When performing the duties of a local electoral board member or general registrar, such officers should conduct their duties in a nonpartisan fashion. When not performing those duties, such officers may participate in partisan political activities that do not conflict with the prohibitions set forth in §§ 24.2-106 and 24.2-110.

CONCLUSION

Accordingly, it is my opinion that § 24.2-106 prohibits the following political activities of a local electoral board member: (1) holding elective office while serving in his appointive office; (2) serving as chairman of a state, local or district level political party committee; and (3) serving as a paid worker for a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of the
jurisdiction served by the electoral board member. Additionally, it is my opinion that local electoral board members are prohibited from being paid or from volunteering to solicit "signatures for nominating petitions for candidates for public office in any public building owned or leased by the county or city served by the electoral board."\(^9\)

It is my opinion that § 24.2-110 prohibits the following political activities of a general registrar: (1) holding elective office while serving in his appointive office; (2) serving as chairman of a political party or as any other officer of a state, local or district level political party committee; and (3) serving as a paid or volunteer worker for a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of the jurisdiction served by the general registrar.

It is further my opinion that local electoral board members and general registrars should perform their official duties in a nonpartisan fashion. When not performing those duties, such officers may participate in partisan political activities that do not conflict with the prohibitions set forth in §§ 24.2-106, 24.2-106.1, and 24.2-110.\(^{20}\)

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\(^3\) Id.
\(^4\) Id.
\(^5\) 1995 Va. Acts chs. 835, 848, at 1744, 1813, respectively.
\(^7\) Id. ("[T]here is no prohibition on partisan political activity by members of local electoral boards, including serving as campaign chairman for a candidate."). Although the 1978 opinion uses the term "chairman" in its conclusion, the question posed in the opinion was whether an electoral board member may serve as campaign manager for a candidate. I must conclude, therefore, that the terms "chairman" and "manager" mean the same in the context of responding to that specific inquiry.
\(^8\) See 1995 Va. Acts, supra note 5, at 1745, 1814, respectively.
\(^10\) City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).
\(^16\) I note, however, that such paid activity involving a candidate in another locality may conflict with the duties of a full-time registrar. See § 24.2-110 (providing that registrar, with consent of electoral board, "may undertake other duties which do not conflict with his duties as general registrar").
\(^17\) See § 24.2-110 ("No general registrar shall serve as a ... volunteer worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of his jurisdiction.").
See, e.g., § 24.2-114(2) (LexisNexis Repl. Vol. 2003) ("No registrar shall actively solicit, in a selective manner, any application for registration or for a ballot or offer anything of value for any such application.").

Section 24.2-106.1.

2003 REPORT OF THE ATTORNEY GENERAL

"No registrar shall actively solicit, in a selective manner, any application for registration or for a ballot or offer anything of value for any such application.").

Section 24.2-106.1.

Opinion no. 03-031 to Keith J. Meredith, Secretary, Carroll County Electoral Board, dated June 13, 2003, is hereby withdrawn.

OP. NO. 03-015

ELECTIONS: THE ELECTION - SPECIAL ELECTIONS.

GENERAL ASSEMBLY: GENERAL ASSEMBLY AND OFFICERS THEREOF.

Local governments have no authority to expend funds on advertising in support or opposition of local or statewide referendum question; may prepare and distribute neutral, nonpartisan statement of explanation of referendum question.

THE HONORABLE KEVIN G MILLER
MEMBER, SENATE OF VIRGINIA
MAY 27, 2003

ISSUE PRESENTED

You ask whether the governing body of a county or city may purchase advertising, printed or otherwise, that supports or opposes statewide referenda.

RESPONSE

It is my opinion that local governments have no authority to expend funds on advertising in support of, or in opposition to, a local or statewide referendum question. It is further my opinion that local governments may, consistent with the procedures detailed in § 24.2-687, prepare and distribute a neutral, nonpartisan statement explaining a local referendum question.

APPLICABLE LAW AND DISCUSSION

The Commonwealth follows the rule of strict construction of statutory provisions. "The powers of boards of supervisors are fixed by statute and are only such as are conferred expressly or by necessary implication." This rule is a corollary to the Dillon Rule, which provides that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable. "[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end." Your inquiry concerns whether § 24.2-687 authorizes a county or city to purchase advertising, printed or otherwise, that supports or opposes statewide referenda. In 1996, the General Assembly enacted §§ 24.2-687 and 30-19.10, relating to the distribution of information on referendum elections. Both sections contain similar wording. Section 24.2-687 authorizes the governing body of a county or city to provide an explanatory statement, consisting of "not more than 500 words" and presented in "plain English," of "each referendum question to be submitted to the voters" of the
locality. Section 24.2-687 also authorizes the governing body to purchase advertise­ments in a newspaper with general circulation in the county or city before the voter registration deadline and before the referendum question is posed to the voters. Section 24.2-687 further provides that “[t]he explanation ... shall be limited to a neutral explanation, and shall not present arguments by either proponents or opponents of the proposal.” Section 24.2-687 also provides that its provisions “shall not be applicable to statewide referenda.”

Section 30-19.10 addresses similar issues for the drafting and distribution of information regarding a statewide referendum question other than a constitutional amendment. Section 30-19.10 directs the “Division of Legislative Services, in consultation with such agencies of state government as may be appropriate, including the Office of the Attorney General,” to provide to interested persons, in “plain English,” an explanation of the proposed ballot question to be submitted to the voters. Section 30-19.10 stipulates that the statement shall consist of “not more than 500 words.” Like § 24.2-687, the statement authorized in § 30-19.10 is to “be limited to a neutral explanation, and shall not present arguments by either proponents or opponents of the proposal.” Section 30-19.10 also directs the State Board of Elections to distribute the explanation to each general registrar for distribution to interested persons and to election officials for posting at polling places on election day. Section 30-19.10 directs the State Board to cause the explanation to be published by paid advertisement in each daily newspaper with an average daily circulation of more than 50,000 in Virginia, and published in Virginia or in a contiguous state or district, once during the week preceding the final day for registration and once during the week preceding the referendum.

A 1974 and a 1980 opinion of this Office discuss the ability of a local government to offer neutral explanations of local referenda issues. The question in the 1974 opinion concerned the authority of a county board of supervisors to expend funds to print information explaining the purpose of a local bond referendum. The proceeds from the issuance of the bonds were to be used to finance the construction of certain sanita­tion facilities within the county. The opinion determined that the cost associated with the printing of information explaining the bond issue is a proper expenditure of funds, provided that the explanation is nonpartisan and neutral in nature.

Similarly, a 1980 opinion concludes that a city council and the local school board may use public funds and facilities to communicate neutral information on a proposed referendum to request changes in the city charter affecting taxes. The opinion notes that the views of governing bodies may be an essential element in the debate of a particular issue. As such, it was proper for the council and school board to make appropriate comment on the effects of the proposed charter amendment and the impact of the amendment on the operation of government. The opinion concludes that there is no prohibition against sending public school students home with explanatory materials that do not advocate a particular position.
Each of these opinions addresses situations where the local governing body or school board provided information to voters on a local referendum question. Each opinion determined that it is appropriate for local governments to expend funds on materials that explain the purpose and effect on the locality of a proposed referenda question. Neither opinion addresses expenditure of funds by a locality pertaining to a statewide referendum.

The power of a governing body to spend funds is limited to those powers expressly granted and those necessarily or fairly implied therein. The 1980 opinion rests on the proposition that providing an explanatory statement to voters on a local issue is an implied power of the governing body’s ability to expend funds for the administration of local government. The 1974 opinion assumes that a locality has such power and does not explicitly address the issue. Until 1996, there was no express grant of such authority. With the enactment of § 24.2-687, the General Assembly has expressly granted localities the authority to expend funds for the purposes set forth in the statute. The extent to which a locality may expend funds with regard to explaining referenda questions to the public is limited to that prescribed in § 24.2-687. The plain language of § 24.2-687 outlines a locality’s authority to expend public funds for the dissemination of material related to explaining local referenda. Therefore, the General Assembly has taken that which was an implied power of a local government and created an express power with certain limitations. 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 language in § 24.2-687, providing that the statute “shall not be applicable to statewide referenda,” acknowledges that the responsibilities set forth in the section are to be undertaken by a local government only for local referenda, while § 30-19.10 requires the Division of Legislative Services to prepare an explanation for statewide referenda questions. No provision in § 24.2-687 confers authority for a local government to expend public monies for the purchase of advertising supporting or opposing a referendum question. This language is limiting by its very nature.

It is well accepted that statutes should not be read in isolation. Statutes relating to the same subject should be considered in pari materia. Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent. The enactment of §§ 24.2-687 and 30-19.10 acknowledges the importance of uniformity in the electoral process. By enacting § 30-19.10, the General Assembly recognized the problems associated with having each individual local government offer an explanation of statewide referenda questions. To allow each locality to produce an explanation on each statewide referendum creates the possibility of having a different explanation in each locality in the Commonwealth. Such a system, with no uniformity, would create confusion and undermine the electoral process. By enacting both statutes that assign the responsibilities of each entity on two different processes regarding referenda questions, the General Assembly has provided uniformity in the conduct of these elections.
Such enactment further recognizes the policy decision of the General Assembly to prohibit differing governmental explanations on issues of statewide importance before the voters of the Commonwealth.

The 1974 and 1980 opinions of this Office focus on the role of local government in explaining local referenda questions. The enactment of §§ 24.2-687 and 30-19.10 is consistent with these prior opinions; however, § 24.2-687 further limits the authority of a locality to expend funds in this context. Like the authority recognized in the prior opinions, § 24.2-687 requires a locality to offer a brief neutral description of the referendum question informing the local citizenry of the issue before it in an upcoming election.

The General Assembly has expressed a locality’s power to expend public funds for advertising in this area. Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. In this instance, the General Assembly has prescribed the method and extent to which a local governing body may expend public funds to present an explanatory statement to the general public on questions of local concern. Section 24.2-687 specifically precludes a local governing body’s expenditure of public funds to publish or advertise statements explaining a statewide referendum question. The General Assembly has assigned that responsibility in § 30-19.10 to the Division of Legislative Services and the State Board of Elections.

This statutory scheme, however, does not prohibit a local government from responding to inquiries from the public on proposed referenda questions. Nor does it prohibit a local governing body from expressing a viewpoint, through a resolution, supporting or opposing a local or statewide referendum question. Additionally, a local government may prepare nonadvocacy materials in order to efficiently respond to constituent inquiries about proposed referenda questions.

Read together, §§ 24.2-687 and 30-19.10 are sensible limits on the government’s ability to influence elections. While it is important to inform the citizenry of the issue before it in a referendum, it is equally important to restrain the government’s ability to manufacture the consent of the governed by the use of taxpayer funds. Sections 24.2-687 and 30-19.10 draw the line between explanatory statements and opinion-making comments.

Recognizing this potential abuse, the General Assembly has enacted a statutory scheme addressing state and local governments’ roles with regard to statewide and local referenda. This statutory scheme does not authorize a locality to expend funds to provide a neutral explanation of a statewide referendum question. Moreover, I can find no statutory authority for a locality to purchase advertising in support of, or in opposition to, a local or statewide referenda question. The General Assembly has expressly set forth the extent to which a locality may expend funds regarding local referenda questions and, at the same time, has detailed the process for distributing information regarding statewide referenda questions. Applying the rule of statutory
construction that, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute, together with Dillon’s Rule of strict construction of a locality’s power, I am compelled to conclude that a locality does not have authority to expend public funds to purchase advertising in support of, or in opposition to, a local or statewide referendum question.

CONCLUSION

Accordingly, it is my opinion that local governments have no authority to expend funds on advertising in support of, or in opposition to, a local or statewide referendum question. It is further my opinion that local governments may, consistent with the procedures detailed in § 24.2-687, prepare and distribute a neutral, nonpartisan statement explaining a local referendum question.

1Johnson v. County of Goochland, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965), cited in Gordon v. Bd. of Sup’rs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); accord County Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); see also VA. CODE ANN. § 15.2-1200 (authorizing counties to adopt measures, which are consistent with state laws, that are deemed expedient to secure and promote citizens’ health, safety and welfare); § 15.2-1201 (vesting county boards of supervisors with powers and authority of city and town councils) (Michie Repl. Vol. 1997).


5Section 24.2-687 defines an explanation presented in “plain English” as one “written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession.”

6See VA. CODE ANN. § 30-19.9 (Michie Repl. Vol. 2001) (providing procedure for distribution of information explaining proposed constitutional amendment(s) to be submitted to voters).

7Section 30-19.10 provides a definition of “plain English” identical to that in § 24.2-687. See supra note 5.


9Id.

10Id.


12Id. at 77.

13Id.

14Id.

15See supra note 2

161979-1980 Op. Va. Att’y Gen., supra note 11, at 77 (noting that General Assembly has conferred upon city and local school board broad governmental powers over city and school system from which may be implied authority to comment on referendum).


OP. NO. 03-088

FISHERIES AND HABITAT OF THE TIDAL WATERS: SUBMERGED LANDS — GENERAL PROVISIONS RELATING TO MARINE RESOURCES COMMISSION.

STATE WATERS, PORTS AND HARBORS: WHARVES, DOCKS, PIERS AND BULKHEADS.

Marine Resources Commission may collect, annually or otherwise, only royalties for commercial use of state-owned bottomlands; may not impose royalty for use of state-owned bottomlands where private wharf, pier or dock is used for noncommercial purposes, is within line of navigability, and is erected within size limitations prescribed by statute.

THE HONORABLE BILL BOLLING
MEMBER, SENATE OF VIRGINIA
NOVEMBER 14, 2003

ISSUES PRESENTED

You ask whether the Marine Resources Commission has the authority to charge rents, as well as royalties, for use of state-owned bottomlands. If only a royalty is permitted, you ask whether a one-time payment or an annual royalty payment is required. You further ask whether there is a distinction between riparian owners’ rights to and beyond the navigation line, and if so, whether a royalty may be assessed within the line.

RESPONSE

It is my opinion that the Marine Resources Commission may collect, annually or otherwise, only royalties for the commercial use of state-owned bottomlands. In fact, the General Assembly has indicated its intent to collect royalties in the 2003 Appropriation...
Act. It is also my opinion that the Commission may not impose a royalty for the use of state-owned bottomlands where the private wharf, pier or dock of a riparian landowner is used for noncommercial purposes, is within the line of navigability, and is erected within the size limitations prescribed by statute.

APPLICABLE LAW AND DISCUSSION

Article I, Chapter 12 of Title 28.2, §§ 28.2-1200 through 28.2-1209, governs ownership and usage of submerged lands and provides the Marine Resources Commission with oversight responsibility for such usage. Article 1 provides for the collection of royalties, rent royalties, and rents. Your questions relate specifically to the collection of rents and/or royalties in circumstances where a riparian landowner builds a dock or wharf out to or upon navigable water.

Section 28.2-1203(A) provides:

It shall be unlawful for any person to build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean, rivers, streams, or creeks which are the property of the Commonwealth, unless such act is performed pursuant to a permit issued by the [Marine Resources] Commission ....

Section 28.2-1205 sets forth factors the Marine Resources Commission must use in determining whether to issue a permit for the use of state-owned bottomlands. Section 28.2-1205(E) requires that “[a]ll permits issued by the Commission for the use of state-owned bottomlands ... shall be in writing and specify the conditions, terms and royalties which the Commission determines are appropriate.” Section 28.2-1205 authorizes the Marine Resources Commission to charge royalties for commercial use of state-owned bottomlands and makes no reference to rents. Therefore, I must conclude that the Marine Resources Commission may charge royalties, but not rents, for the uses described in § 28.2-1205.

“Rent” and “royalties,” however, are similar: “rent” is “[c]onsideration paid, usu[ally] periodically, for the use or occupancy of property”; “royalty” is “a payment (as a percentage of the amount of property used) ... for permitting another to ... use ... such property (as natural resources, patents or copyrights) ....” I am aware of no statute prohibiting the Marine Resources Commission from requiring an annual royalty payment as opposed to a one-time royalty payment.

The General Assembly recently acknowledged the fees and royalties imposed by the Marine Resources Commission in the 2003 Appropriation Act:

It is the intent of the General Assembly that beginning July 1, 2004, the Marine Resources Commission shall collect all fees and royalties assessed by the Commission for the use of state-owned bottomlands under the provisions of Chapter 12 of Title 28.2, Code of Virginia. Prior to resuming the collection of any such fees, the Secretary of Natural Resources shall review the report of
the Virginia Delegation of the Chesapeake Bay Commission made pursuant to House Joint Resolution 633 (2003) and shall submit a plan for the collection of such fees to the Chairmen of the House Appropriations and Senate Finance Committees.\[10\]

A 1986 opinion of this Office concludes that there is no requirement that royalties be made in lump sum payments.\[11\] The prior opinion further concludes that royalties assessed for the use of natural resources generally are paid periodically over the time of use.\[12\] The General Assembly is presumed to have knowledge of the Attorney General's interpretation of the law, and its "failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation."\[13\] Therefore, there is no indication that the General Assembly intended to limit royalty payments to a one-time payment.\[14\]

You also ask whether there is a distinction between riparian owners' rights to and beyond the navigation line, and if so, whether a royalty may be assessed within the line.

There is a distinction. A riparian landowner's right to "wharf out" extends to the line of navigability.\[15\] A pier to the line of navigability provides a riparian owner with access to the navigable waterway. Section 62.1-164 codifies the common law right of a riparian landowner to erect a private, noncommercial pier or wharf in a watercourse opposite his land, provided that such right neither obstructs navigation nor results in injury to a person's private rights.\[16\] Section 62.1-164 provides:

Any person owning land upon a watercourse may erect a private wharf on the same, or private pier or landing, in such watercourse opposite his land; provided, such wharf, pier or land is for noncommercial purposes and navigation be not obstructed, nor the private rights of any person be otherwise injured thereby. The circuit court of the county in which such wharf, pier or landing is, after causing ten days' notice to be given to the owner thereof, of its intention to consider the subject, if it be satisfied that such wharf, pier or landing obstructs the navigation of the watercourse, or so encroaches on any private landing as to prevent the free use thereof, may abate the same. [Emphasis added.]

In addition, § 28.2-1203(A)(5) provides that "placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite those lands, provided that ... the piers do not extend beyond the navigation line," generally does not require a permit from the Marine Resources Commission.\[17\]

Statutes related to the same subject should be considered in pari materia\[18\] and should be construed to "give the fullest possible effect to the legislative intent embodied in the entire statutory enactment."\[19\] Sections 62.1-164 and 28.2-1203(A)(5) embody the same subject and, when read together, indicate that the General Assembly has
determined that a riparian landowner's right to erect a private, noncommercial wharf, pier or landing to the navigation line does not significantly interfere with the public's right to use the state-owned bottomland, and, therefore, Commission oversight is not required. The General Assembly has provided no such exemption for commercial use by riparian landowners. 20

Recent Supreme Court of Virginia cases involving disputes between riparian landowners over noncommercial uses provide guidance as to riparian rights:

Among the rights to which a riparian owner is entitled is the right to the underwater soil between his land and the line of navigability in the watercourse. Upon that soil, the owner may erect docks and other facilities, subject to the rights of the public reserved by the General Assembly, provided no injury be done to the private rights of others. 21

The Court notes that the General Assembly has vested the Marine Resources Commission with jurisdiction to issue permits for use of state-owned bottomlands, including the placement of wharves by riparian landowners. 22 Specifically, the Court stated that "[a]dministrative approval is required for such uses of subaqueous beds because title to the bed is vested in the Commonwealth, subject to use by the people in common." 23 Based on the statutory framework relative to riparian landowners' rights and the Supreme Court's recognition of the jurisdiction of the Marine Resources Commission to permit the use of state-owned bottom lands, I must conclude that the Marine Resources Commission may impose a royalty for the use of state-owned bottomlands unless the wharf, pier or dock is a private structure limited in size and scope and not reaching beyond the point of navigability. The royalty imposed, annual or otherwise, must be a reasonable charge to protect the public's right to the Commonwealth's natural resources. 24

CONCLUSION

Accordingly, it is my opinion that the Marine Resources Commission may collect, annually or otherwise, only royalties for the commercial use of state-owned bottomlands. In fact, the General Assembly has indicated its intent to collect royalties in the 2003 Appropriation Act. It is also my opinion that the Commission may not impose a royalty for the use of state-owned bottomlands where the private wharf, pier or dock of a riparian landowner is used for noncommercial purposes, is within the line of navigability, and is erected within the size limitations prescribed by statute.

Section 28.2-1208(C).

Section 28.2-1203(B) makes it unlawful to use state-owned bottomlands without a permit except as set forth in subdivisions A 1 through A 6 of § 28.2-1203. Section 28.2-1206(A)-(D) establishes certain permit fees and royalties to be charged for dredging state-owned bottomlands.


Section 28.2-1205(D) authorizes the Commission to issue permits for noncommercial uses of state-owned bottomlands.


Id. at 340.


The General Assembly has, however, provided the option for commercial facilities engaged in the primary business of ship construction and repair to pay a one-time fee in lieu of annual royalties, other than those for dredging. Section 28.2-1206(B) (Michie Repl. Vol. 2001); see also § 28.2-1206(C).


A riparian landowner must obtain a permit from the Marine Resources Commission if the pier or structure exceeds a certain size or height. Section 28.2-1203(A)(5) (LexisNexis Supp. 2003).


A 1985 opinion of this Office notes that the General Assembly, in enacting § 62.1-164, intended to preserve the common law right of riparian landowners to erect private, noncommercial piers and wharves, subject to reasonable state regulation. 1985-1986 Op. Va. Att’y Gen., supra note 16, at 110. The General Assembly has not modified § 62.1-164 subsequent to the 1985 opinion and, therefore, has not demonstrated any intent to extend the right to “wharf out” for commercial uses.

Zappulla v. Crown, 239 Va. 566, 569, 391 S.E.2d 65, 67 (1990) (citation omitted); Langley v. Meredith, 237 Va. 55, 62, 376 S.E.2d 519, 523 (1989). Zappulla involves riparian appportionment. It should be noted that the “right to build wharves is one which is subject to State regulation, and, while it involves a certain use of the soil under the water for the specific purposes designated, is not exclusive ownership.” Taylor, 102 Va. at 772, 47 S.E. at 880.

Zappulla, 239 Va. at 570, 391 S.E.2d at 67. The question for the Court was the impact of a permit from the Marine Resources Commission on a dispute between private parties.
The Court determined that the Marine Resources Commission does not determine rights as between private parties, but “determines only the rights of an applicant vis-a-vis the Commonwealth and the public.” Id. at 570, 391 S.E.2d at 68.

See § 28.2-1205(A).

OP. NO. 03-103

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.

COURTS NOT OF RECORD: DISTRICT COURTS.

Judge has discretion to briefly delay civil commitment hearing to better provide due process for temporarily detained patient who cannot safely be brought for hearing within prescribed 48-hour time frame, to close hearing for good cause and conduct proceedings in patient's holding room without public present, or to conduct hearing outside patient's presence if patient's interests are adequately represented by counsel; may conduct hearing via video conferencing. Retired general district court judge may conduct civil commitment hearings when recalled to duty by Chief Justice of Supreme Court of Virginia or designated to hear and dispose of action by chief district judge.

THE HONORABLE S. LEE MORRIS
CHIEF JUDGE, PORTSMOUTH GENERAL DISTRICT COURT
DECEMBER 18, 2003

ISSUES PRESENTED

You ask two questions pertaining to the holding of civil commitment hearings under Title 37.1. Specifically, you ask what actions a judge may take that will not result in the release of an apparently ill patient when the hearing time requirements of §§ 37.1-67.1 and 37.1-67.3 cannot be met, and the patient cannot be safely brought to a public hearing. You also inquire whether the definitions in § 37.1-1 permit a retired general district court judge to conduct civil commitment hearings.

RESPONSE

It is my opinion that a judge has several options when confronted with a situation in which a temporarily detained patient cannot safely be brought for a public civil commitment hearing within the time parameters required by §§ 37.1-67.1 and 37.1-67.3. First, a judge may continue a civil commitment hearing beyond the prescribed forty-eight-hour time frame when such continuance serves to protect the due process or statutorily created rights of the temporarily detained person. Second, a judge may order the hearing closed for good cause upon motion of the patient or his attorney and conduct the hearing in the holding or seclusion room. Third, in extreme situations, a judge may hold the hearing in the public hearing room outside the patient’s presence, after a finding of good cause to do so for the patient's benefit, trusting that the patient's interests will be adequately represented by his attorney and others appearing on his behalf. Finally, a judge may hold the hearing within the requisite time period and within the “presence” of the patient and the public, yet still address important safety concerns by using video conferencing procedures where available.

It is also my opinion that a retired general district court judge may conduct civil commitment hearings when he has been recalled to duty by the Chief Justice of the
Supreme Court of Virginia or he has been designated to hear and dispose of an action by a chief district judge.

BACKGROUND

You pose a hypothetical situation in which a judge arrives for a duly scheduled civil commitment hearing of a patient held under a temporary detention order and discovers that the patient is violent, in restraints, and is incapable of intelligently participating in the hearing. The patient cannot be brought safely from the holding room to the public hearing room, and a hearing, if any, must be held in the holding room where the patient is restrained. The holding room is in a secured part of the facility where the public is not permitted.

APPLICABLE LAW AND DISCUSSION

The Supreme Court of the United States consistently has stated that civil detention and commitment involve "a significant deprivation of liberty that requires due process protection." The requirements of due process mandate, among other things, that a hearing be provided as expeditiously as possible following an individual's involuntary detention in a mental health facility. Sections 37.1-67.1 and 37.1-67.3 unambiguously state that a civil commitment hearing must be held within forty-eight hours of execution of a temporary detention order, except as extended by weekends or holidays.

In an attempt to protect the right to a speedy hearing, prior Attorneys General have concluded that §§ 37.1-67.1 and 37.1-67.3 do not authorize involuntary detention beyond the length of time specified in the statutes.

The right to a speedy hearing, however, is not the only right implicating due process considerations or the applicable statutory provisions. Indeed, to conduct a hearing speedily without allowing full play for such other rights may well lead to a longer deprivation of liberty than any confinement occasioned by a brief continuance.

Among the other rights possessed by an individual facing deprivation of his liberty through civil commitment are the rights to be represented by an attorney, to be present during his hearing, and to testify if he so chooses. In addition, civil commitment hearings generally are open to the public.

The problem is that the exercise of certain legal rights, such as the right to a speedy hearing, may serve to preclude the exercise of other rights, such as the right to be present or to have a public hearing. Thus, to exercise one right may be tantamount to a waiver of other rights. It is a general rule that an adult may waive any constitutional or statutory right as long as the waiver is "an intentional relinquishment or abandonment of a known right or privilege."

When a person is entitled to competing rights, he or she ordinarily is recognized as having the right to elect which rights he or she will exercise and which he or she will waive; however, the approach is not always so straightforward when the competency of the individual is an issue.
If, in the judge's discretion, the patient has the capacity to make a knowing and intelligent waiver of one of his rights and this waiver is evidenced by some affirmative act, the judge may grant the waiver and proceed accordingly. In the hypothetical situation you present, however, the patient is incapable of intelligently participating in a hearing. If the patient is so impaired that he cannot exercise his own prerogative to waive a particular right, the judge may consider a request for waiver made on the patient's behalf by his attorney.

A request for a waiver in the situation you describe may take one of three forms. First, the individual or his attorney may ask to delay the hearing beyond the prescribed forty-eight-hour time frame in order that the individual may regain some control over his behavior and thus exercise his right to participate meaningfully in the hearing. This may be in the individual's best interests, because it may result in a shorter length of confinement overall. Any such continuance should be of limited duration, with the judge keeping in mind the underlying rationale of the time frames articulated in §§ 37.1-67.1 and 37.1-67.3, and the significant deprivation of liberty borne by the individual awaiting hearing. Alternatively, the judge may, on a case-by-case basis, order a hearing closed if, on motion of the patient or his attorney, the court determines that good cause to close the hearing is shown. A closed hearing may be held in the holding room or seclusion room where the patient is located instead of in the public hearing room. Finally, the hearing may proceed as scheduled in the public hearing room while the individual remains in the holding room, for his own safety and that of others, after a finding of good cause by the court, trusting that his interests will be adequately represented by his attorney and others appearing on his behalf.

A judge should also consider holding the civil commitment hearing through the use of video conferencing if such technology is available and its use is practical under the circumstances. Throughout the country, courts are beginning to utilize video conferencing to conduct judicial business. In 1995, the United States Court of Appeals for the Fourth Circuit considered a challenge to the use of video conferencing in a civil commitment hearing. The Fourth Circuit conducted its analysis based on the three-factor test articulated by the United States Supreme Court in Mathews v. Eldridge. The Fourth Circuit held that "the use of video conferencing allows for the [patient's] 'presence,' at least in some sense, at the commitment hearing." Applying the three-part analysis enunciated in Mathews, the Fourth Circuit found that, despite a "sizable infringement" on the involuntarily committed individual, the use of video conferencing in civil commitment hearings violated none of the individual's constitutional or statutory rights. In reaching its conclusion, the court spoke about the safety risks inherent in proceedings involving a potentially mentally unstable individual, much like the hypothetical situation you present. Therefore, it is my opinion that a civil commitment hearing may be conducted by video conferencing in situations where a patient cannot be brought safely from a holding room to a public hearing room for his hearing.

Your final inquiry is whether the definitions in § 37.1-1 permit a retired general district court judge to conduct civil commitment hearings pursuant to § 37.1-67.3. Section
37.1-67.3 provides that commitment hearings are to be conducted by a “judge.” Section 37.1-1 defines “judge” to include “only the judges, associate judges and substitute judges of general district courts ... and of juvenile and domestic relations district courts ..., as well as the special justices authorized by § 37.1-88.”

Section 16.1-69.22:1 provides for the temporary recall of retired district court judges:

The Chief Justice of the Supreme Court may call upon and authorize any judge of a district court who is retired ... to perform, for a period not to exceed ninety days at any one time, such judicial duties in any district court as the Chief Justice ... shall deem in the public interest for the expeditious disposition of the business of such courts.

In addition, § 16.1-69.35(1) permits the chief judge of each district to designate a retired district judge to hear and dispose of any action properly coming before the district court when a regular judge is unable to hold court, the chief district judge determines that assistance is needed, and another regular district judge is not reasonably available. Finally, § 16.1-69.35(3) allows the Chief Justice of the Supreme Court, “upon his own initiative or upon written application of the chief district court judge desiring assistance,” to designate “a retired judge to provide judicial assistance” to relieve congestion in the work of a district court. In all of these instances, the recalled or designated retired judge is to have all of the powers, duties, privileges and jurisdiction of any judge while so acting. For that reason, it is my opinion that retired judges may conduct civil commitment hearings pursuant to § 37.1-67.3 when acting under the authority of a recall pursuant to § 16.1-69.22:1 or § 16.1-69.35.

In contrast, it would be inappropriate for a retired general district court judge to conduct a civil commitment hearing if he were not restored to active service pursuant to recall. As a general rule, words in a statute are to be given their usual and commonly understood meaning. The word ‘judge’ or ‘justice’ means ‘[a] public officer who, by virtue of his office, is clothed with judicial authority.’ This definition would not include one who is retired.”

A retired judge is only on active service and restored to judicial authority when he regains the powers, duties and privileges of his prior position by virtue of recall.

CONCLUSION

Accordingly, it is my opinion that a judge has several options when confronted with a situation in which a temporarily detained patient cannot safely be brought for a public civil commitment hearing within the time parameters required by §§ 37.1-67.1 and 37.1-67.3. First, a judge may continue a civil commitment hearing beyond the prescribed forty-eight-hour time frame when such continuance serves to protect the due process or statutorily created rights of the temporarily detained person. Second, a judge may order the hearing closed for good cause upon motion of the patient or his attorney and conduct the hearing in the holding or seclusion room. Third, in extreme situations, a judge may hold the hearing in the public hearing room outside the
patient’s presence, after a finding of good cause to do so for the patient’s benefit, trusting that the patient’s interests will be adequately represented by his attorney and others appearing on his behalf. Finally, a judge may hold the hearing within the requisite time period and within the “presence” of the patient and the public, yet still address important safety concerns by using video conferencing procedures where available.

It is also my opinion that a retired general district court judge may conduct civil commitment hearings when he has been recalled to duty by the Chief Justice of the Supreme Court of Virginia or he has been designated to hear and dispose of an action by a chief district judge.

3Section 37.1-67.1 provides, in part, that “[t]he duration of temporary detention shall not exceed forty-eight hours prior to a hearing. If the forty-eight-hour period herein specified terminates on a Saturday, Sunday or legal holiday, such person may be detained, as herein provided, until the next day which is not a Saturday, Sunday or legal holiday.” Section 37.1-67.3 provides, in part, that “[t]he commitment hearing shall be held within forty-eight hours of the execution of the temporary detention order as provided in § 37.1-67.1; however, if the forty-eight-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, such person may be detained, as herein provided, until the next day that is not a Saturday, Sunday, legal holiday or day on which the court is lawfully closed.”

Use of the word “shall” in a statute generally indicates that its procedures are intended to be mandatory, rather than permissive or directive. See Op. Va. Att’y Gen.: 1996, supra note 2, at 158 n.3; 1989 at 250, 251-52.
51996 Op. Va. Att’y Gen., supra note 2, at 155-56 (concluding that it is acceptable to briefly delay civil commitment hearing beyond statutory time period, at patient’s request, in order to exercise his right to employ attorney, seek independent evaluation, or call other witnesses).
10It is generally understood that waiver of a right requires an affirmative act. See Barker v. Wingo, 407 U.S. 514, 525-26 (1972).
12Virginia has a short time frame for conducting a civil commitment hearing compared to other states. See, e.g., Md. CODE ANN. [HEALTH-GEN.] § 10-632(b), (c)(1) (2002) (hearing must be held within ten days, but may be postponed additional seven days for good cause); N.J. STAT. ANN. § 30:4-27.12(a) (Michie 2003) (hearing must be held within twenty days of initial admission); N.C. GEN. STAT. § 122C-267(a) (2002) (hearing must be held within ten days and court may grant
continuance of up to five additional days). Therefore, it is reasonable to assume that a slight delay beyond the initial forty-eight-hour period in holding the individual’s civil commitment hearing would not violate due process rights.


In your hypothetical situation, the holding room or seclusion room is in a secured part of the facility where the public is not permitted, for the safety of both the patient and the public and in compliance with insurance requirements. In most situations, the public in attendance are family members, friends or persons involved with the care of the individual, and unless there are a large number of such individuals, most hospitals will permit them to enter that portion of the hospital where the holding room or seclusion room is located. The hearing could, therefore, be held in the holding room or seclusion room under these circumstances.

15See Schmidt v. Goddin, 224 Va. 474, 481-83, 297 S.E.2d 701, 705-06 (1982) (holding that Schmidt's due process rights were not violated when he was excluded from courtroom hearing during testimony of witnesses with whom he would have daily contact, because committee, guardian ad litem, and Schmidt’s children and their counsel were present); see also Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976) (discussing at length protection of individual’s due process rights under New Jersey civil commitment statute). In Schmidt, the Supreme Court of Virginia specifically adopted the reasoning in Coll which stated that, "[i]n a proceeding designed at least in part to benefit the patient, it would indeed be a paradox to require him to hear testimony which might adversely affect his mental condition." Schmidt, 224 Va. at 483, 297 S.E.2d at 706 (quoting Coll, 411 F. Supp. at 913).


18Mathews identified three factors to be used “in determining those procedural safeguards due a person whose interests are to be adversely affected by government actions.” Baker, 45 F.3d at 843. The first factor to be considered is “the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.” Mathews v. Eldridge, 424 U.S. 319, 335 (1976), quoted in Baker, 45 F.3d at 843.

1945 F.3d at 843.

20Id. at 847-48.

21Id. at 847.

22See Va. Code Ann. § 16.1-69.22:1(C) (LexisNexis Repl. Vol. 2003) (“Any judge recalled to duty under this section shall have all the powers, duties, and privileges attendant on the position he is recalled to serve.”); § 16.1-69.35(1) (LexisNexis Repl. Vol. 2003) (“While acting, any judge so designated shall have all the authority and power of the judge of the court, and his order or judgment shall, to all intents and purposes, be the judgment of the court.”); § 16.1-69.35(3) (LexisNexis Repl. Vol. 2003) (“Every judge so designated shall have the same powers and jurisdiction and be authorized to perform the same duties as any judge of the district for which he is designated to assist and while so acting his order or judgment shall, to all intents and purposes, the judgment of the court to which he is assigned.”).


OP. NO. 03-084

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL—TRANSPORTATION OF ADMITTED PERSONS; ESCAPE.

100-road-mile qualification applicable to sheriffs transporting persons certified for involuntary admission to hospital applies to magistrates directing transportation of persons under emergency custody orders or temporary detention orders.

THE HONORABLE LENNY MILLHOLLAND
SHERIFF FOR THE CITY OF WINCHESTER
OCTOBER 10, 2003

ISSUE PRESENTED

You ask whether § 37.1-71(B), which requires the sheriff of the jurisdiction where a person is a resident to transport the person unless that sheriff's office is more than 100 road miles from the nearest boundary of the jurisdiction in which civil commitment proceedings took place, is applicable to § 37.1-71(A), which governs magistrates directing the transportation of persons under emergency custody orders or temporary detention orders.

RESPONSE

It is my opinion that the 100-road-mile qualification in § 37.1-71(B), applicable to sheriffs transporting persons certified for involuntary admission to a hospital, applies also to magistrates directing the transportation of persons under emergency custody orders or temporary detention orders pursuant to § 37.1-71(A).

APPLICABLE LAW AND DISCUSSION

The 2003 Session of the General Assembly amended § 37.1-71 by adding a subsection B designation as a result of adding new language as subsection A, as follows:

A. When a person is the subject of an emergency custody order pursuant to § 37.1-67.01 or a temporary detention order pursuant to § 37.1-67.1, the magistrate shall direct the transportation of that person by a law-enforcement officer from a specified agency and jurisdiction to such other medical facility as may be necessary to obtain emergency medical evaluation or treatment prior to the placement of the individual in the temporary detention facility.  

The rules of statutory construction that govern my response to your inquiry include the recognized rule that a statute must be read as a whole, and all of its parts must be examined so as to make it harmonious, if possible. Furthermore, statutes relating to the same subject should not be read in isolation. If an act of the legislature "is complete in itself and stands alone ..., it is only necessary that its provisions be observed; otherwise it should be read in connection with other cognate general statutes; that is to say, those which deal with [the] general subject." Moreover, I am also required to apply the rule that statutes dealing with the same subject matter must be read together to give effect to the legislative intent. "A statute should be construed, where possible, with a view toward harmonizing it with other statutes." The construction placed
upon language used in one section of the Code may be considered in determining the meaning of similar or the same language used in another section. Thus, related sections of the Code must be considered and construed together.

"While not part of the code section, in the strictest sense, the caption may be considered in construing the statute, as it is 'valuable and indicative of legislative intent.'" The caption to § 37.1-71 reads: "Transportation of person in civil commitment process." Both subsections A and B of § 37.1-71 deal with the transportation of persons in the civil commitment process. Section 37.1-71(B), therefore, obviously is a statutory provision on this same subject and relates to the same subject matter of your inquiry. The second paragraph of § 37.1-71(B) provides:

The sheriff of the jurisdiction where the person is a resident shall be responsible for transporting the person unless the sheriff’s office of such jurisdiction is located more than 100 road miles from the nearest boundary of the jurisdiction in which the proceedings took place. In cases where the sheriff of the jurisdiction of which the person is a resident is more than 100 road miles from the nearest boundary of the jurisdiction in which the proceedings took place, it shall be the responsibility of the sheriff of the latter jurisdiction to transport the person. The cost of transportation of any person so applying or certified for admission pursuant to § 37.1-67.3 or § 37.1-67.4 shall be paid by the Commonwealth from the same funds as for care in jail.

A 1988 opinion of the Attorney General concludes that this particular provision requires the sheriff of the jurisdiction in which a person resides to provide the transportation to the hospital unless that sheriff’s office is located outside the mileage range specified in the statute. The opinion also notes that the purpose of the qualified mileage range in § 37.1-71 is to relieve the sheriff of a large metropolitan area or a jurisdiction in which there exists a regional medical facility from the responsibility of transporting all persons from surrounding localities to such hospitals. It requires the sheriff of the locality in which the person resides to share in that responsibility. When a person is certified for admission in a jurisdiction far from his place of residence, however, such a requirement is impractical.

This stated purpose has equal application to the 100-road-mile qualification in § 37.1-71(B). The General Assembly has taken no action to alter this observation in the 1988 opinion. In addition, the General Assembly has not expressly exempted the qualification set forth in § 37.1-71(B). 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."
Therefore, I must conclude that § 37.1-71(A) is governed by the qualification in the second paragraph of § 37.1-71(B), requiring that the sheriff of the jurisdiction where a person is a resident transport the person unless that sheriff’s office is more than 100 road miles from the nearest boundary of the jurisdiction in which civil commitment proceedings took place.

CONCLUSION

Accordingly, I am of the opinion that the 100-road-mile qualification in § 37.1-71(B), applicable to sheriffs transporting persons certified for involuntary admission to a hospital, applies also to magistrates directing the transportation of persons under emergency custody orders or temporary detention orders pursuant to § 37.1-71(A).


2See Gallagher v. Commonwealth, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); 2A Norman J. Singer, Sutherland Statutory Construction § 46:05, at 154 (West 6th ed. 2000) (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.”); Op. Va. Att’y Gen.: 1994 at 93, 95; 1993 at 173, 174; 1992 at 48, 50; 1991 at 13, 17; 1983-1984 at 245, 246.


7See, e.g., First Nat’l Bank v. Holland, 99 Va. 495, 503-06, 39 S.E. 126, 129-30 (1901) (examining various sections of Code and history of legislation to determine whether terms “goods or chattels” were intended to embrace “chooses in action”).

8Moore v. Downham, 166 Va. 77, 184 S.E. 199 (1936).


101987-1988 Op. Va. Att’y Gen. 405, 406 (citing § 37.1-71, predecessor to § 37.1-71(B)). The mileage qualification in § 37.1-71 was thirty-five miles at the time the 1988 opinion was issued.

11Id. at 406.

12Had the intent of the General Assembly been to exempt the 2003 amendment, it would have begun the provision with the phrase, “notwithstanding any provisions of law to the contrary.” This phrase indicates a legislative intent to override any potential conflicts with earlier legislation. See Op. Va. Att’y Gen.: 1998 at 19, 21; 1996 at 197, 198; 1987-1988 at 1, 2.

OP. NO. 03-078
MILITARY AND EMERGENCY LAWS: EMERGENCY SERVICES AND DISASTER LAW.
CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE.
POLICE (STATE): BASIC STATE POLICE COMMUNICATION SYSTEM.

Broad powers of Governor, in event of declared emergency, to require state agencies to work together with private sector to protect citizens of Commonwealth. Sharing of information and intelligence collected by Intelligence and Information 'Fusion' Center with public and private entities. Discretionary dissemination of matter that is not law-enforcement sensitive by custodian to necessary parties when no emergency has been declared. Certain law-enforcement data may be disseminated only to criminal justice agencies. Immunity available to participating private entities in event of formally declared emergency. Determination whether sovereign immunity applies to private entities in absence of formally declared emergency depends on capacity in which entities were acting and whether acts are performed under direction and control of Commonwealth, based on nature of, and state's interest in, function to be performed.

THE HONORABLE JOHN W. MARSHALL
SECRETARY OF PUBLIC SAFETY
DECEMBER 1, 2003

ISSUES PRESENTED

You inquire concerning the provision of certain sensitive information to specific private entities that will participate in the proposed Intelligence and Information "Fusion" Center, a facility funded, owned, and operated by the Commonwealth. Specifically, you inquire whether the Center may provide limited public safety and health-related information to predetermined private entities that may play an active role in ensuring the security of the Commonwealth. You also inquire whether state or sovereign immunity extends to such private entities acting in furtherance of the Center's operations.

RESPONSE

It is my opinion that when an emergency has been declared, the Governor has broad powers to require state agencies to work in cooperation with the private sector to provide for the safety and security of the Commonwealth. Thus, some information and intelligence collected by the Intelligence and Information "Fusion" Center may be shared with the private sector in the event of a formally declared emergency. If an emergency has not been declared by the Governor, most data that is not law-enforcement sensitive may be disseminated, at the discretion of the custodian, to necessary parties. Irrespective of a formal declaration of an emergency, certain law-enforcement data, including most criminal history data, may be disseminated only to criminal justice agencies.

It is further my opinion that participating private entities have certain immunity from liability in the event of a formally declared emergency in Virginia. If no such emergency exists, private entities may enjoy sovereign immunity in certain circumstances. In the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of, and the state's interest in, the function to
be performed. Since such relationships will vary significantly and will depend on the circumstances of each case, I am unable to opine on this issue as a general matter.

**BACKGROUND**

You relate that the Commonwealth, as part of the Secure Virginia Initiative, is moving forward with plans for an Intelligence and Information "Fusion" Center. The Department of State Police and State Department of Emergency Management will operate the Center jointly. The Center will serve as a clearinghouse for information and intelligence gathering and analysis. A broad spectrum of information and intelligence involving public safety and health will be "fused" into a usable format at the Center. This information will be shared with relevant public institutions and certain private entities that play a role in the safety and security of the Commonwealth.

**APPLICABLE LAW AND DISCUSSION**

The Commonwealth of Virginia Emergency Services and Disaster Law of 2000, §§ 44-146.13 through 44-146.28:1, enables the Governor and the executive branch of the Commonwealth, in the event of an emergency, to deal with natural or man-made disasters. This statutory framework provides for specific emergency powers to ensure the maximum coordination possible between federal and state authorities and private entities in the event of such disaster. Provided that an emergency exists, the Governor, by and through the executive branch of state government, has broad authority under the Emergency Services and Disaster Law to control and direct the functions of the public and private sectors to protect the citizens of the Commonwealth.

Section 44-146.22(B) limits dissemination to private entities or the public of sensitive information in the custody of government, in the event of a declared emergency. Specifically, § 44-146.22(B) prohibits the disclosure of information submitted by public or nonpublic entities in accordance with § 2.2-3705(A)(57), unless the information is requested (1) for a specific law-enforcement purpose, (2) in compliance with a court order, or (3) with the written consent of the entity voluntarily submitting it. In situations where no emergency has officially been declared, decisions whether to disseminate information, absent specific disclosure authority, often are left to the judgment of the governmental entity involved. Each decision likely would be made on a case-by-case basis, considering such factors as the existence of a specific statutory limitation, the sensitivity of the information, the private sector's right and need to know, and the ramifications on public safety and welfare of such information inadvertently becoming public. An important consideration regarding the dissemination of information is its treatment under The Virginia Freedom of Information Act. While private citizens may be permitted physical access within the Intelligence and Information "Fusion" Center, access to the information and intelligence collected by the Center is controlled by the same limitations imposed on its dissemination.

Irrespective of the official declaration of an emergency, certain law-enforcement information, including criminal information obtained through the National Crime Information Center, the federal criminal database maintained by the Federal Bureau of Investigation,
is restricted. The collection, storage and dissemination of this information and intelligence, which may be accessed through the Virginia Criminal Information Network maintained by the Department of State Police, is limited by federal and state law to entities involved in the administration of criminal justice. Thus, not only would this information be unavailable to the private sector, but also to any public entity that is not a criminal justice agency. Additionally, it is a criminal offense to knowingly use or permit another to use, for any purpose not consistent with state law, information contained within any report or record relating to an ongoing criminal investigation by the State Police given in confidence to any person employed by a governmental agency within the Commonwealth.

Virginia criminal records maintained by the Central Criminal Records Exchange are available to criminal and noncriminal justice agencies, as well as to certain public service companies. Thus, many utility companies and public transportation providers are entitled to limited criminal record information in the Commonwealth. Most information available through the Virginia Criminal Information Network, which includes criminal records from the federal government and other states, as well as various law-enforcement intelligence bulletins posted on the Network, is only available to criminal justice agencies and could not be freely disseminated to certain entities participating in the Intelligence and Information “Fusion” Center.

Whether nongovernmental personnel are entitled to sovereign immunity for acts or omissions in the operation of the Center is impacted by whether the Governor has made a formal declaration of an emergency. Section 44-146.23 provides immunity from liability, except in the case of willful misconduct by certain parties, for public or private entities engaged in emergency service activities initiated pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000. In the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of and the state’s interest in the function to be performed. Since such relationships will vary significantly and are dependent upon the circumstances of each case, I am unable to opine on this issue as a general matter.

CONCLUSION

Accordingly, it is my opinion that when an emergency has been declared, the Governor has broad powers to require state agencies to work in cooperation with the private sector to provide for the safety and security of the Commonwealth. Thus, some information and intelligence collected by the Intelligence and Information “Fusion” Center may be shared with the private sector in the event of a formally declared emergency. If an emergency has not been declared by the Governor, most data that is not law-enforcement sensitive may be disseminated, at the discretion of the custodian, to necessary parties. Irrespective of a formal declaration of an emergency, certain law-enforcement data, including most criminal history data, may be disseminated only to criminal justice agencies.
It is further my opinion that participating private entities have certain immunity from liability in the event of a formally declared emergency in Virginia. If no such emergency exists, private entities may enjoy sovereign immunity in certain circumstances. In the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of, and the state’s interest in, the function to be performed. Since such relationships will vary significantly and will depend on the circumstances of each case, I am unable to opine on this issue as a general matter.

1Section 44-146.17(7) empowers the Governor to “declare a state of emergency” whenever he believes “the safety and welfare of the people of the Commonwealth require the exercise of emergency measures due to a threatened or actual disaster.” “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[.]” VA. CODE ANN. § 44-146.16(2a) (LexisNexis Repl. Vol. 2002).


4Section 2.2-3705(A)(57) of The Virginia Freedom of Information Act generally prohibits the disclosure, among others, of public records containing tactical plans, the disclosure of which would jeopardize public safety.


8Federal regulations governing criminal justice information systems state that the purpose of such systems “is to assure that criminal history record information ... is ... disseminated in a manner to ensure the ... security of such information and to protect individual privacy.” 28 C.F.R. § 20.1 (2003). The regulations define “criminal justice agency” to include courts and governmental agencies that perform, and allocate a substantial portion of their annual budget to, “the administration of criminal justice.” Id. § 20.3(g).

Section 9.1-101 defines “criminal justice agency” to include courts, governmental agencies and other agencies that perform “the administration of criminal justice,” as well as private and public entities that employ, for the purpose of performing “criminal justice activities,” special conservators of the peace or special police officers appointed under § 15.2-1737 or §§ 19.2-12 and 19.2-13.

The term “administration of criminal justice” means the “[d]etection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders,” and includes “criminal identification activities and the collection, storage, and dissemination of criminal history record information.” 28 C.F.R. § 20.3(b); see also VA. CODE ANN. § 9.1-101 (LexisNexis Supp. 2003).
OP. NO. 03-052

NOTARIES AND OUT-OF-STATE COMMISSIONERS: POWERS AND DUTIES.

DOMESTIC RELATIONS: PREMARITAL AGREEMENT ACT.

Attorney's secretary, who is notary public, accurately recording, by stenographic, electronic or other means, testimony of party to divorce proceeding, is "court reporter" within context of § 20-155(ii).

THE HONORABLE WILLIAM J. HOWELL
SPEAKER OF THE HOUSE OF DELEGATES
JULY 31, 2003

ISSUE PRESENTED

You inquire whether an attorney's secretary, who is a notary public, taking and transcribing testimony as part of a divorce proceeding, is a "court reporter" within the context of § 20-155(ii).

RESPONSE

It is my opinion that an attorney's secretary, who is a notary public, accurately recording, by stenographic, electronic or other means, the testimony of a party to a divorce proceeding, is a "court reporter" within the context of § 20-155(ii).

BACKGROUND

You inquire regarding the 2003 amendment to § 20-155 in response to a 2002 decision of the Supreme Court of Virginia. ¹

You explain that in Flanary v. Milton, ² on the day preceding the husband's death, and while the wife's deposition was being taken in the divorce proceeding between the husband and wife, the parties' attorneys recited into the record an oral agreement between the parties. Under the provisions of the oral agreement, the wife affirmed that such agreement would constitute a full and final settlement of all rights accrued...
by virtue of their marriage. The wife subsequently petitioned for spousal allowances and an elective share in the husband's augmented estate. The Supreme Court reversed the trial court's ruling that the oral agreement was valid and effectively released these rights, because the oral agreement of the wife was subject to the requirements of § 20-155 to be in writing and signed by the parties. The 2003 Session of the General Assembly amended § 20-155 to provide that marital agreements are not required to be in writing and are considered executed if the terms of such agreements (i) are contained in a court order endorsed by counsel or the parties of record, or (ii) are recorded and transcribed by a court reporter and affirmed personally by the parties.

You relate that your question arises in the context of a married person's deposition being taken in an attorney's office, before the attorney's secretary who is a notary public, as a part of a divorce proceeding. Assuming all other requirements of § 20-155(ii) are met, you ask whether the notary public in such a case is a "court reporter" within the context of § 20-155(ii). You note that the Virginia Code does not define the term "court reporter," and that there is disagreement among lawyers concerning the correct answer to this question.

APPLICABLE LAW AND DISCUSSION

The 2003 Session of the General Assembly amended § 20-155 as follows:

Married persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution. However, If the terms of such agreement are (i) contained in a court order endorsed by counsel or the parties or (ii) recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed. A reconciliation of the parties after the signing of a separation or property settlement agreement shall abrogate such agreement unless otherwise expressly set forth in the agreement.  

When a particular word in a statute is not defined therein, it must be given its ordinary meaning. In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling. The term "court reporter" is generally defined to mean "[a] person who records testimony, stenographically or by electronic or other means, and when requested, prepares a transcript." Several additional rules of statutory construction apply to your request. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." In addition, statutes should not be construed to frustrate their purpose. 

"[T]ake the words as written' and give them their plain
meaning."\(^{12}\) One must look to the entire statute to ascertain the intent of the General Assembly.\(^{13}\)

For the purposes of responding to your request, I must assume that the attorney’s secretary, who is a notary public, administers an oath to the individual giving the deposition. Section 47.1-12 provides that "[e]ach notary shall be empowered to ... (ii) administer oaths." Furthermore, I must assume that the attorney’s secretary you describe accurately records, by stenographic, electronic or other means, the testimony of the married person in the trial-related proceedings, i.e., the taking of depositions in the attorney’s office as part of a divorce proceeding. Making these required assumptions, the attorney’s secretary in the described circumstances fulfills all of the plain and ordinary requirements of a “court reporter.”

**CONCLUSION**

Accordingly, I am of the opinion that an attorney’s secretary, who is a notary public, accurately recording, by stenographic, electronic or other means, the testimony of a party to a divorce proceeding, is a “court reporter” within the context of § 20-155(ii).

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\(^{2}\)See id. at 21-22, 556 S.E.2d at 768.

\(^{3}\)See id. at 22, 556 S.E.2d at 768.

\(^{4}\)See id.

\(^{5}\)See id. at 24, 556 S.E.2d at 769.

\(^{6}\)2003 Va. Acts chs. 662, 669, at 870, 871, 875, 875, respectively. I note that 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." County School Bd. v. Town of Herndon, 194 Va. 810, 814, 75 S.E.2d 474, 477 (1953) (citation omitted).


\(^{9}\)BLACK’s LAW DICTIONARY 368 (7th ed. 1999).


\(^{13}\)See Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (to derive true purpose of act, “statute should be construed so as to give effect to its component parts”).
OP. NO. 02-149
PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.
ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Information provided to Retirement System regarding underlying investments of limited partnership not traded on governmentally regulated securities exchange is exempt from public disclosure. Information regarding name of limited partnership, amount and present value of investment is not exempt.

MR. W. FORREST MATTHEWS, JR.
DIRECTOR, VIRGINIA RETIREMENT SYSTEM
JANUARY 27, 2003

ISSUE PRESENTED

You ask whether confidential information, including information regarding underlying assets, provided to the Virginia Retirement System by limited partnerships in the private equity market and upon which the Retirement System relies to make investment decisions regarding those partnerships, is subject to disclosure under The Virginia Freedom of Information Act.

RESPONSE

It is my opinion that the described confidential information provided to the Virginia Retirement System by limited partnerships in the private equity market may be exempt from disclosure under The Virginia Freedom of Information Act, provided such information meets the requirements of § 2.2-3705(A)(47) of the Act. Even though the Retirement System may deny public access to such confidential information, the Retirement System is required to provide to a valid requester under the Act the identity of any private equity limited partnership in which it invests and the amount and present value of such investments.

BACKGROUND

You relate that the Virginia Retirement System has a diversified investment portfolio. The Retirement System considers a vast amount of information in determining the allocation of assets and the assets in which to invest within the asset groups. You relate that private equity is a growing and important asset class that is not traded on any governmentally regulated exchange.

You advise that the Retirement System typically invests in private equity as a limited partner in a limited partnership. In many instances, the general partner is a management firm that manages a specific fund or funds in which the limited partners invest. While the limited partnership may own interests in several investments, the Retirement System holds only an investment position in the limited partnership and not in the underlying investments of the partnership. The general partner, whether a management fund or otherwise, provides detailed information to the Retirement System regarding the partnership’s underlying investments. This information is provided on a confidential basis so that the Retirement System may monitor current investments and make informed investment decisions. You also relate that the confidentiality of both the initial and the ongoing analyses regarding these underlying investments is critical,
because disclosure of such confidential investment information would affect adversely the value of the investment being acquired, held or disposed of by the Retirement System. Participation in these private equity investments is at the discretion of the general partner. You also indicate that the limited partnerships rely on the Retirement System to keep the information regarding the underlying investments confidential, because disclosure of such information would have an adverse impact on private equity investment acquired, held or disposed of by the Retirement System. Additionally, you indicate that the Retirement System’s disclosure of the confidential information may result in limiting the Retirement System’s access to the private equity market, because general partners seeking equity investors do not want to risk disclosure of the confidential analysis.\(^2\)

You advise that, as of August 31, 2002, 7.1% of the Retirement System portfolio consists of private equity, which has performed favorably compared to other asset classes. You also advise that it would not be in the best interest of Retirement System members and beneficiaries if the Retirement System’s access to private equity investments were reduced or eliminated.

**APPLICABLE LAW AND DISCUSSION**

Section 2.2-3704(A) of The Virginia Freedom of Information Act\(^3\) sets forth the general policy of the Commonwealth that governmental records be open to the public. Section 2.2-3704(A) provides, in part, that “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.” Section 2.2-3705 of the Act provides various exclusions from the mandatory disclosure provisions of § 2.2-3704(A). Section 2.2-3705(A)(47) provides:

Records of the Virginia Retirement System, acting pursuant to § 51.1-124.30, ... or of the Rector and Visitors of the University of Virginia, ... relating to the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that: (i) such records contain confidential analyses ... prepared by the retirement system or provided to the retirement system under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) disclosure of such confidential analyses would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system or the Rector and Visitors of the University of Virginia. Nothing in this subdivision shall be construed to prevent the disclosure of records relating to the identity of any investment held, the amount invested, or the present value of such investment. [Emphasis added.]

Essentially, § 2.2-3705(A)(47) sets three conditions in order for the exclusion from disclosure to apply. First, the security or ownership interest in an entity must not be
traded on a governmentally regulated securities exchange. Generally, private equity of the nature you describe is not traded on a governmentally regulated securities exchange. Second, the records at issue must contain confidential analyses of the future value of such ownership interest or the future financial performance of the entity prepared by or provided to the Retirement System under a promise that the information be kept confidential. Finally, the Retirement System must determine that disclosure of the confidential information would have an adverse effect on the value of such investments. To the extent the confidential information you describe meets these criteria, § 2.2-3705(A)(47) authorizes the Retirement System to exclude such information from the mandatory disclosure requirements of the Act.

This exclusion is consistent with the constitutional and statutory provisions relative to the Retirement System's investment responsibilities. Article X, § 11 of the Constitution of Virginia provides that Retirement System funds "shall be deemed separate and independent trust funds, ... and shall be invested and administered solely in the interests of the members and beneficiaries thereof." (Emphasis added.) This provision of the Constitution originated during the 1969 Special Session of the General Assembly due to concerns over the practice of allowing state and local government borrowing from the Retirement System at low interest rates. While this practice was favorable for state and local governments as borrowers, it was not in the best interest of the beneficiaries of the fund. During debate of the issue in the Senate, it was observed "'retirement funds are a trust and should be invested at the highest and best rate consistent with trust obligations' and that it was unfair to public employees 'to permit their funds to be invested at less than the best interest rate available.'"

Section 51.1-124.30(C) emphasizes the importance of investing Retirement System funds in a manner that is in the best interests of Retirement System members and beneficiaries:

The Board [of Trustees of the Virginia Retirement System] shall discharge its duties with respect to the Retirement System solely in the interest of the beneficiaries thereof and shall invest the assets of the Retirement System with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. The Board shall also diversify such investments so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so. [Emphasis added.]

These provisions clearly provide that the Retirement System should diversify its assets as part of its responsibility to make decisions in the interests of its members and beneficiaries. The exclusion in § 2.2-3705(A)(47) recognizes the need for the Retirement System to invest in an array of assets that benefit its members and beneficiaries. In the context of the Retirement System investing in the private equity market,
Disclosure may have an adverse effect not only on the investment acquired, held and disposed of, but also on the Retirement System's overall portfolio. If the Retirement System were required to breach confidentiality agreements with those in the private equity markets that provide investment information, the Retirement System may not continue to be invited to participate in that market.

CONCLUSION

Accordingly, it is my opinion that the described confidential information provided to the Virginia Retirement System by limited partnerships in the private equity market may be exempt from disclosure under The Virginia Freedom of Information Act, provided such information meets the requirements of § 2.2-3705(A)(47) of the Act. Even though the Retirement System may deny public access to such confidential information, the Retirement System is required to provide to a valid requester under the Act the identity of any private equity limited partnership in which it invests and the amount and present value of such investments.

1 The portfolio includes fixed income investments; domestic, international and private equity investments; real estate and other investments.

2 You advise that the execution of a confidentiality agreement is required to participate in each of the private equity market limited partnerships.


4 See generally Vance H. Fried, New Approaches to Minority Media Ownership Columbia Institute for TeleInformation, Columbia University: Private Equity Funding for Minority Media Ownership, 51 Fed. Comm. L.J. 609, 610 (1999) ("The two defining characteristics of the private equity market are in its name. First, it is structured as equity or near equity (e.g., subordinated debt with warrants) investment, not debt... Second, it is an investment in an unregistered (private) security that cannot be purchased or sold in the public market.").


6 Id.

7 Id. at 1135-36 (citation omitted).

OP. NO. 03-056

PRISONS AND OTHER METHODS OF CORRECTION: PRISONER PROGRAMS AND TREATMENT — LOCAL CORRECTIONAL FACILITIES.

COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER.

Prisoner-workers from Portsmouth city jail may work on state, county and city property outside city; sheriff has no authority to supervise prisoners working outside sheriff's jurisdiction.

THE HONORABLE GARY W. WATERS
SHERIFF FOR THE CITY OF PORTSMOUTH
OCTOBER 8, 2003

ISSUES PRESENTED

You ask whether prisoners confined to jail in the City of Portsmouth and assigned to a work release program by court order pursuant to § 53.1-1311 ("prisoner-workers")
may work on state, county and city property located outside the city. If so, you ask whether you need to obtain permission from the locality where such prisoners will be working.

RESPONSE

It is my opinion that, pursuant to § 53.1-129, prisoner-workers from the Portsmouth city jail may work on state, county and city property located outside the city. It is also my opinion, however, that the sheriff has no authority to supervise the prisoner-workers while they are working outside the sheriff’s jurisdiction.

BACKGROUND

You state that prisoners confined to jail in the City of Portsmouth are assigned, by court order, to work release programs operated under your supervision. You further state that the city sheriff’s office has a contract with the Department of Transportation for prisoners at the city jail to work on Department-owned property in Chesapeake and Williamsburg under the supervision of a Portsmouth deputy sheriff.

APPLICABLE LAW AND DISCUSSION

Section 53.1-129 provides:

The circuit court of any county or city may, by specific order entered of record for an identified individual prisoner, allow a person confined in the jail of such county or city who is awaiting disposition of, or serving sentences imposed for, misdemeanors or felonies to work on (i) state, county, city or town . . . .

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.”\(^2\) The language of § 53.1-129 does not limit the prisoner-workers to work on state, county, city or town property located within the locality in which they are confined. Therefore, a prisoner confined at the Portsmouth jail may perform work on state, county, city or town property located anywhere within the Commonwealth. I must also conclude, however, that, as sheriff, you have no authority to supervise the prisoner-workers while they are working outside your territorial limits.

A sheriff is a constitutional officer whose duties “shall be prescribed by general law or special act.”\(^3\) This Office has long held that county law-enforcement officers, including sheriffs, have no authority outside their jurisdiction, absent specific statutory authorization.\(^4\) Absent such legislation, a county law-enforcement officer has no greater authority than does a private citizen.\(^5\)

The General Assembly has authorized local law enforcement to act beyond their territorial limits in certain situations.\(^6\) In these situations, the statutes outline the process by which, and the extent that, local law-enforcement officers may exercise their law-enforcement responsibilities and duties outside their territorial jurisdiction.\(^7\) The General Assembly has not enacted any legislation that would authorize sheriffs or other local law-enforcement officers to supervise prisoner-workers beyond their territorial
limits. Accordingly, it is my opinion that local law-enforcement officers do not have this authority. Nor may a local law-enforcement officer or agency obtain this authority by agreement with another jurisdiction. The General Assembly has outlined the circumstances under which local law-enforcement agencies are authorized to enter into such agreements. None of these provisions authorize local law enforcement to enter into agreements providing for interjurisdictional supervision of prisoner-workers.

CONCLUSION

Accordingly, it is my opinion that, pursuant to § 53.1-129, prisoner-workers from the Portsmouth city jail may work on state, county and city property located outside the city. It is also my opinion, however, that the sheriff has no authority to supervise the prisoner-workers while they are working outside the sheriff’s jurisdiction.

Section 53.1-131 authorizes the circuit court to assign certain offenders to a work release program under the supervision of the sheriff of a local jail.


See supra note 6.


OP. NO. 03-042

PRISONS AND OTHER METHODS OF CORRECTION: STATE CORRECTIONAL FACILITIES.

Director of Department of Corrections may permit prisoners to be trained, housed and paid by private ship-disposal firm to dismantle ships at James River Reserve Fleet site, provided Director receives Governor’s prior approval and properly designates site as state correctional facility.

THE HONORABLE DAVID B. ALBO
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 30, 2003

ISSUE PRESENTED

You ask whether Virginia law authorizes the Department of Corrections to agree to permit convicted persons committed to the custody of the Director of the Department
("prisoner(s)") to be trained, housed and paid by a private ship-disposal firm to disassemble certain obsolete James River Reserve Fleet ships maintained by the Maritime Administration of the United States Department of Transportation.\(^1\)

**RESPONSE**

It is my opinion that § 53.1-45.1(A) authorizes the Director of the Department of Corrections to permit prisoners to be trained, housed and paid by a private ship-disposal firm to dismantle the ships at the James River Reserve Fleet site, provided that the Director receives prior approval of the Governor and the Director properly designates the site as a state correctional facility pursuant to § 53.1-19.

**BACKGROUND**

You state that the Maritime Administration maintains ships in the James River that are slated for disposal. You also state that a private ship-disposal firm has proposed to enter into an agreement with the Department of Corrections to use prisoners as a major part of the workforce. The private ship-disposal firm will train, house, and pay the prisoners to dispose of the ships at the site of the James River Reserve Fleet; however, the Department will maintain control and authority over the prisoners.

It is my understanding that the Department of Corrections would require by contract, that procedures consistent with applicable Occupational Safety and Health standards be in place to protect the workers. Moreover, training approved by the Environmental Protection Agency and/or the Virginia Department of Environmental Quality must be conducted prior to commencement of the project so that workers will handle hazardous materials in a safe manner.\(^2\)

**APPLICABLE LAW AND DISCUSSION**

Section 53.1-45.1(A) authorizes the Director of the Department of Corrections to enter into agreements to provide prisoner workers to entities, such as the private ship-disposal firm, to produce goods or services.\(^3\) Specifically, § 53.1-45.1(A) provides that 

\[\text{"[t]he Director, with the prior approval of the Governor, may enter into an agreement with a public or private entity to operate a work program in a state correctional facility for prisoners confined therein."}\]

Section 53.1-45.1(A) limits the Director's authority with respect to prisoner work agreements by requiring (1) that the Director obtain the Governor's approval to enter into such agreements, and (2) that the work program be operated in a state correctional facility.

The agreement contemplates that the prisoners will be housed and work on site at the James River Reserve Fleet and not in a correctional facility. Operating the work program at the James River Reserve Fleet site would not meet the second requirement that the work program be operated in a state correctional facility. Operating the work program on site would not be fatal to the authority of the Director to enter into the agreement, however, if the James River Reserve Fleet site were designated as a correctional facility. The Director has authority to establish correctional institutions. Section 53.1-19 provides that 

\[\text{"[t]he Director, subject to the approval of the Board [of Corrections] and the Governor, shall determine the necessity for and select the site of any new}\]
state correctional facility." Thus, if the Director obtains the necessary approvals from the Board of Corrections and the Governor and designates the James River Reserve Fleet site as a correctional facility, the second requirement of § 53.1-45.1(A) can be met.

CONCLUSION

Accordingly, it is my opinion that § 53.1-45.1(A) authorizes the Director of the Department of Corrections to permit prisoners to be trained, housed and paid by a private ship-disposal firm to dismantle the ships at the James River Reserve Fleet site, provided that the Director receives prior approval of the Governor and the Director properly designates the site as a state correctional facility pursuant to § 53.1-19.

1You also inquire whether, if the private ship-disposal firm houses the prisoners, there are legal restrictions on the Department of Corrections with respect to either direct or contractual operation of the firm as a private correctional facility. Based on supplemental information provided to this Office, it appears that operation by a private prison company of the James River Reserve Fleet project is not an option and that the Department of Corrections would maintain direct authority over the prisoners. Consequently, this question is not addressed.

2Section 53.1-33 requires that a licensed physician determine whether a prisoner engaged in a work assignment has the physical and mental capacity to do the required work.

3See also Va. Code Ann. § 53.1-45.1(B) (LexisNexis Supp. 2003) ("Articles produced or manufactured and services provided by prisoners participating in such a program may be purchased as provided in § 53.1-47 and may be bought, sold or acquired by exchange on the open market through the participating public or private entity.").

4The ship-disposal process will result in scrap metal that will be sold on the open market. Section 53.1-45.1(B) authorizes the sale of the scrap metal, provided that "[a]rticles produced or manufactured and services provided by prisoners participating in such a program may be ... bought, sold or acquired by exchange on the open market through the participating public or private entity." The agreement also may be subject to federal restrictions on the marketability of prison-made goods, which are designed to protect private business from competition from goods produced by prison labor. The federal restrictions prohibit transportation in interstate commerce of "goods, wares, or merchandise manufactured, produced, or mined ... by ... prisoners." 18 U.S.C.A. § 1761(a) (West 2000). A project may be exempt from these restrictions if, for example, the prisoner workers are paid the prevailing wage for such work, or they participate in benefits, such as workers' compensation, that are available to federal or state government workers. See id. § 1761(c)(2), (3) (West 2000).

5Wages are not paid directly to the prisoners. Section 53.1-45.1(C) provides: "The Director shall arrange for compensation for such employment. Wages earned by prisoners shall be paid to the Director who shall deduct from such wages, in the following order of priority, an amount to: "1. Meet the obligation of any judicial or administrative order to provide support and such funds shall be disbursed according to the terms of such order; "2. Pay any fines, restitution or costs as ordered by the court; and "3. Defray a portion of the prisoner's keep. "The balance shall be credited to the prisoner's account in accordance with § 53.1-42."
Continuance of medical physician member’s service on Board of Medicine when member’s move into new congressional district is result of redistricting and subsequent voluntary move is within same district.

THE HONORABLE ANITA A. RIMLER
SECRETARY OF THE COMMONWEALTH
JULY 31, 2003

ISSUE PRESENTED

You ask whether a medical physician member of the Board of Medicine, whose residence is changed from the Tenth to the Eleventh Congressional District by redistricting, and who then changes his residence within the Eleventh Congressional District, may continue to serve on the Board.

RESPONSE

It is my opinion that a medical physician member of the Board of Medicine, whose residence is changed from the Tenth to the Eleventh Congressional District by redistricting, and who then changes his residence within the Eleventh Congressional District, may continue to serve on the Board.

BACKGROUND

You observe that § 54.1-2911 requires that one medical physician from each congressional district serve on the Board of Medicine. You also note that § 54.1-2911 provides that, in the event a medical physician member of the Board “ceases to reside in the district from which he was appointed, except by reason of redistricting, his office shall be deemed vacant.”

You relate that in 2000, a medical physician was appointed from the Tenth Congressional District to serve a four-year term on the Board of Medicine. Pursuant to the redistricting of the congressional districts by the 2001 Special Session of the General Assembly, the member’s residence has changed from the Tenth to the Eleventh Congressional District. You advise that in August 2003, the member will move his residence to another address within the Eleventh Congressional District. In addition, the new residence is in the geographical area that comprised the former Tenth Congressional District.

You, therefore, inquire whether the member, by moving his residence within the Eleventh Congressional District, continues to be eligible to serve on the Board of Medicine or whether his position will be deemed vacant.

APPLICABLE LAW AND DISCUSSION

Section 54.1-2911 provides for membership on the Board of Medicine:

The Board of Medicine shall consist of one medical physician from each congressional district .... If any medical physician member of the Board ceases to reside in the district from which he was appointed, except by reason of redistricting, his office shall be deemed vacant.
Use of the word "shall" in a statute ordinarily, but not always, implies that its provisions are mandatory.\(^2\)

Several rules of statutory construction apply to your request. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."\(^3\) In addition, statutes should not be construed to frustrate their purpose.\(^4\) "‘[T]ake the words as written’ and give them their plain meaning.”\(^5\) One must look to the entire statute to ascertain the intent of the General Assembly.\(^6\)

In the situation you describe, the medical physician member's residence change, from the Tenth to the Eleventh Congressional District, is the direct result of the 2001 redistricting.\(^7\) The specific exception for redistricting contained in § 54.1-2911 is, therefore, applicable. Thus, the exception permits the member to continue to serve on the Board.\(^8\)

The General Assembly does not specify that a physician member's subsequent move within the same congressional district to which he was redistricted will result in his office being deemed vacated. When the General Assembly intends to enact a mandatory requirement, it, of course, knows how to express its intention.\(^9\) The clear and unambiguous language of § 54.1-2911 addresses the situation when a medical physician member of the Board of Medicine voluntarily changes congressional districts. In the facts you provide, the medical physician member's congressional district was changed solely by the redistricting process and not by his voluntary actions.

**CONCLUSION**

Accordingly, it is my opinion that a medical physician member of the Board of Medicine, whose residence is changed from the Tenth to the Eleventh Congressional District by redistricting, and who then changes his residence within the Eleventh Congressional District, may continue to serve on the Board.


\(^2\)Compare Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using "shall" required court to summon nine disinterested freeholders in condemnation case), and Ladd v. Lamb, 195 Va. 1031, 1034-37, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court "shall forward" copy of conviction to Commissioner of Department of Motor Vehicles within fifteen days is not mandatory, but merely directory).


\(^6\)See Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (noting that to derive true purpose of act, "statute should be construed so as to give effect to its component parts.").

\(^7\)See supra note 1.
OP. NO. 03-022

PROPERTY AND CONVEYANCES: RESIDENTIAL LANDLORD AND TENANT ACT.


Landlord or managing agent of apartment complex is not prohibited from releasing to commissioner of revenue tenant list and vehicle information. Tenant’s prior written consent to release such information is not required. Commissioner is prohibited from divulging tax information acquired in performance of his or her duties with respect to personal property of tenant.

THE HONORABLE GERALDINE M. WHITING
COMMISSIONER OF THE REVENUE FOR ARLINGTON COUNTY
OCTOBER 8, 2003

ISSUE PRESENTED

You ask whether § 55-248.9:1 prohibits the landlord or managing agent of an apartment complex from releasing to the commissioner of the revenue a list of tenants, including vehicle information, without prior written consent of the tenants.

RESPONSE

It is my opinion that § 55-248.9:1 does not prohibit a landlord or managing agent of an apartment complex from releasing to the local commissioner of the revenue a tenant list and vehicle information. A tenant’s prior written consent is not required, because the tax statutes analyzed in this opinion authorize the release of such information to commissioners of the revenue. Generally, a commissioner of the revenue is prohibited from divulging any tax information acquired in the performance of his or her duties with respect to the personal property of any tenant.

APPLICABLE LAW AND DISCUSSION

Section 55-248.9:1 of the Virginia Residential Landlord and Tenant Act provides that “[n]o landlord or managing agent shall release information about a tenant or prospective tenant in the possession of the landlord to a third party unless” the tenant has consented to such release in writing or the information is provided pursuant to one of the exceptions enumerated in the statute. The purpose of § 55-248.9:1 is to prevent a landlord or managing agent from selling, trading or otherwise distributing information about a tenant to third parties without the prior written consent of the tenant or unless one of the statute’s exceptions applies. The release of such information could result in identity theft or unwanted commercial solicitations. Section 55-248.9:1 previously precluded the release of “financial information about a tenant.” Section 55-248.9:1 now prohibits the release of all information concerning a tenant and enumer-
A commissioner of the revenue is not listed as an exception in § 55-248.9:1. You ask whether a landlord or managing agent of an apartment complex may nonetheless provide a tenant list and vehicle information to a commissioner of the revenue for tax assessment purposes.

Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2, specifically sets out the duties of city and county commissioners of the revenue. Article 1, Chapter 39 of Title 58.1, §§ 58.1-3900 through 58.1-3909, provides for the enforcement of the local personal property tax laws by commissioners of the revenue.

Section 58.1-3901 provides that the failure of an apartment house owner or operator to file a list of tenant names and addresses, “upon request of the commissioner of the revenue of the county or city in which any such apartment house ... is located,” is punishable as a Class 4 misdemeanor. Section 58.1-3901 clearly provides that a landlord must provide a tenant list to the commissioner of the revenue.

Section 58.1-3109 provides:

Each commissioner of the revenue shall:

6. Require taxpayers or their agents or any person, firm or officer of a company or corporation to furnish information relating to tangible or intangible personal property, income or license taxes of any and all taxpayers; and require such persons to furnish access to books of account or other papers and records for the purpose of verifying the tax returns of such taxpayers and procuring the information necessary to make a complete assessment of any taxpayer's tangible and intangible personal property, and license taxes for the current tax year and the three preceding tax years[] [Emphasis added.]

A tenant's vehicle is tangible personal property. Moreover, the information possessed by a landlord regarding a tenant's vehicle is “information necessary to make a complete assessment of any taxpayer's tangible ... personal property.” Section 58.1-3109(6) requires “any person” to furnish the commissioner with the information necessary to properly assess tangible personal property. (Emphasis added.) The word “person” includes “any individual, corporation, partnership, association, company, business, trust, joint venture or other legal entity.” Accordingly, a landlord or managing agent is a “person” for the purposes of §§ 58.1-3109(6) and 58.1-3901.

Section 58.1-3110 authorizes the commissioner of the revenue to “summon the taxpayer or any other person to appear ..., to answer, under oath, questions touching the tax liability of any and all specifically identified taxpayers.” (Emphasis added.) Section 58.1-3110 thus authorizes a commissioner of the revenue to summon the landlord or managing agent, if necessary, to answer questions to clarify the tax liability of a specific tenant, including vehicle information. Tenants who are on a list provided to the commissioner by an apartment building owner or operator are “specifically identified taxpayers” for the purposes of § 58.1-3110.
It is an accepted principle of statutory construction that statutes relating to the same subject should not be read in isolation.\(^\text{11}\) To determine legislative intent, statutes dealing with the same subject matter must be construed together to achieve a harmonious result, resolving conflicts to give effect to each statute, to the maximum extent possible.\(^\text{12}\) In addition, when it is not clear which of two statutes applies, the more specific statute prevails over the more general.\(^\text{13}\) Moreover, "when 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."\(^\text{14}\)

The purpose of the filing required by § 58.1-3901 is to assist the commissioner in enforcing personal property tax laws.\(^\text{15}\) The importance of complying with § 58.1-3901 is underscored by the criminal sanction imposed for the failure to comply with its provisions. The purpose of § 58.1-3109(6) is to empower a commissioner with the ability to obtain the information necessary to properly assess tangible personal property. The importance of a commissioner's responsibility to properly assess taxes is further evidenced by § 58.1-3110, which grants a commissioner the ability to summon persons to answer questions regarding "specifically identified taxpayers."

Section 55-248.9:1 does not except a commissioner of the revenue from the confidentiality provision of the statute. As such, it is unclear whether §§ 58.1-3901 and 58.1-3109(6) nonetheless authorize a commissioner to obtain a list of tenants and vehicle information from an apartment building owner or operator.

Section 55-248.9:1 applies generally to all tenant information in the possession of a landlord or managing agent. Section 58.1-3901 specifically requires an apartment building owner or operator to release tenant names and addresses to the local commissioner of the revenue upon request of the commissioner. To the extent there is a conflict between §§ 58.1-3901 and 55-248.9:1 regarding the release of tenant names and addresses, or it is unclear which statute applies, the specific authorization in § 58.1-3901 governs. Consequently, a commissioner of the revenue may require an apartment building owner or operator to release such a list. Moreover, the apartment building owner or operator is not required to obtain the written consent of the tenant prior to releasing such information to the commissioner.

Section 58.1-3109(6) is specific to information relating to a taxpayer's tangible personal property. Section 58.1-3109(6) clearly authorizes a commissioner of the revenue to require information regarding a tenant's tangible personal property for purposes of tax assessment. This section also authorizes a commissioner to require "any person, firm or officer of a company or corporation to furnish information relating to tangible ... personal property ... of any and all taxpayers." (Emphasis added.)

Your inquiry concerns whether § 58.1-3109(6) authorizes the release of such information, given the prohibitions against disclosure of tenant information in § 55-248.9:1. Section 55-248.9:1 deals generally with tenant information in possession of a landlord or managing agent. Section 58.1-3109(6) deals specifically with information related to
a taxpayer's tangible personal property. To the extent there is a conflict between the authorization in § 58.1-3109(6) and the prohibition in § 55-248.9:1, or it is unclear which statute applies, the specific authorization in § 58.1-3109(6), concerning the release of information pertaining to tangible personal property, governs. Consequently, a commissioner of the revenue may require an apartment building owner or operator to release information concerning a tenant's tangible personal property for the purpose of assessing taxes.

It is important to note that the purpose of § 55-248.9:1 is not frustrated by this interpretation. The intent of § 55-248.9:1 is to protect tenant information from being released to third parties for such things as commercial solicitations and to prevent identity theft without the tenant's knowledge, with certain exceptions. The release of tenant names, addresses and vehicle information to a local commissioner of the revenue does not undermine the protections provided by § 55-248.9:1. Commissioners of the revenue are required to keep certain taxpayer information confidential. Section 58.1-3(A) protects from public disclosure any information revealed to a commissioner under §§ 58.1-3109(6) and 58.1-3901. Therefore, the protections of § 55-248.9:1 are not lost.

CONCLUSION

Accordingly, it is my opinion that § 55-248.9:1 does not prohibit a landlord or managing agent of an apartment complex from releasing to the local commissioner of the revenue a tenant list and vehicle information. A tenant's prior written consent is not required, because the tax statutes analyzed in this opinion authorize the release of such information to commissioners of the revenue. Generally, a commissioner of the revenue is prohibited from divulging any tax information acquired in the performance of his or her duties with respect to the personal property of any tenant.

1For purposes of this opinion, I assume that the commissioner of the revenue is acting in his or her official capacity within the jurisdiction that the commissioner serves.
2Section 55-248.9:1 authorizes the release of confidential tenant records in the following circumstances:
   "1. The tenant or prospective tenant has given prior written consent;
   "2. The information is a matter of public record as defined in § 2.2-3701;
   "3. The information is a summary of the tenant's rent payment record, including the amount of the tenant's periodic rent payment;
   "4. The information is a copy of a material noncompliance notice that has not been remedied or, termination notice given to the tenant under § 55-248.31 and the tenant did not remain in the premises thereafter;
   "5. The information is requested by a local, state, or federal law-enforcement or public safety official in the performance of his duties; or
   "6. The information is otherwise provided in the case of an emergency."
4See supra note 2.
5See supra note 2.
6The punishment for conviction of a Class 4 misdemeanor is "a fine of not more than $250." VA. CODE ANN. § 18.2-11(d) (LexisNexis Supp. 2003).
You inquire whether § 18.2-254 allows a defendant, upon completion of the Department of Corrections' Therapeutic Community Program, to be returned to the court for a reduction or suspension of sentence.

It is my opinion that a court may modify the sentence of a defendant, upon completion of the Department of Corrections' Therapeutic Community Program, only if such modification occurs within twenty-one days of entry of the sentencing order.

You relate that defendants referred by court order to the Department of Corrections' Therapeutic Community Program pursuant to § 18.2-254 are returned to the court,
upon successful completion of the program, for consideration of a reduction or suspension of sentence.

APPLICABLE LAW AND DISCUSSION

Section 18.2-254 provides for the commitment of convicted persons for substance abuse treatment. Section 18.2-254(A) requires that the judge or court order such person to undergo such treatment or education for substance abuse, if available, as the judge or court deems appropriate based upon consideration of the substance abuse assessment. The treatment or education shall be provided by a program licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services or by a similar program available through the Department of Corrections if the court imposes a sentence of one year or more.

Section 18.2-254(B) provides that a court may commit persons convicted of drug-related offenses to any facility “licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services” to treat persons “for the intemperate use of narcotic or other controlled substances.” Confinement at such a facility is treated as “confinement in a penal institution.”

[u]Upon presentation of a certified statement from the director of the treatment facility to the effect that the confined person has successfully responded to treatment, the court may release such confined person prior to the termination of the period of time for which such person was confined and may suspend the remainder of the term upon such conditions as the court may prescribe.

The Department of Corrections’ Therapeutic Community Program is not a program licensed by the Department of Mental Health.

Rule 1:1 of the Rules of the Supreme Court of Virginia provides, in part: “All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.”

Section 19.2-303 allows the court that hears the case to modify a felony sentence after the twenty-one-day period has elapsed if the person “has not actually been transferred to a receiving unit of the Department [of Corrections].”

When a person is committed to the Department of Corrections and assigned to its Therapeutic Community Program pursuant to § 18.2-254(A), the court has no jurisdiction to suspend or modify the sentence unless the suspension or modification occurs within twenty-one days of the initial sentencing order. As previously noted, the Department of Mental Health, Mental Retardation and Substance Abuse Services has not licensed the Department of Corrections’ Therapeutic Community Program.
Thus, § 18.2-254(8) does not apply to the Department’s Therapeutic Community Program.

CONCLUSION

Accordingly, it is my opinion that a court may modify the sentence of a defendant completing the Department of Corrections’ Therapeutic Community Program only if such modification occurs within twenty-one days of entry of the sentencing order.

1VA. CODE ANN. § 18.2-254(B) (LexisNexis Supp. 2003).

2A review of the Department of Mental Health’s website does not list this program as a licensed facility. See Licensed Provider Search, available at http://www.dmhmras.state.va.us/lpsa/orpglocsearch.asp (last visited Sept. 23, 2003).

3See also Va. Dep’t of Corr. v. Crowley, 227 Va. 254, 316 S.E.2d 439 (1984) (holding that orders releasing prisoners and suspending their sentences, which were entered after twenty-one-day period prescribed in Rule 1:1 had expired and prisoners had been transferred to penitentiary, were void for lack of jurisdiction).

4VA. SUP. CT. R. 1:1; see also Crowley, 227 Va. at 259, 316 S.E.2d at 441 (quoting In re Commonwealth, Dep’t of Corr., 222 Va. 454, 463, 281 S.E.2d 857, 862 (1981)) (concluding that, pursuant to reading of Rule 1:1 and § 53-272, predecessor to § 19.2-303, trial court has no authority to suspend sentence, after expiration of twenty-one-day period, if prisoner has been committed and delivered to penitentiary); Godfrey v. Williams, 217 Va. 845, 846, 234 S.E.2d 301, 302 (1977) (affirming that Rule 1:1 grants trial court authority to modify or vacate final judgment within twenty-one days after entry, but does not authorize trial court to extend twenty-one-day limitation period).

5See supra note 2.

OP. NO. 03-018

TAXATION: ELECTRIC UTILITY CONSUMPTION TAX.

Pamunkey and Mattaponi tribal members are not subject to state or local tax for activities occurring on Indian reservations; consumption tax on electricity may not be collected from such tribal members living on respective Indian reservations for electricity consumed on those reservations.

THE HONORABLE HULLIHEN WILLIAMS MOORE
CHAIRMAN, STATE CORPORATION COMMISSION
MAY 13, 2003

ISSUE PRESENTED

You inquire whether the state and local electric utility consumption tax imposed by § 58.1-2900 may be collected from members of the Pamunkey and Mattaponi Indian tribes living on their respective reservations.

RESPONSE

The activities of the Pamunkey and Mattaponi tribal members that take place on the Indian reservations are not subject to state and local tax. Therefore, it is my opinion that the consumption tax on electricity may not be collected from Pamunkey and
Mattaponi tribal members who live on the respective Indian reservations for electricity consumed on those reservations.

APPLICABLE LAW AND DISCUSSION

Section 58.1-2900 imposes a state, local and special regulatory tax on consumers of electricity in the Commonwealth. The electric utility consumption tax is applicable for tax years beginning January 1, 2001. Your inquiry concerns whether the tax may be collected from members of the Pamunkey and Mattaponi Indians. This Office consistently has concluded that members of the Pamunkey and Mattaponi Indian tribes are not subject to tax for those otherwise taxable activities occurring on the Indian reservations. A 1957 opinion of this Office relied on a 1919 circuit court case, which held that "an Indian residing on the reservation of the Mattaponi Tribe [is] not subject to taxation either by the County of King William or the Commonwealth of Virginia, but that the personal property owned by an Indian off the reservation [is] liable to taxation."

This Office previously determined that Indians are subject to certain taxes and licenses for off-reservation property or activity. Prior opinions of this Office also have determined that any change to the tax status of the activities of Indians lies within the purview of the General Assembly. The General Assembly is presumed to have knowledge of the Attorney General's interpretation of the law, and its "failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation." I am not aware of any action by the General Assembly to change the longstanding tax treatment for members of Pamunkey and Mattaponi Indians tribes for those activities engaged in or on the Indian reservations.

CONCLUSION

The activities of the Pamunkey and Mattaponi tribal members that take place on the Indian reservations are not subject to state and local tax. Therefore, it is my opinion that the consumption tax on electricity may not be collected from Pamunkey and Mattaponi tribal members who live on the respective Indian reservations for electricity consumed on those reservations.

1 1999 Va. Acts ch. 971, cl. 3, at 2547, 2560 (providing that Chapter 29 of Title 58.1, §§ 58.1-2900 to 58.1-2903, "shall be effective for tax years, beginning on and after January 1, 2001").
4 Op. Va. Att'y Gen.: 1969-1970, supra note 2, at 277 (concluding that real estate and personal property located off reservation are subject to probate tax); 1960-1961 at 141 (concluding that hunting license is required to hunt off reservation property). But see text infra note 7.
7 I note that the General Assembly has enacted legislation providing that "[n]o license to hunt, trap or fish shall be required of any Indian who habitually resides on an Indian reservation or of a member of the Virginia recognized tribes who resides in the Commonwealth." VA. CODE ANN.
§ 29.1-301(1) (LexisNexis Supp. 2002). The General Assembly also has provided that “any member of the Mattaponi, Pamunkey, or Chickahominy Indian tribes or any other recognized Indian tribe of the Commonwealth living on the tribal reservation” is exempt from the sales and use tax on motor vehicles. Va. Code Ann. § 58.1-2403(4) (LexisNexis Supp. 2002). In these instances, the General Assembly expanded the general tax exemption afforded to members of these tribes to certain off-reservation activities.

OP. NO. 02-015

**TAXATION: ELECTRIC UTILITY CONSUMPTION TAX — LICENSE TAXES — INCOME TAX — TAXATION OF CORPORATIONS.**

Electric cooperative is required to pay local gross receipts tax in 2001 based on year 2000 gross receipts.

THE HONORABLE THOMAS A. HAZELWOOD
COMMISSIONER OF THE REVENUE FOR THE CITY OF SUFFOLK
MAY 12, 2003

**ISSUE PRESENTED**

You ask whether a locality may require an electric cooperative to pay a business license tax in 2001 based on the cooperative’s 2000 gross receipts. Your question is prompted by the 2001 amendments to §§ 58.1-3731 and 58.1-2901(D). Section 58.1-3731 permits localities to impose limited gross receipts taxes on certain public service corporations, and § 58.1-2901(D) provides for a transition period to begin collecting an electric utility consumption tax rather than the limited gross receipts tax on electric suppliers. The General Assembly amended these two statutes as part of an effort to restructure the regulation of electric utilities.

**RESPONSE**

It is my opinion that an electric cooperative is required to pay the local gross receipts tax in 2001 based on the gross receipts received by the cooperative in 2000.

**BACKGROUND**

You relate that an electric cooperative operating in your locality was in existence before the local license tax was imposed in 1971. I understand from your request that the electric cooperative obtained its first license in 1971, and the cooperative claims that the tax paid for the 1971 license was based on 1970 gross receipts. You relate that the electric cooperative has paid subsequent license taxes each year through 2000, based on the gross receipts from each preceding year. You inquire whether the electric cooperative is required to pay a business license tax on local gross receipts in 2001 based on its 2000 gross receipts.

**APPLICABLE LAW AND DISCUSSION**

In anticipation of the deregulation of energy utilities and the probable sale of energy to Virginia customers by energy suppliers located outside the Commonwealth, the local tax structure for energy utilities was converted from a gross receipts license tax to a consumption tax. Formerly, pursuant to § 58.1-3731, electric suppliers were subject to a local “license tax ... at a rate not to exceed one-half of one percent of the gross
receipts of such company accruing from sales to the ultimate consumer. In lieu of paying the gross receipts license tax, electric utilities are now required to collect from their customers a consumption tax based on kilowatt-hour usage. Your inquiry arises from legislative amendments relating to the transition from the local gross receipts tax to the local consumption tax.

Section 58.1-3731 previously permitted localities to impose limited gross receipts taxes on light and power companies. Generally, the amount of business license taxes, including the local gross receipts tax imposed pursuant to Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735, is based on the gross receipts from the preceding calendar year. The issue here, however, addresses a more specific question than one regarding the general application of a business license tax. Your question relates to a very specific provision regarding the phaseout of the gross receipts tax as applied to an electric supplier for a very specific period. Section 58.1-3731 provides that "[a]fter December 31, 2000, the license tax ... shall not be imposed on ... electric suppliers as defined in § 58.1-400.2, except upon gross receipts for calendar year 2000."

Central to your inquiry are the amendments to §§ 58.1-3731 and 58.1-2901 enacted by the 1999 and 2001 Sessions of the General Assembly. The General Assembly added language to § 58.1-3731 in 1999 stating that, "[a]fter December 31, 2000, the license tax authorized by this section shall not be imposed on electric suppliers ..., except as provided in § 58.1-2901 D." In that same year, the General Assembly added Chapter 29 to Title 58.1, including §§ 58.1-2900 and 58.1-2901, pertaining to the imposition and collection of an electric utility consumption tax on consumers of electricity. Section 58.1-2901(D) originally provided that "[t]axes on electricity sales in the year ending December 31, 2000, relating to the local consumption tax, shall be paid in accordance with § 58.1-3731. Monthly payments [of the electric utility consumption tax] shall commence on February 28, 2001." In a similar vein, the 1999 General Assembly also enacted § 58.1-2901(F) to provide that "[t]he portion of the electric utility consumption tax relating to the local consumption tax replaces and precludes localities from imposing a license tax in accordance with § 58.1-3731 ... on electric suppliers subsequent to December 31, 2000, except as provided in subsection D."

The 2001 General Assembly amended the last sentence in § 58.1-3731 to preclude the imposition of a license tax on electric suppliers, "[a]fter December 31, 2000, ... except upon gross receipts for calendar year 2000," as provided in § 58.1-2901(D). It also amended § 58.1-2901(D) to require that "[t]axes on electricity sales in the year ending December 31, 2000, relating to the local consumption license tax, shall be paid in accordance with § 58.1-3731." The plain language of a statute should be given its clear and unambiguous meaning. The 1999 General Assembly made § 58.1-2901 effective for tax years beginning January 1, 2001. The amendatory language to § 58.1-3731, "upon gross receipts for calendar year 2000," enacted during the 2001 Session of the General Assembly,
plainly states that gross receipts for calendar year 2000 relating to the local *license* tax are subject to collection. The plain language of §§ 58.1-3731 and 58.1-2901(D) requires the gross receipts tax to be imposed on those receipts for the year 2000 and the consumption tax imposed for the year 2001. In essence, in 2001, the utility is required to remit the tax collected during 2000 from electric utility consumers, while at the same time beginning collection of the consumption tax.

Moreover, assuming for argument that the 2001 amendments to §§ 58.1-3731 and 58.1-2901(D) create any ambiguity concerning whether the local gross receipts tax may be collected in 2001 on gross receipts received in 2000, the rules of statutory construction require the same conclusion. An important rule 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." The only language change to § 58.1-3731 during the 2001 Session of the General Assembly pertinent to this inquiry was the addition of the language "*upon gross receipts for calendar year 2000.*" A determination that electric suppliers are not subject to the gross receipts tax for the year 2000 would require me to conclude that the amendatory language is without meaning and that the action of the General Assembly was useless. The rules of statutory construction disfavor such an interpretation.

**CONCLUSION**

Accordingly, it is my opinion that an electric cooperative is required to pay the local gross receipts tax in 2001 based on the gross receipts received by the cooperative in 2000.

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1 I assume that such electric cooperative falls within the purview of § 58.1-400.2 (providing for taxation of certain electric suppliers).

2 Pursuant to § 58.1-2901, "the provider of billing services" is responsible for collecting the electric utility consumption tax. Section 58.1-2901(E) defines "provider of billing services" as "the person who bills a consumer for electric services rendered."

3 See 2000 Va. Acts ch. 706, at 1380 1388-89 (adding Chapter 29.1 to Title 58.1, relating to natural gas consumption tax); 1999 Va. Acts ch. 971, at 2547, 2557-59 (adding Chapter 29 to Title 58.1, relating to electric utility consumption taxation).


8 To the extent it is argued that the statutes governing the imposition and collection of the gross receipts tax generally compel a different analysis, the statutes governing the same for electric suppliers are specific to electric suppliers and, therefore, override the more general statutes applicable to the gross receipts tax. An accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general. See Va. Nat’l Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979); Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935); City of Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); Op. Va.

8. 'Electric supplier' means any corporation, cooperative, partnership or other business entity providing electric service." Section 58.1-400.2(C) (Michie Repl. Vol. 2000).


10. Id. at 2577-59.

11. Id. at 2558. The 2001 Session of the General Assembly replaced the word "consumption" with the word "license" in § 58.1-2901(D). See 2001 Va. Acts ch. 829, at 1151, 1152; id. ch. 861, at 1406, 1608.

12. Id. at 1152, 1608, respectively.


The Tax Commissioner concurs in this finding and notes that, prior to January 1, 2001, and including calendar year 2000, electric suppliers were allowed to embed the gross receipts tax in their rates. Tax Comm'r Priv. Ltr. Rul. PD 01-135 (Sept. 19, 2001), available at http://policylibrary.tax.state.va.us/OTP/Policy.nsf.

20. I note that the local gross receipts tax was embedded in the electric utility consumer's rate through the year 2000, and that the consumer began paying the electric utility consumption tax in 2001 in lieu of having the gross receipts tax factored into the rates utilities charged its customers. For the electric utility consumer, the transition from a gross receipts tax to a consumption tax is seamless, as the consumer is not subject to double taxation.


22. See sources cited supra note 14. A reference to § 58.1-2905(D) was also added to provide a cross-reference to gas utilities and gas suppliers, as defined in § 58.1-400.2, which are taxed in the same manner as electric suppliers. Id.

23. See Natrella v. Bd. of Zoning Appeals, 231 Va. 451, 461, 345 S.E.2d 295, 301 (1986) (citing Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984) (rules of statutory construction argue against reading legislative enactment in manner that makes it useless or absurd; reasonable effect should be given to every word to allow enactment to remedy mischief at which it is directed)).

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**OP. NO. 03-065**

**TAXATION: GENERAL PROVISIONS OF TITLE 58.1 — IN GENERAL (SECRET OF INFORMATION) — TAXES ADMINISTERED BY THE DEPARTMENT OF TAXATION.**

Local revenue officials may assert qualified privilege to disclose confidential tax information to federal government in response to federal grand jury subpoena or administrative subpoena or summons issued pursuant to I.R.C. § 7602. Once privilege is asserted, tax information may be forwarded to court in sealed envelope, with instructions not to open until there is review and judicial order consistent with federal law.
THE HONORABLE PHILIP J. KELLAM
COMMISSIONER OF THE REVENUE FOR THE CITY OF VIRGINIA BEACH
SEPTEMBER 25, 2003

ISSUE PRESENTED

You ask whether, in the absence of a court order, tax information obtained by the commissioner of the revenue lawfully may be disclosed in response to a federal grand jury subpoena or in response to an administrative subpoena or summons as authorized by § 7602 of the Internal Revenue Code\(^1\) or other federal law.

RESPONSE

It is my opinion that local revenue officials may assert a qualified privilege to disclose confidential tax information to the federal government in response to a federal grand jury subpoena or an administrative subpoena or summons issued pursuant to § 7602 of the Internal Revenue Code. Once the privilege is asserted, the information may be forwarded to the court in a sealed envelope with instructions that it not be opened until there is a review and judicial order consistent with federal law.

BACKGROUND

Your request does not describe the nature of the information that is sought by the federal government and in the possession of your office. For purposes of this opinion, I shall assume that the information qualifies as “confidential,” as contemplated by § 58.1-3.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3 establishes the general principle that state and local tax and revenue officials are prohibited from disclosing confidential information about the transactions, property, income or business of any taxpayer.\(^2\) The 1926 Session of the General Assembly originally enacted this rule,\(^3\) and its application continues, “[e]xcept in accordance with a proper judicial order or as otherwise provided by law.”\(^4\) The General Assembly has not defined the term “proper judicial order” in the context of § 58.1-3.

Your question is not directly addressed by existing state court precedent, nor is there federal precedent directly on point.\(^5\) A federal district court, however, has examined the interplay between federal law and conflicting state privacy laws.\(^6\) First, the court recognized that, pursuant to § 58.1-109,\(^7\) a state tax official may respond to a grand jury subpoena by sending the requested information in a sealed envelope to the clerk of court, with instructions that the envelope not be unsealed absent a judicial order.\(^8\) The court reasoned that the official’s reliance on § 58.1-109 may be understood as an assertion of a “qualified privilege” not to disclose the state tax information.\(^9\)

Next, the court determined that, under § 6103(i)(1)(A) of the Internal Revenue Code,\(^10\) “[d]isclosure of federal tax returns to federal officers for use in a grand jury proceeding are permitted only upon an order by a federal district court or magistrate judge.”\(^11\) Then the court found that, under Federal Rule of Evidence 501, “it is reasonable to extend the § 6103 qualified privilege of federal returns to state tax returns.”\(^12\)
Finally, the court recognized that "[t]here are multiple benefits of preserving federalism and comity by honoring the Commonwealth's qualified privilege." As a result of these considerations, the court ruled that, "when the [federal] government wants to subpoena state tax return information on individual taxpayers, the court shall follow the strictures that Congress has set forth in § 6103."  

Analyzing the reasoning of the federal precedent, the prohibitions in § 58.1-3 constitute a statutory basis to assert a "qualified privilege" not to disclose confidential information, except in strict compliance with the requirement in § 58.1-3(A) for a "judicial order." Section 58.1-109, which provides a procedure for complying with a summons or subpoena requiring production of confidential tax returns, flows directly from the requirement that the taxpayer information described in § 58.1-3(A) shall not be disclosed by the state and local officials listed therein. A "commissioner of the revenue" is one of the officials designated in § 58.1-3(A). In the absence of disclosure provisions specifically applicable to commissioners of the revenue, the procedural protections afforded by § 58.1-109 evidence the intent of the General Assembly that confidential taxpayer information be disclosed in the manner and under the circumstances described in the statute.  

CONCLUSION  

Accordingly, it is my opinion that local revenue officials may assert a qualified privilege to disclose confidential tax information to the federal government in response to a federal grand jury subpoena or an administrative subpoena or summons issued pursuant to § 7602 of the Internal Revenue Code. Once the privilege is asserted, the information may be forwarded to the court in a sealed envelope with instructions that it not be opened until there is a review and judicial order consistent with federal law.

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1Section 7602 authorizes the Secretary of the Treasury to examine books and witnesses to ascertain the correctness of any federal tax return. *See* I.R.C. § 7602 (West 2002).  
3See 1926 Va. Acts ch. 147, § 6, at 252, 255.  
4*Va. Code Ann.* § 58.1-3(A) (LexisNexis Supp. 2003). Sections 58.1-3 and 58.1-3.1 also specify certain limited instances in which taxpayer information may be shared.  
5A prior opinion of the Attorney General concludes that a subpoena duces tecum in a civil action between private litigants does not constitute a "proper judicial order" authorizing the disclosure of confidential tax information pursuant to § 58.1-3. *See* 1998 Op. Va. Att’y Gen. 123. In this instance, the federal government, rather than private litigants, is seeking the information.  
6*See* In re *Grand Jury Subpoena*, 144 F. Supp. 2d 540 (W.D. Va. 2001). While that decision concerns state tax returns in the possession of the State Tax Commissioner, the reasoning of the court may apply by analogy to local tax information under the control of a local tax official.  
7Section 58.1-109 permits "[t]he Tax Commissioner and each employee of the Department of Taxation" to comply with "any summons, subpoena, subpoena duces tecum or order, directing him to produce any confidential tax returns kept by or in the possession of the Department," by mailing a certified reproduction or enlargement of such returns "in a sealed envelope to the clerk of court. Such envelope shall not be opened unless and until a judge of such court determines that the information contained therein is of such importance that the ends of justice require that the secrecy and confidentiality of such returns be violated."
In re Grand Jury Subpoena, 144 F. Supp. 2d at 541.

144 F. Supp. 2d at 542.

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties "shall be the supreme law of the land." U.S. CONST. art. VI, cl. 2; see also 2001 Op. Va. Att'y Gen. 143, 144.


OP. NO. 03-005

TAXATION: LICENSE TAXES.

Telephone company formed as limited liability company is subject to local license taxation.

THE HONORABLE R. STEVEN LANDES
MEMBER, HOUSE OF DELEGATES
FEBRUARY 18, 2003

ISSUE PRESENTED

You ask whether a telephone company formed as a limited liability company is subject to taxation under § 58.1-3731, which authorizes a locality to impose a license tax on telephone companies.

RESPONSE

It is my opinion that a telephone company formed as a limited liability company is subject to taxation under § 58.1-3731.

BACKGROUND

You relate that a telephone company formed as a limited liability company holds a certificate of convenience and necessity from the State Corporation Commission. You also relate there is some confusion as to whether § 58.1-3731 authorizes the imposition of a license tax on a limited liability company since the heading of § 58.1-3731 references "public service corporations."

APPLICABLE LAW AND DISCUSSION

Section 58.1-3731 authorizes a county, city or town to impose a license tax on telephone companies "at a rate not to exceed one-half of one percent of the gross receipts of
such company accruing from sales to the ultimate consumer in such county, city or
town.\textsuperscript{1} The license tax may be imposed “in addition to any tax levied under Chapter
26 [of Title 58.1].”\textsuperscript{2}

Prior opinions of this Office, although recognizing that the term “public service corpora-
tion” is not defined in Title 58.1, have relied on the definition provided in § 56-1 when
addressing local license tax issues related to certain public service corporations.\textsuperscript{3} Reliance on the definition of “public service corporation” in § 56-1 is appropriate,
because Title 56 establishes the regulatory powers and duties of the State Corporation
Commission for public service companies and corporations.\textsuperscript{4} By necessity, Title 56
must describe the term “public service corporation” so the appropriate entities may
be properly regulated. Section 56-1 provides that “[t]he words ‘public service corpora-
tion’ or ‘public service company’ shall include ... telephone companies ... ‘Public service corporation’ or ‘public service company’ shall not
include a municipal corporation, other political subdivision or public institution owned
or controlled by the Commonwealth.”

The only entities excluded from the above-referenced definition are municipal corpora-
tions, political subdivisions and public institutions owned or controlled by the Com-
monwealth. In addition, § 58.1-2600 defines “telephone company,” as that term is
used in Chapter 26 of Title 58.1, as “a person holding a certificate of convenience and
necessity granted by the State Corporation Commission.” (Emphasis added.) “The
word ‘person’ shall include any individual, corporation, partnership, association,
company, business, trust, joint venture or other legal entity.”\textsuperscript{5} Thus, the term “public
service corporation” or “public service company” includes a limited liability company.

Section 58.1-3731 unambiguously mandates that telephone companies are subject to
local license tax. “The manifest intention of the legislature, clearly disclosed by its
language, must be applied.”\textsuperscript{6} Therefore, as a legal entity meeting the definition of a
“telephone company,” a limited liability company “holding a certificate of convenience
and necessity granted by the State Corporation Commission,” is subject to the local
license tax authorized by § 58.1-3731. Although the headline of § 58.1-3731 references
“public service corporations,” such reference does not exclude other types of entities.
The headlines of statutes in the Virginia Code “are intended as mere catchwords ...
and shall not be deemed or taken to be titles of such sections.”\textsuperscript{7} As such, the reference
to “corporation” has no bearing on the types of entities that are subject to taxation
under § 58.1-3731. The headline is merely a reference of convenience as opposed to a
limiting phrase.\textsuperscript{8}

CONCLUSION

Accordingly, it is my opinion that a telephone company formed as a limited liability
company is subject to taxation under § 58.1-3731.

\textsuperscript{1}Charges for long distance telephone calls, however, are not included in the gross receipts of tele-


See Jones v. Div. of Child Support Enforc. ex rel. Owens, 19 Va. App. 184, 189, 450 S.E.2d 172, 175 (1994) (noting that words of statute, not heading, carry force of law); see also Ritholz v. Commonwealth, 184 Va. 339, 367, 35 S.E.2d 210, 223 (1945) (noting that “[i]n construing a section ... [the court is] not concerned with the heading of the section, as it is purely a matter of informative convenience and in no sense a part of the provisions of the section” (quoting Good v. Commonwealth, 155 Va. 996, 1000, 154 S.E. 477, 478 (1930))).

OP. NO. 02-146

TAXATION: LICENSE TAXES.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Applicability of gross receipts exemption to real estate broker whose agent receives full commission from real estate sales transaction, minus business license tax paid by broker, and pays desk fee to broker.

THE HONORABLE CHARLES D. CROWSON, JR.
COMMISSIONER OF THE REVENUE FOR THE CITY OF NEWPORT NEWS
JANUARY 27, 2003

ISSUES PRESENTED

You pose two questions concerning the status and effect of an amendment to the business, professional and occupational license (“BPOL”) tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735. Specifically, you inquire concerning the applicability of the 2002 amendment to § 58.1-3732.2 exempting from gross receipts “desk fees” and other overhead costs of certain real estate brokers for purposes of determining BPOL tax. You also ask whether the amendment is retroactive in its application.

RESPONSE

It is my opinion that the gross receipts exemption provided by the 2002 amendment to § 58.1-3732.2 is applicable to a real estate broker whose agents (1) receive full commission from the broker less an adjustment for the business license tax paid by the broker
and (2) pay desk fees to the broker. It is further my opinion that such amendment is not retroactive and is applicable prospectively as of July 1, 2002, the effective date of the statute.

BACKGROUND
You relate that certain brokers within the real estate industry purchase a BPOL license for the agents that are associated with the broker. You also relate that other brokers require all associated agents to purchase individual licenses and reduce their reported gross receipts by the amount paid to those agents. Both types of brokers assert that reimbursed expenses are strictly recovered costs and should not be included in the brokers' calculation of BPOL tax liability relating to gross receipts. The brokers claim that they are reporting the entire commission for gross receipts purposes and that reimbursed expenses are a redistribution of the original commission and not additional gross receipts. You inquire as to the proper application of the 2002 amendment to § 58.1-3732.2, as it pertains to the allowable deductions from gross receipts for brokers.

APPLICABLE LAW AND DISCUSSION
Your initial question pertains to the application of the 2002 amendment to § 58.1-3732.2. The 2002 Session of the General Assembly reenacted the first paragraph of § 58.1-3732.2 and added a second paragraph to the statute as follows:

Gross receipts of real estate brokers for license tax purposes under Chapter 37 ... shall not include amounts received by any broker which that arise from real estate sales transactions to the extent that such amounts are paid to a real estate agent as a commission on any real estate sales transaction and the agent is subject to the business license tax on such receipts. The broker claiming the exclusion shall identify on its license application each agent to whom the excluded receipts have been paid, and the jurisdiction in the Commonwealth of Virginia to which the agent is subject to business license taxes.

In the event that a real estate agent receives the full commission from the broker less an adjustment for the business license tax paid by the broker on such commissions and the agent pays a desk fee to the broker, the desk fee and other overhead costs paid by the agent to a broker shall not be included in the broker's gross receipts. If the agent files separately, the agent must identify on its license application the broker to whom such excluded receipts have been paid, and the amount of such receipts that were included in the broker's license application.

The amendatory language is specific to the circumstances where “the desk fee and other overhead costs” are excluded from a real estate broker’s gross receipts. Section 58.1-3732.2 provides for the exclusion of desk fees and overhead costs from the gross receipts of a real estate broker whose agent (1) receives full commission from a sale
minus adjustment for the business license tax paid by the broker and (2) pays the broker a desk fee.

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."3 Pursuant to § 58.1-3732.2, if the financial arrangement between a real estate broker and his agent is structured so that the agent receives "full commission from the broker less an adjustment for the business license tax paid by the broker on such commissions and the agent pays a desk fee to the broker," then desk fees and overhead costs are not included in the broker's gross receipts. The use of the term "and" in § 58.1-3732.2 implies the conjunctive unless the words in the statute clearly express legislative intent otherwise.4 There is nothing in § 58.1-3732.2 that expresses a legislative intent that the term "and" be disjunctive. Therefore, a real estate broker must pay an agent a full commission, less an adjustment for the business license tax paid by the broker on such commissions, and receive a desk fee from the agent in order to deduct the desk fee and other overhead costs from the gross receipts.5

You next ask whether the 2002 amendment to § 58.1-3732.2 is retroactive. The Supreme Court of Virginia has recognized that "'[r]etrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest.'"6 Moreover, the legislature has also made it clear that, where a statute is "reenacted," the changes to the statute will be effective prospectively absent a specific retroactive date. Section 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 and third emphases added.]

For the 2002 amendment to operate retrospectively, it must contain some manifest indication on its face of such an intent. Otherwise, it only operates prospectively. The 2002 amendment lacks any specific date as required by § 1-13.39:3 upon which it would apply retroactively. Therefore, the new language is applicable on and after July 1, 2002.8

CONCLUSION

Accordingly, it is my opinion that the gross receipts exemption provided by the 2002 amendment to § 58.1-3732.2 is applicable to a real estate broker whose agents (1) receive full commission from the broker less an adjustment for the business license tax paid by the broker and (2) pay desk fees to the broker. It is further my opinion that such amendment is not retroactive and is applicable prospectively as of July 1, 2002, the effective date of the statute.
OP. NO. 03-043
TAXATION: REAL PROPERTY TAX.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).
TRADE AND COMMERCE: ENTERPRISE ZONE ACT.

Partial tax exemption for rehabilitation permitted where historic structure is demolished, provided person receiving exemption is not property owner responsible for demolition.

MR. JOHN A. RUPP
CITY ATTORNEY FOR THE CITY OF RICHMOND
AUGUST 5, 2003

ISSUE PRESENTED

You ask whether § 58.1-3221(E) permits the partial exemption from real estate taxation of certain rehabilitated structures under the hypothetical scenario presented below.

RESPONSE

It is my opinion that, under the hypothetical scenario presented, § 58.1-3221(E) permits a partial exemption from real estate taxation for rehabilitated property where a registered historic structure has been demolished, provided that the person receiving the partial exemption is not the property owner responsible for the demolition.

BACKGROUND

You relate a hypothetical situation involving two adjoining parcels of land ("parcels A and B"). Each parcel features a structure determined by the Department of Historic Resources to contribute to the significance of a registered historic district ("historic structure"). During the first year, owners A and B own parcels A and B, respectively. Owner A obtains the necessary local permits and demolishes the historic structure on parcel A. During the second year, owner B files an application with the city assessor for a partial exemption for parcels A and B. The city assessor informs owner B that the application cannot be approved, because parcel A has no structures for the owner to rehabilitate. Owner B then purchases parcel A and records a deed of consolidation,
thus combining the two parcels into one. Owner B resubmits his application for partial exemption, which includes a rehabilitated structure that, prior to combining the two parcels, existed on parcel B and extended onto parcel A.

APPLICABLE LAW AND DISCUSSION

Sections 58.1-3220 and 58.1-3221 allow localities, by ordinance, to provide for the partial exemption from real estate taxation of certain structures or improvements that have been rehabilitated. Sections 58.1-3220(A) and 58.1-3221(A) provide, respectively, that such structures or improvements must be at least fifteen years old for residential property, and either at least twenty years old for commercial or industrial property or fifteen years old for commercial or industrial property located in an enterprise zone. The availability of the real estate tax exemption is limited further by §§ 58.1-3220(E) and 58.1-3221(E):

Where rehabilitation is achieved through demolition and replacement of an existing structure, the exemption provided in subsection A shall not apply when any structure demolished is a registered Virginia landmark or is determined by the Department of Historic Resources to contribute to the significance of a registered historic landmark.

You ask whether the limitation set forth above means that only the owner demolishing the historic structure is prohibited from receiving the partial tax exemption or if subsequent owners of the property also are prohibited from receiving the partial tax exemption. 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. In this case, it is unclear whether the language in §§ 58.1-3220(E) and 58.1-3221(E), “[w]here rehabilitation is achieved through demolition and replacement of an existing structure,” forever prohibits property owners who are not responsible for the demolition of a structure from receiving a partial tax exemption, or if the language is intended to forever bar the availability of a partial tax exemption to the property.

"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." Legislative intent requires an appraisal of the subject matter, purposes, objects and effects of a statute, as well as its express terms. The purpose of §§ 58.1-3220 and 58.1-3221 is to encourage the redevelopment of property falling into disrepair by offering tax relief to improve the property. For example, § 58.1-3221(A) authorizes a locality, by ordinance, to “provide for the partial exemption from taxation of real estate on which any structure or other improvement is no less than twenty years of age, or fifteen years of age if the structure is located in an area designated as an enterprise zone by the Commonwealth.” The purpose of the Enterprise Zone Act is “to stimulate business and industrial growth in such areas which would result in neighborhood, commercial and economic revitalization of such areas of the Commonwealth by means of regulatory flexibility and tax incentives.” The preferential tax treatment for structures located within an enterprise zone encourages private invest-
ment to revitalize commercial and industrial real estate through rehabilitation. Similarly, § 58.1-3220 provides the same tax relief for residential areas as § 58.1-3221 provides for commercial or industrial structures, thus evidencing the intent of the General Assembly to encourage revitalization of residential real estate through rehabilitation.

In the hypothetical situation you present, owner B is not responsible for the destruction of the structure on parcel A. Instead, owner B acquired parcel A after the structure on it was demolished by owner A. After purchasing parcel A, B files a deed of consolidation thereby joining the two parcels into one. The rehabilitation of the structure on parcel B will extend onto the original parcel A. When owner B resubmits his application requesting the partial tax exemption, he is not the owner that demolished the historic structure. Statutes should not be interpreted so as to produce absurd results or irrational consequences. The provision in §§ 58.1-3220(E) and 58.1-3221(E), stating that the partial tax exemption will not apply to rehabilitation where a historic structure is demolished, encourages a current owner to retain the historic structure as part of the plan of rehabilitation. To deny the partial tax exemption to any subsequent owner who is not responsible for the initial demolition, however, frustrates the purpose of §§ 58.1-3220 and 58.1-3221, by permanently eliminating the incentive to rehabilitate or revitalize the property. Such an interpretation would lead to an absurd result.

In this case, owner B is rehabilitating a historic structure on parcel B that extends onto the original parcel A. By conducting the rehabilitation of a historic structure on parcel B, owner B is engaging in the type of activity §§ 58.1-3220 and 58.1-3221 intend to promote. To forever foreclose owner B from receiving the partial tax exemption for the newly consolidated parcel frustrates the purpose of §§ 58.1-3220 and 58.1-3221, and the language contained in those statutes does not warrant such an interpretation.

CONCLUSION

Accordingly, it is my opinion that, under the hypothetical scenario presented, § 58.1-3221(E) permits a partial exemption from real estate taxation for rehabilitated property where a registered historic structure has been demolished, provided that the person receiving the partial exemption is not the property owner responsible for the demolition.

1Although you relate that owner B is the applicant in the situation presented, the partial exemption runs with the land and the owner of the land; therefore, owner B has no standing to make such application. See Richmond, Va., Code § 27-83 (2002). Accordingly, the actual reasons stated for the assessor’s denial are irrelevant.

2See Va. Const. art. X, § 6(h) (authorizing General Assembly to enact general law allowing localities to provide partial tax exemptions “of real estate whose improvements, by virtue of age and use, have undergone substantial renovation, rehabilitation or replacement”).

3Section 58.1-3221(A) provides that “[t]he governing body of any county, city or town may, by ordinance, provide for the partial exemption from taxation of real estate on which any structure or other improvement no less than twenty years of age, or fifteen years of age if the structure is located in an area designated as an enterprise zone by the Commonwealth, has undergone substantial rehabilitation, renovation or replacement for commercial or industrial use, subject to such conditions as the ordinance may prescribe. The ordinance may, in addition to any other restrictions
hereinafter provided, restrict such exemptions to real property located within described zones or districts whose boundaries shall be determined by the governing body. The governing body of a county, city or town may establish criteria for determining whether real estate qualifies for the partial exemption authorized by this provision and may require the structure to be older than twenty years of age, or fifteen years of age if the structure is located in an area designated as an enterprise zone by the Commonwealth, or place such other restrictions and conditions on such property as may be prescribed by ordinance. Such ordinance may also provide for the partial exemption from taxation of real estate which has been substantially rehabilitated by complete replacement for commercial and industrial use."

4The limitation in § 58.1-3220(E) is applicable to residential structures.


OP. NO. 03-030

TAXATION: REVIEW OF LOCAL TAXES—COLLECTION BY DISTRESS, SUIT, LIEN, ETC.
CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.
COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

Sheriff is not entitled to statutorily authorized 5% commission for serving distress warrant on behalf of local treasurer for collection of delinquent taxes, which subsequently are paid to treasurer’s office.

THE HONORABLE JOHN R. NEWHART
SHERIFF FOR THE CITY OF CHESAPEAKE
JUNE 26, 2003

ISSUE PRESENTED

You ask whether a sheriff is entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the treasurer for the collection of delinquent taxes pursuant to § 58.1-3934(B), which subsequently are paid to the treasurer’s office.

RESPONSE

It is my opinion that a sheriff is not entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the local treasurer for the collection of delinquent taxes, which subsequently are paid to the treasurer’s office.
APPLICABLE LAW AND DISCUSSION

Section 58.1-3919 requires a local treasurer to collect delinquent taxes "by distress or otherwise." Section 58.1-3934(B) authorizes a county or city to place local taxes in the hands of the sheriff for collection and entitles the sheriff to the powers conferred by law upon the treasurer.

Section 8.01-499 provides:

An officer receiving money under [Chapter 18 of Title 8.0][1][1] shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment is entered. For failing to do so, the officer shall be liable as if he had acted under an order of such court. After deducting from such money a commission of five per centum and his necessary expenses and costs, including reasonable fees to sheriff's counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under a writ of fieri facias on the judgment. [Emphasis added.]

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."[2] The plain language of § 8.01-499 provides for payment of a commission to the sheriff when he collects the amount due. In order to "make return thereof forthwith to the court," as required by § 8.01-499, the officer must have collected the amount due. A 1962 opinion of the Attorney General determined that no fee is payable to the sheriff when a garnishee makes payment directly to the court, because no collection is made by the officer. I find no authority rendering the rationale of the 1962 opinion incorrect.

CONCLUSION

Accordingly, it is my opinion that a sheriff is not entitled to the five percent commission authorized under § 8.01-499 for serving a distress warrant on behalf of the local treasurer for the collection of delinquent taxes, which subsequently are paid to the treasurer's office.

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1Chapter 18 of Title 8.01 encompasses the statutes governing executions and other means of recovery.


31962-1963 Op. Va. Att'y Gen. 101, 102 (concluding that § 8-429, predecessor to § 8.01-499, applies only to instances where sheriff makes actual collection of amounts due); see also Va. Code Ann. § 15.2-1609.3(D) (LexisNexis Supp. 2002) ("When, after distaining or levying on tangible property the officer neither sells nor receives payment and either takes no forthcoming bond or takes one which is not forfeited, he shall ... have ... a fee of twelve dollars." (Emphasis added)).
OP. NO. 02-122

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

COUNTIES, CITIES AND TOWNS: JOINT ACTIONS BY LOCALITIES — JOINT EXERCISE OF POWERS — CERTAIN LOCAL GOVERNMENT OFFICERS — PROHIBITION ON DUAL OFFICE HOLDING.

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

County treasurer has no authority to serve as agent for town treasurer or finance director to collect town taxes. Appointment of county treasurer as treasurer for town located within county served by treasurer.

MR. PAUL S. MCCULLA
COUNTY ATTORNEY FOR FAUQUIER COUNTY
MAY 20, 2003

ISSUE PRESENTED

You ask whether the Fauquier County treasurer is permitted to act as agent for the collection of real and personal property taxes, including delinquent real and personal property taxes, for the town of Warrenton.

RESPONSE

It is my opinion that a county treasurer has no authority to serve as agent for a town treasurer or finance director for the purpose of collecting town taxes. A county treasurer, however, may be appointed to serve as treasurer for a town located within the county served by the treasurer, provided the treasurer agrees to assume such additional duties.

BACKGROUND

You relate that the town of Warrenton is located within the boundaries of Fauquier County. The finance director for the town is responsible for collecting taxes. You state that the charter for the town of Warrenton requires the town manager to appoint department heads, such as the finance director. You further relate that the town charter does not specifically provide for a treasurer. You indicate that the finance director desires to engage the county treasurer as an agent to collect the town’s real and personal property taxes, including delinquent taxes. You ask whether state law permits such a relationship.

APPLICABLE LAW AND DISCUSSION

A city or county treasurer is a constitutional officer whose “duties and compensation shall be prescribed by general law or special act.” The powers and duties of a local 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 he serves. Section 58.1-3919 grants local treasurers the authority to collect delinquent taxes by distress. Section 15.2-1534(A) prohibits a treasurer from holding any other such office simultaneously; however, § 15.2-1534(B)(2) provides that subsection A does not prohibit “[a] treasurer of a county from serving as appointed treasurer of a town located in the county.” Conversely, I find no authority for a county treasurer to act as agent for a finance director or treasurer of a town.
Virginia follows the Dillon Rule of strict construction, which provides that "'municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.'" The powers of local governments are also limited to "'those conferred expressly or by necessary implication.'" Any doubt as to the existence of a power must be resolved against the locality. Accordingly, because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly. These rules are also applicable to constitutional officers, such as county treasurers.

In instances where the General Assembly grants the power to do something, but does not specifically direct implementation, the local government may elect a reasonable method to exercise such power. The General Assembly specifically has answered the question whether a county treasurer may act on behalf of a town by providing in § 15.2-1534(B)(2) that the dual officeholding prohibition in § 15.2-1534(A) shall not preclude "'[a] treasurer of a county from serving as appointed treasurer of a town located in the county.'" In addition, § 58.1-3919.1 permits local treasurers, with the approval of their governing bodies, to employ private collectors to collect local taxes, other than real estate taxes, that have been delinquent for six months or more. Section 58.1-3934(A) authorizes a governing body, with the approval of the local treasurer, to hire attorneys to collect any local taxes that are delinquent for six months or more. Alternatively, § 58.1-3934(B) authorizes the governing body to "place [such] taxes or other charges ... in the hands of the sheriff of the county or city for collection, or employ a local delinquent tax collector." Nothing in any of these statutes provides for the treasurer of one jurisdiction to act on behalf of the treasurer or finance director of another jurisdiction in the collection of taxes.

You cite §§ 15.2-1300 through 15.2-1310 as possible sources of authority to allow a county treasurer to act on behalf of a town. Section 15.2-1300(A) provides for two or more political subdivisions to exercise jointly any power, privilege or authority otherwise capable of being exercised by each such political subdivision, "except where an express statutory procedure is otherwise provided for the joint exercise." Section 15.2-1300(B) allows two or more political subdivisions to enter into agreements for joint action pursuant to the provisions of § 15.2-1300.

The purpose of § 15.2-1300 is to allow a more efficient and economical exercise of existing powers by two or more political subdivisions, rather than grant additional substantive authority or modify existing duties. Thus, the power sought to be exercised in each instance must exist in each political subdivision before the power may be exercised jointly. Therefore, provided that each political subdivision has the authority to exercise certain powers independently, they may jointly conduct such activities.

Section 58.1-3919.1, therefore, would allow the treasurer of any county or town, subject to the approval of the local governing body, to engage private tax collectors for certain delinquent taxes. Both counties and towns have the same authority pursuant to
this provision and could, subject to the requirements in § 15.2-1300, jointly engage private tax collectors. The provisions for the exercise of joint powers, however, do not permit an agency relationship between a town and a county for the collection of taxes.

A 1983 opinion of this Office states that a treasurer has no authority to collect taxes owed to a jurisdiction he does not serve.¹⁰ That opinion is still applicable. A county treasurer also appointed to serve as town treasurer would, therefore, collect the town’s taxes as its treasurer. Thus, such an arrangement does not conflict with the prior opinion. Absent appointment as the town treasurer, however, the county treasurer has no authority to collect town taxes. I also note that it is within a treasurer’s discretion to accept such an appointment and assume the corresponding additional duties.²⁰ Prior to the appointment of a county treasurer to also serve as town treasurer, a determination should be made that the appointment is consistent with the charter for the town of Warrenton.²¹

CONCLUSION

It is my opinion that a county treasurer has no authority to serve as agent for a town treasurer or finance director for the purpose of collecting town taxes. A county treasurer, however, may be appointed to serve as treasurer for a town located within the county served by the treasurer, provided the treasurer agrees to assume such additional duties.

¹In some localities, a finance director or other officer performs the duties of treasurer. See VA. CODE ANN. § 58.1-3123 (Michie Repl. Vol. 2000).
²1964 Va. Acts ch. 47, at 77, 79-80 (citing §§ 6-1, 6-2, relating to appointment of town manager by town council and appointment and removal of town officers and employees by town manager).
¹⁰Id. at 573-74, 232 S.E.2d at 40 (quoting Horne, 216 Va. at 117, 215 S.E.2d at 455).

12See Gordon v. Bd. of Supvrs., 207 Va. 827, 153 S.E.2d 270 (1967) (finding that county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power exercised by board was expressly implied from legislative act allowing local governing body to lend real property to any authority it created).


15Any 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.” VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).


17Id.; see also 1965-1966 Op. Va. Att’y Gen. 71, 72 (concluding that where each of three counties has authority to establish and operate police training facility, counties may establish joint facility).

181977-1978 Op. Va. Att’y Gen. 131, 133 (citing § 15.1-21(a), predecessor to § 15.2-1300(A)).


20“The treasurer shall exercise all the powers conferred and perform all the duties imposed upon treasurers by law. He may perform such other duties, not inconsistent with his office, as the governing body may request…. He shall be elected as provided by general law for a term of four years.” VA. CODE ANN. § 15.2-1608 (Michie Repl. Vol. 1997) (emphasis added). Absent specific legislation, local governing bodies have no authority to specify the duties of constitutional officers. See Op. Va. Att’y Gen.: 2000 at 204, 205; 1995 at 47, 48; 1978-1979 at 289.

21A town may elect to appoint a treasurer charged with the responsibility to collect taxes and a finance director charged with other financial responsibilities. Such an arrangement, however, must not conflict with the town charter or any other applicable statute.

OP. NO. 03-047

TAXATION: STATE RECORDATION TAX.

Recordation tax may not be collected on federal land credit association deeds of trust.

THE HONORABLE RYAN T. MCDOWGULE
MEMBER, HOUSE OF DELEGATES
JUNE 26, 2003

ISSUE PRESENTED

You ask whether the recordation tax imposed pursuant to § 58.1-803 may be collected on deeds of trust of a federal land credit association.

RESPONSE

It is my opinion that § 2098 of the Farm Credit Act generally exempts federal land credit associations from federal, state or local taxation. Therefore, the recordation tax imposed pursuant to § 58.1-803 may not be collected on deeds of trust of a federal land credit association.
APPLICABLE LAW AND DISCUSSION

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 taxation applies, regardless of whether a state has granted specific exemptions. Federal law granting tax exemptions overrides state law to the contrary.

A 2002 opinion of this Office determined that the mere appearance of an agency of the federal government as a guarantor or beneficiary on a deed of trust does not necessarily relieve payment of the recordation tax under § 58.1-803. The opinion further notes that the absence of a state statutory exception, by itself, is not dispositive of whether a transaction involving a federal agency is subject to taxation. Congress may create exemptions from taxation for specific entities even if such exceptions are not memorialized in the states’ laws. Implicit in the 2002 opinion is the authority of the federal government to exempt specific real estate transactions from state taxation.

Section 2098 of the Farm Credit Act of 1971, as amended, generally exempts federal land credit associations and the income derived from certain transactions from taxation:

Each Federal land bank association and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Federal land bank association to the same extent, according to its value, as other similar property held by other persons is taxed. The mortgages held by the Federal land bank associations and the notes, bonds, debentures, and other obligations issued by the associations shall be considered and held to be instrumentalities of the United States and, as such, they and the income therefrom shall be exempt from all Federal, State, municipal, and local taxation, other than Federal income tax liability of the holder thereof under the Public Debt Act of 1941 ...

Pursuant to § 2098, federal land credit association deeds of trust are not subject to the recordation tax imposed pursuant to § 58.1-803.

CONCLUSION

Accordingly, it is my opinion that § 2098 of the Farm Credit Act generally exempts federal land credit associations from federal, state or local taxation. Therefore, the recordation tax imposed pursuant to § 58.1-803 may not be collected on deeds of trust of a federal land credit association.

1 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 the Congress.” 392 U.S. 339, 346 (1968). The Court 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 be taxed only as allowed by federal law. See Fed. Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935).

1U.S. CONST. art. VI, cl. 2; see Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211 (1824) (stating that act of Congress is supreme and that state tax must yield to it and must not interfere with or be contrary to laws enacted pursuant to Constitution); Op. Va. Att’y Gen.: 1992 at 183, 185; 1990 at 259, 259; 1987-1988 at 504, 505; 1974-1975 at 477, 477-78.


4Id. at 329.

5See 12 C.F.R. § 619.9155 (2003) (defining “federal land credit association” as federal land bank association that has received transfer of direct long-term real estate lending authority pursuant to Farm Credit Act of 1971).


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OP. NO. 03-004

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC.

Locality may not assess personal property tax on boat weighing more than 10,000 pounds if boat is garaged, docked or parked in Commonwealth less than six months. Boat weighing over 10,000 pounds must be physically located within Commonwealth for six or more months to establish situs for personal property tax purposes.

THE HONORABLE WALTER A. STOSCH
SENATE MAJORITY LEADER
FEBRUARY 6, 2003

ISSUE PRESENTED

You ask whether a locality may assess personal property tax on a boat that weighs over 10,000 pounds when the owner docks the boat in the Commonwealth for less than six months during a year.

RESPONSE

It is my opinion that a locality may not assess a personal property tax on a boat weighing more than 10,000 pounds if the boat is garaged, docked or parked in the Commonwealth less than six months a year. The situs required to impose personal property taxes on a boat weighing over 10,000 pounds is not established unless the boat is physically located within the Commonwealth for a period of six months or more.

BACKGROUND

You relate that an individual domiciled in Virginia owns a boat weighing more than 10,000 pounds. You further relate that the boat is sometimes docked within the Commonwealth and, at other times, outside the Commonwealth. You advise that the boat is not
docked at any Virginia locality for more than six months. In fact, the boat is docked outside the Commonwealth for the majority of a year.

APPLICABLE LAW AND DISCUSSION

Chapter 35 of Title 58.1, §§ 58.1-3500 through 58.1-3522, governs local taxation of tangible personal property. Specifically, § 58.1-3511(A), which determines the situs of tangible personal property for purposes of local taxation, provides:

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. However, the situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked; however, the situs for vehicles with a weight of 10,000 pounds or less registered in Virginia but normally garaged, docked or parked in another state shall be the locality in Virginia where registered. [Emphasis added.]

The provisions governing the situs of mobile personal property weighing 10,000 pounds or less and property weighing more than 10,000 pounds are different. The situs of a boat registered in Virginia weighing 10,000 pounds or less is the Virginia locality in which it is registered. In such circumstances, the locality may impose a personal property tax although the boat is normally garaged, docked or parked elsewhere.

The situs of a boat weighing in excess of 10,000 pounds is determined on the basis of where it is normally garaged, docked or parked. This Office has concluded that the phrase “normally garaged, docked or parked” means that the personal property being taxed must have been located in a particular jurisdiction for six months or more. Therefore, under the circumstances you pose, the boat is not “normally garaged, docked or parked” in Virginia.

CONCLUSION

Accordingly, it is my opinion that a locality may not assess a personal property tax on a boat weighing more than 10,000 pounds if the boat is garaged, docked or parked in the Commonwealth less than six months a year. The situs required to impose personal property taxes on a boat weighing over 10,000 pounds is not established unless the boat is physically located within the Commonwealth for a period of six months or more.


OP. NO. 03-089
WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT.
CONSTITUTION OF VIRGINIA: BILL OF RIGHTS (CRIMINAL PROSECUTIONS).

Entry on Child Abuse and Neglect Central Registry of name of individual acquitted of criminal charges related to child abuse and neglect does not constitute double jeopardy violation.

THE HONORABLE MARK L. COLE
MEMBER, HOUSE OF DELEGATES
DECEMBER 1, 2003

ISSUE PRESENTED

You ask whether local departments of social services may enter on the Child Abuse and Neglect Central Registry the name of an individual acquitted of criminal charges related to child abuse and neglect.

RESPONSE

It is my opinion that entry on the Child Abuse and Neglect Central Registry of the name of an individual acquitted of criminal charges related to child abuse and neglect does not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

BACKGROUND

You have been advised that local departments of social services are entering on the Child Abuse and Neglect Central Registry the names of individuals who have been acquitted of criminal charges related to child abuse and neglect. You question whether placing the names of such individuals in the Central Registry violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

APPLICABLE LAW AND DISCUSSION

The Fifth Amendment to the Constitution of the United States provides that “[no] person shall be subject for the same offense to be twice put in jeopardy of life or limb.” The Constitution of Virginia states that a person in a criminal prosecution “shall not ... be put twice in jeopardy for the same offense.”

The Double Jeopardy Clause guarantees protection against a second prosecution for the same offense after acquittal or conviction and protection against multiple punishments for the same offense. “Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors.” “It is well established that the Double Jeopardy Clause prevents the retrial of a criminal defendant who has been acquitted of the crime charged.” The Clause protects only
against the imposition of multiple criminal punishments for the same offense. Thus, the Double Jeopardy Clause guards against dual punishment for the same crime.

Chapter 15 of Title 63.2, §§ 63.2-1500 through 63.2-1529, comprises Virginia's child abuse and neglect laws. Section 63.2-1514(B) requires the State Department of Social Services to "maintain a child abuse and neglect information system that includes a central registry of founded complaints [of child abuse and neglect]." Section 63.2-1515 mandates that the central registry contain such information as is prescribed by regulation of the State Board of Social Services. The Board has regulated information entered on the central registry. The regulations define "central registry" as

a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser and/or neglector in founded child abuse and/or neglect complaints or reports not currently under administrative appeal, maintained by the department.

"Founded" means that a review of all the facts shows by a preponderance of the evidence that child abuse or neglect has occurred. Names of individuals appearing in founded reports of child abuse and neglect are maintained in the central registry for three or more years, depending on the severity of the complaint. Based on a review of Virginia's child abuse and neglect laws and regulations of the State Board of Social Services, it is clear that a determination whether a complaint of abuse or neglect is founded does not constitute a criminal proceeding. The evidence required—a preponderance of the evidence—is a civil evidentiary requirement. A founded complaint does not result in jail time, probation, or fines, and does not require proof beyond a reasonable doubt; rather, it is a civil administrative act.

While founded complaints are placed in the central registry pursuant to § 63.2-1515, unfounded complaints are maintained separately by the Department of Social Services and are only accessible to the Department and local departments for child-protective services. "The purpose of retaining these complaints or reports is to provide local departments with information regarding prior complaints or reports." Unfounded reports are purged from the Department's records after one year, provided that no additional reports of abuse are received regarding the subject of the complaint or the child.

The Supreme Court of the United States has considered "whether and under what circumstances a civil penalty may constitute 'punishment' for purposes of double jeopardy analysis." "In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." The threshold question is whether the legislature intended the particular successive punishment to be civil or criminal in nature. Second, we must evaluate the "statute on its face" to determine whether it provides for a criminal sanction.
"[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." First, one must determine whether the legislature, in establishing the penalizing mechanism, indicates either expressly or impliedly a preference for one label or the other. Second, where the legislature has indicated an intention to establish a civil penalty, one must address "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." It is clear that entering a name on the central registry is not intended as a deterrent or retribution, but is intended to be wholly civil. First, various statutes in Title 18.2 address crimes and offenses against children. Moreover, the General Assembly has made it clear that the goal of Title 63.2 is protection of children, not punishment of their abusers. Section 63.2-1500 states:

The General Assembly declares that it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.

Similarly, Virginia courts have noted that "the purpose of the [Child Abuse and Neglect] Act is not one of punishment and correction of the alleged abuser. Rather, under this statute, the policy of protecting abused children and preventing further abuse of those children is key." There is no evidence to suggest that the General Assembly intends the entry of a name on the central registry to be criminal. Entering a name on the central registry is a civil administrative act.

Next, we must address "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." As noted, there is nothing to indicate that entry of a name on the central registry is punitive. A founded report of child abuse and neglect does not result in prison, probation, community service, or fines. Indeed, a long line of cases has declared that child abuse registries are not punitive. The entry of a name on the central registry is a civil action designed to protect the children of the Commonwealth, rather than to punish abusers.

CONCLUSION

Therefore, it is my opinion that entry on the Child Abuse and Neglect Central Registry of the name of an individual acquitted of criminal charges related to child abuse and neglect does not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

1 U.S. CONST. amend. V.
2 VA. CONST. art. I, § 8.


4 Brown, 432 U.S. at 165 (citation omitted).


722 VA. ADMIN. CODE 40-700-10 to 40-700-30 (West 2003).

8 "Identifying information" includes "the name, race, sex, and date of birth of the subject." 22 VA. ADMIN. CODE 40-700-10.

9 Id.

10 Id.

11 See 22 VA. ADMIN. CODE 40-700-30 (providing for maintenance of identifying information in central registry for eighteen, seven, or three years, depending on level of founded case); see also id. 40-700-20 (setting forth three levels of founded cases).

12 Section 63.2-1526(A) permits the subject of a founded complaint to petition the local department of social services to amend its determination. If the local department upholds the founded complaint, the subject is entitled to an informal conference. VA. CODE ANN. § 63.2-1526(A) (LexisNexis Repl. Vol. 2003). At the informal conference, the subject may be represented by counsel and may present the testimony of witnesses, documents, and other submissions of proof. Id. Lastly, the Commissioner of the Department of Social Services must grant the subject of the complaint an administrative hearing, which may be appealed in accordance with the Administrative Process Act. Section 63.2-1526(A), (B).


14 Id.

15 "The subject of the complaint or report is the person who is alleged to have committed abuse or neglect." Id.

16 Id.


18 Id. at 447.


21 Kennedy, 372 U.S. at 168-69 (setting forth factors to consider in determining whether statutory sanction is penal).

22 Ward, 448 U.S. at 248; see also Helvering, 303 U.S. at 399 (noting that question whether I.R.C. § 293(b) imposes criminal sanction is one of statutory construction); see, e.g., One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-37 (1972) (examining legislative history of relevant federal laws to determine whether Congress intended sanctions to be penal).

23 See One Lot Emerald Cut Stones, 409 U.S. at 236-37.

24 Ward, 448 U.S. at 248-49, see also Flemming v. Nestor, 363 U.S. 603 (1960) (upholding constitutionality of § 202(n) of Social Security Act, which provides for termination of benefits payable to alien deported because of subversive activity, explaining that Congress did not intend social security benefits to be used to support those deported for communist associations; sanction in § 202(n), therefore, is not punitive, but is mere denial of noncontractual governmental benefit).
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29Ward, 448 U.S. at 248-49.

3See Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999) (registration provision of Tennessee Sex Offender Registration and Monitoring Act is not intended to be punitive); Montalvo v. Snyder, 207 F. Supp. 2d 581 (E.D. Ky. 2002) (classification of prisoner as sexual offender and notification of release to local authorities is remedial and not punitive or excessive); Doe v. Weld, 954 F. Supp. 425 (D. Mass. 1996) (sexual offender registration is unlikely to be considered punitive as applied to juveniles); Young v. State, 806 A.2d 233 (Md. 2002) (registration requirement is not intended as punishment but is regulatory requirement available for protection of public); Meinders v. Weber, 604 N.W.2d 248 (S.D. 2000) (registration is not punitive in effect but is intended to aid law enforcement in preventing future crimes); Commonwealth v. Gaffney, 733 A.2d 616, 619 (Pa. 1999) (registration is designed to further nonpunitive goal of public safety); Kellar v. Fayetteville Police Dep't, 5 S.W.3d 402 (Ark. 1999) (Sex and Child Offender Registration Act is regulatory, civil, and nonpunitive in nature); State v. Burr, 598 N.W.2d 147 (N.D. 1999) (registration requirement is regulatory, not punitive, and is designed to aid law enforcement agencies); Opinion of the Justices to the Senate, 668 N.E.2d 738 (Mass. 1996) (registration is not designed to punish, but to regulate).

OP. NO. 02-148

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT – COMPLAINTS.

HEALTH: REGULATION OF MEDICAL CARE FACILITIES.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON – CRIMINAL SEXUAL ASSAULT.

Duty of medical personnel and their staff to report suspected child abuse, neglect or statutory rape to local department of social services or Department of Social Services' hotline. Such reporting is excepted from patient health records privacy requirement.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
FEBRUARY 11, 2003

ISSUE PRESENTED

You ask whether § 32.1-127.1:03, pertaining to the confidentiality of medical records, prevents medical personnel and their staff from reporting to the appropriate child protective agencies incidences of child abuse and statutory rape revealed to them by a child victim in conversation.
RESPONSE

It is my opinion that § 63.2-1509 imposes a duty on medical personnel and their staff, who have reason to suspect that a child is abused or neglected or that statutory rape has occurred, to report such suspicions to the local department of social services or the Department of Social Services' hotline. Section 32.1-127.1:03(D)(6) specifically excepts from the patient confidentiality provisions of § 32.1-127.1:03 reports of suspected child abuse to the appropriate child protective agencies, as required by § 63.2-1509.

BACKGROUND

You relate that § 32.1-127.1:03(A) recognizes a patient's right of privacy in the content of the patient's medical record. You relate that § 63.2-1509 imposes a duty on physicians, nurses, teachers and others to report to the appropriate authorities certain injuries to children, including abuse and neglect. Finally, you observe that medical providers have a confidentiality obligation with regard to patient medical records, but question whether this includes an admission by a minor that abuse or statutory rape has occurred.

APPLICABLE LAW AND DISCUSSION

Section 32.1-127.1:03(A) provides, in part, that "[p]atient records are the property of the provider maintaining them, and, except when permitted by this section or by another provision of state or federal law, no provider, or other person working in a health care setting, may disclose the records of a patient." (Emphasis added.) Section 32.1-127.1:03(B) defines patient "record" as

any written, printed or electronically recorded material maintained by a provider in the course of providing health services to a patient concerning the patient and the services provided. "Record" also includes the substance of any communication made by a patient to a provider in confidence during or in connection with the provision of health services to a patient or information otherwise acquired by the provider about a patient in confidence and in connection with the provision of health services to the patient.

Section 32.1-127.1:03(D) authorizes the disclosure of certain patient records:

Providers may disclose the records of a patient:

6. As required or authorized by law relating to ... abuse, neglect or domestic violence, ... and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in ... [§] 63.2-1509. [Emphasis added.]

Section 63.2-1500 sets forth the general policy of the Commonwealth regarding the reporting of suspected child abuse and neglect. Specifically, § 63.2-1500 provides:
The General Assembly declares that it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.

Section 63.2-100(4) defines "abused or neglected child," as that term is used in Title 63.2, to mean "any child less than eighteen years of age ... [w]hose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law."

Section 63.2-1509(A) requires that "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."

Specifically, § 63.2-1509(A) requires suspected child abuse or neglect to be reported by:

1. Any person licensed to practice medicine or any of the healing arts;
2. Any hospital resident or intern, and any person employed in the nursing profession;
3. Any professional staff person, not previously enumerated, employed by a private or state-operated hospital, institution or facility to which children have been committed or where children have been placed for care and treatment[.]

The persons listed above encompass the medical personnel and their staff contemplated by your request. As such, these individuals have an affirmative duty to report suspected child abuse and neglect. A child's admission of abuse to a physician or medical personnel clearly gives that person a "reason to suspect" that child abuse or neglect has occurred.

Similarly, medical personnel and their staff have a duty to report statutory rape when a child victim reveals such incidence to them in a conversation. Although not specifically called statutory rape, §§ 18.2-61 and 18.2-63 address the criminal aspects of sex with a minor. The penalties for statutory rape may differ depending on the age of the victim, the age of the perpetrator, the age difference between the victim and perpetrator, and the presence of force, threat or intimidation.

Section 63.2-1508 requires the local department of social services to determine if a report or complaint of child abuse or neglect is valid. One of the elements that must be present, in order for the department to conduct an investigation, is that "[t]he alleged
abuser is the alleged victim child's parent or other caretaker." Therefore, in those instances where the alleged rape is not committed by the child's parent or other caretaker, it is possible that the local department of social services would be unable to conclude that the complaint is valid under the requirements of § 63.2-1508.

Whether a complaint is valid to initiate an investigation by the local department of social services, however, is irrelevant to the reporting requirements of § 63.2-1509. Section 63.2-1508 specifically provides that "[n]othing in this section shall relieve any person specified in § 63.2-1509 from making a report required by that section, regardless of the identity of the person suspected to have caused such abuse or neglect." (Emphasis added.) Therefore, regardless of the identity of the person alleged to have committed statutory rape, § 63.2-1509 requires that such suspicions be reported.

This Office previously has concluded that § 63.2-1508 requires teachers to report any suspected child abuse or neglect, including acts committed under § 18.2-63. Accordingly, since statutory rape is an act that meets the definition of "abuse or neglect" in § 63.2-100, medical personnel and their staff have a similar duty to report suspected violations of §§ 18.2-61 and 18.2-63.

While § 32.1-127.1:03(D)(6) provides that a health care provider "may" disclose patient records "[a]s required or authorized by law relating to ... suspected child or adult abuse reporting requirements, including ... those contained in ... [§] 63.2-1509," the use of the term "may" does not make such disclosure optional. Section 63.2-1509 is mandatory in its requirement that medical personnel and staff report suspected child abuse. Section 32.1-127.1:03(D)(6) merely permits such personnel and staff to comply with the mandatory provisions of § 63.2-1509 without such disclosure being considered a violation of the confidentiality requirements of § 32.1-127.1:03.

CONCLUSION

Accordingly, it is my opinion that § 63.2-1509 imposes a duty on medical personnel and their staff, who have reason to suspect that a child is abused or neglected or that statutory rape has occurred, to report such suspicions to the local department of social services or the Department of Social Services' hotline. Section 32.1-127.1:03(D)(6) specifically excepts from the patient confidentiality provisions of § 32.1-127.1:03 reports of suspected child abuse to the appropriate child protective agencies, as required by § 63.2-1509.


2 See also 2002 Op. Va. Att’y Gen. 344, 345 (concluding that § 63.1-248.3(A)(12), predecessor to § 63.2-1509(A)(12), imposes on volunteer and professional Boy Scout leaders duty to report suspected child abuse or neglect to local department of social services or Department of Social Services' hotline); Op. Va. Att’y Gen.: 2001 at 94, 96 (determining that teacher or other school administrator who suspects that eighteen-year-old student is having sexual relationship with thirteen- or fourteen-year-old student, or that two minor students whose age differences are
within purview of § 18.2-63 are engaging in sexual conduct, has duty to report knowledge of activity to local department of social services for investigation.); 1981-1982 at 43, 44 (concluding that psychiatrist would be required to report suspected child abuse or neglect in accordance with former § 63.1-248.3, and that physician-patient privilege would not prohibit psychiatrist from testifying in legal proceedings resulting from such report.); 1975-1976 at 41, 42 (concluding that former § 63.1-248.3 imposes duty on person licensed to practice medicine or healing arts to report suspected child abuse or neglect to local department of welfare).

Failure to comply with § 63.2-1509(A) may result in an initial fine of $500 and a fine between $100 and $1000 for subsequent offenses. See Va. Code Ann. § 63.2-1509(D) (LexisNexis Repl. Vol. 2002). Moreover, any person who, in good faith, makes a report pursuant to § 63.2-1509(A) is immune from civil or criminal liability. See § 63.2-1509(C).

“If any person has sexual intercourse with a complaining witness … or causes a complaining witness … to engage in sexual intercourse with any other person and such act is accomplished … with a child under age thirteen as the victim, he or she shall be guilty of rape.” Va. Code Ann. § 18.2-61(A) (LexisNexis Supp. 2002).

“If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony. However, if such child is thirteen years of age or older but under fifteen years of age and consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused’s junior, the accused shall be guilty of a Class 6 felony. If such consenting child is less than three years the accused’s junior, the accused shall be guilty of a Class 4 misdemeanor.” Va. Code Ann. § 18.2-63 (Michie Repl. Vol. 1996).

See §§ 18.2-61(A)(i), (iii); 18.2-63.

Section 63.2-1508(2) (LexisNexis Repl. Vol. 2002).

BACKGROUND

You have been advised that local departments of social services interpret Chapter 816 to mean that parents may be free from criminal prosecution, but not civil liability. You question whether Chapter 816 provides an affirmative defense to criminal and civil proceedings against the parent.

APPLICABLE LAW AND DISCUSSION

The 2003 Session of the General Assembly enacted Chapter 816, relating to the protection of infants. Abandoning a newborn child falls within the definition of child abuse and neglect. Chapter 816 amends § 18.2-371.1(B), a portion of Virginia's criminal child abuse and neglect statutory framework, to include the following language:

2. If a prosecution under this subsection is based solely on the accused parent having left the child at a hospital or rescue squad, it shall be an affirmative defense to prosecution of a parent under this subsection that such parent safely delivered the child to a hospital that provides 24-hour emergency services or to an attended rescue squad that employs emergency medical technicians, within the first 14 days of the child's life.

Chapter 816 adds the same language in § 18.2-371.1(B)(2) as a second paragraph in § 18.2-371 and as subsection B in § 40.1-103. Chapter 816 also grants civil and criminal immunity to hospitals and rescue squads accepting abandoned newborns. Finally, Chapter 816 grants local departments of social services the authority to take custody of abandoned children, arrange appropriate placement for the child, and institute proceedings to terminate parental rights.

Depending upon the act, child abuse or neglect is a Class 4 felony under § 18.2-371.1(A) or a Class 6 felony under § 18.2-371.1(B)(1). Violation of § 18.2-371 is a Class 1 misdemeanor, and violation of § 40.1-103 is a Class 6 felony. Thus, in cases of safe delivery of a child not more than 14 days old to a rescue squad or to a hospital that provides 24-hour services, Chapter 816 creates an affirmative defense to criminal prosecution under §§ 18.2-371, 18.2-371.1 and 40.1-103. Absent proof of an affirmative defense, violation of these statutes subjects the guilty party to punishment of jail time and fines.

The Code does not contemplate civil prosecution for child abuse and neglect. Rather, under Chapter 15 of Title 63.2, local departments of social services investigate complaints of child abuse and neglect and determine if such complaints are “founded” or “unfounded.” The names of those found to have committed child abuse or neglect are placed in the central registry.

Whereas the purpose of §§ 18.2-371, 18.2-371.1 and 40.1-103 is to deter conduct and punish those found guilty of violating the respective statute, the purpose of a finding of abuse or neglect under Chapter 15 of Title 63.2 is the protection of children. Section 63.2-1500 sets forth the general policy of the Commonwealth regarding suspected
child abuse and neglect. Specifically, the General Assembly has declared in § 63.2-1500 that

it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.

I am aware of no statute or case law which states that the purpose of Chapter 15 of Title 63.2 is to punish one found to have committed child abuse or neglect. Moreover, while Chapter 816 provides an affirmative defense to several criminal statutes, findings of abuse and neglect under Chapter 15 of Title 63.2 are not included.

CONCLUSION

Accordingly, it is my opinion that Chapter 816 creates an affirmative defense to criminal acts of child abuse and neglect, but does not provide an affirmative defense to civil findings of child abuse and neglect.


2 Chapter 816 designated a subdivision 1, and added a subdivision 2, to existing subsection B of § 18.2-371.1. See 2003 Va. Acts, supra note 1, at 1129.

3 See id. Section 18.2-371 pertains to crimes against children, and § 40.1-103 pertains to child labor.

4 Section 8.01-226.5:2 grants civil and criminal immunity to rescue squad and hospital personnel “receiving a child under the circumstances described in” the second paragraph of § 18.2-371, § 18.2-371.1(B)(2), or § 40.1-103(B), except when injury to the child “is the result of gross negligence or willful misconduct.”


7 Chapter 15 of Title 63.2 is entitled “Child Abuse and Neglect” and sets forth the state requirements for reporting incidences of suspected child abuse or neglect.

8 See § 63.2-1505(A)(7) (LexisNexis Repl. Vol. 2002). Pursuant to § 63.2-1503(A), the State Board of Social Services has adopted regulations pertaining to child protective services. The regulations define “founded” to mean “that a review of the facts shows by a preponderance of the evidence that child abuse and/or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint.” 22 Va. Admin. Code
40-705-10 (West 2003). "'Unfounded' means that a review of the facts does not show by a preponderance of the evidence that child abuse or neglect occurred." Id.

See § 63.2-1515 (LexisNexis Repl. Vol. 2002). "'Central registry' means a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser and/or neglector in founded child abuse and/or neglect complaints or reports not currently under administrative appeal, maintained by the [Virginia Department of Social Services]." 22 Va. Admin. Code 40-705-10.

The Name Index consists of an alphabetical listing of individuals to whom opinions in this report are rendered and their corresponding opinion numbers. This index will be helpful in locating opinions that are cross-referenced in this report.
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2. Serving as chairman of state, local or district level political party committee (electoral board member only);
3. Serving as chairman of political party or as any other officer of state, local or district level political party committee (general registrar only);
4. Serving as paid worker, and in case of general registrar, volunteer, for candidate for nomination or election to office filled by election in whole or in part by qualified voters of jurisdiction served by electoral board member or registrar; and
5. Being paid or volunteering to solicit signatures for nominating petitions for candidates for public office in public building owned or leased by county or city served by electoral board (electoral board member only). Local electoral board members and general registrars should perform official duties in nonpartisan fashion. When not performing official duties, such officers may participate in partisan political activities not in conflict with prohibitions in §§ 24.2-106, 24.2-106.1, 24.2-110

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Clerk’s office is integral part of administrative operations of circuit court and provides numerous services to judicial and other public officials, as well as to public.

Clerks, under their statutory duty to establish system that satisfies statutory requirement for maintaining records, have discretion, but no obligation, to provide deputy clerk in courtroom during civil proceedings.

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