THE 2004
REPORT OF THE ATTORNEY GENERAL

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*The 2004 Annual Report of the Attorney General is dedicated to Barbara Coleman for her many years of service to the Attorneys General and to the Commonwealth of Virginia.
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LETTER OF TRANSMITTAL

May 1, 2005

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 2004. During the period covered by this report, the Office of the Attorney General issued sixty-six opinions. This report reflects the 2004 tenure of Attorney General Jerry W. Kilgore. 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 variety of legal issues encountered throughout the Commonwealth and its local governments. These issues include the application of the Dillon Rule to local government powers, interpretation of The Virginia Freedom of Information Act, and the jurisdiction of the Commonwealth’s child-protective services on a United States Naval Weapons Station.

Many constitutional officers and local government attorneys sought legal advice on numerous issues facing their local governments. These opinions represent an interpretation of state and federal law and the efforts of this Office to ensure 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 the Attorney General is such that the citizens of this Commonwealth may be proud of the accomplishments of its public servants. It is with pleasure that I present some of the accomplishments of this Office during the past year.

2004 LEGISLATIVE ACCOMPLISHMENTS

During the 2004 Session of the General Assembly, the Office of the Attorney General worked with many members of the legislature to make Virginia’s communities safer and the Commonwealth’s government more open and accountable. In particular, I am pleased to report that the General Assembly overwhelmingly adopted the ambitious legislative package proposed during the third year of the term of Attorney General Jerry W. Kilgore. This legislative package included measures to continue to protect our most precious asset—our children, to fight gang violence, to
assist domestic violence victims, to address the needs of consumers, to make higher education more accessible, and to hold government leaders accountable to their constituents.

**Combating Gang Violence**

Shortly after the 2003 General Assembly Session, Attorney General Kilgore announced a Task Force on Gang Violence, combining representatives of various law enforcement agencies, legislators, and community leaders. After numerous gang-related crimes occurred in Northern Virginia, Richmond, and even in rural communities, Attorney General Kilgore called together a working group to determine steps to thwart the gang violence. After meeting in various communities across the Commonwealth, the Task Force made numerous recommendations, many of which involved legislative changes to Virginia’s gang law.

This Office worked tirelessly, both prior to and during the 2004 General Assembly Session, with Senators Ken Stolle and Bill Mims and Delegates Dave Albo, Bob McDonnell, Robert Hurt, Scott Lingamfelter, and Tom Rust to pass a comprehensive anti-gang initiative. The Act contained a majority of the Task Force’s recommendations including: a new Virginia Racketeer Influenced and Corrupt Organization Act (RICO), which will help fight street gangs. It also creates a felony for operation of an illegal money transmitting business.

Further, the Act increases penalties for gang recruitment and acts of violence during initiation. Under the gang recruitment provision, the legislation expands offenses beyond the situation of an adult gang member recruiting juveniles to join gangs. In addition, the Act creates a “three-strikes” law for gang activity. It also amends Virginia law to create sentencing enhancements for gang offenses and makes a third or subsequent conviction related to gang participation and recruitment a Class 3 Felony (five to twenty years). Additionally, the statute now includes the forfeiture of property and money used in gang-related crimes and the presumption of no bail for gang-related offenses. Finally, the Act allows law enforcement to detain an illegal alien without a warrant if the alien has a previous felony conviction or previously has been deported or left the country. While the fight against gang-violence continues throughout the Commonwealth at the local and state level, thanks to the efforts of many, Virginia communities have greater resources and more legal options to address this growing problem. It is, in part, through such efforts that we will work to reclaim our streets and neighborhoods for all law abiding citizens.

**Protecting Children**

The 2004 Session of the General Assembly expanded the Child Protection Act of 2003 to address a number of issues related to protecting the well-being of the children of the Commonwealth. Patroned by Senator Ken Stolle and Delegates Terry Kilgore and John Cosgrove, The General Assembly passed “Conner’s Law,” which recognizes the right of an unborn child not to have his life willfully, unlawfully, and
maliciously taken by an act of violence on the life of the child’s pregnant mother. Additional legislation, sponsored by Shenandoah Valley legislators, Senator Mark Obenshain and Delegate Chris Saxman, protects those children whose parents or guardians allow them to live in the presence of illegal drugs. The legislation adds such an offense to the definition of child abuse. Both of these pieces of legislation represent a commitment to the dignity and worth of human life and provide needed safeguards to the children of Virginia.

**Combating Domestic Violence**

When Attorney General Kilgore took Office, he proposed a comprehensive domestic violence package to address the needs of victims throughout Virginia. The General Assembly overwhelmingly passed the anti-domestic violence package developed by this Office. Building on that success, Attorney General Kilgore sponsored legislation carried by Senator Tommy Norment and Delegate Morgan Griffith to address the financial needs of victims, advocates and law enforcement officials who battle domestic violence. Lawmakers approved legislation that establishes a *Domestic Violence Victims Fund* to support criminal prosecutions of domestic violence, sexual assault, and stalking cases and provides funding to services and programs that assist victims. Expected to amount to approximately $2.5 million per year, the fund will be supported by increasing court costs in general district criminal and traffic cases by $2. Additionally, half of the existing $20 marriage license fee will be allocated to the Department of Social Services, securing an additional $500,000 per year for domestic violence programs.

The General Assembly passed additional domestic violence legislation that authorizes judges to award temporary child support at protective order hearings so a battered spouse has the ability to care for and protect children. If an abuser injures an individual in violation of a protective order, or if the abuser violates a protective order by stealthily entering the home of a protected person, the legislation increases the penalties for such violations by making it a felony for an abuser’s third or subsequent violation of a protective order. Additionally, Child Protective Services workers are required to participate in mandatory domestic violence awareness training so that they are able to identify and understand possible domestic violence situations and its harmful effect on children. Finally, the legislation establishes model policies for law enforcement to address the needs of victims and how to gather the best evidence for any potential prosecution of a crime involving stalking and sexual assault.

**Stopping Price Gouging**

In the fall of 2003 after the devastating impact of Hurricane Isabel, Attorney General Kilgore announced that he would seek legislation to create the Virginia Post-Disaster Anti-Price Gouging Act. With the leadership of Senator Tommy Norment and Delegate Melanie Rapp whose districts suffered greatly from the destruction of Hurricane Isabel, Virginia’s Post-Disaster Anti-Price Gouging Act passed. This Act
prohibits merchants from selling, leasing or licensing necessary goods and services at unconscionable prices during declared states of emergency. In determining whether a merchant is violating the Act, one must consider whether a price grossly exceeds prices charged during the ten days prior to the emergency or disaster and whether the price increase reflects actual costs to the merchant. It is not the intention of the Act to interfere with price fluctuations or changes caused by normal free market forces. A consumer who suffers a loss under the Act is entitled to actual damages or $500, whichever is greater. Additionally, if a court finds that the violation was willful, it may award three times the actual damages or $1,000, whichever is greater. The Act protects Virginia citizens from those who would exploit disastrous circumstances for personal gain.

Do Not Call List

Attorney General Kilgore proposed additional consumer protection legislation to address the problem of telemarketers. Senator Marty Williams and Delegate Harvey Morgan sponsored legislation that creates a Virginia Do Not Call List, which prohibits telemarketers from calling any Virginia resident who has placed his number on the national Do Not Call List. The legislation, which also allows residents to include their cellular phones with Virginia area codes, permits consumers to bring actions against violators in general district court. Telemarketers violating the law could be liable for damages of $500 per infraction, plus attorneys’ fees and court costs. The law also requires telemarketers to provide caller identification information, thus arming Virginians to effectively prevent most uninvited and unwelcome phone solicitations.

Task Force on Higher Education

In the spring of 2003, Attorney General Kilgore announced the creation of the Attorney General’s Task Force on Access to Higher Education, a working group to examine the potential legal and policy barriers to access to college, university, and post-secondary education. The Task Force looked at such issues as transfer agreements between community colleges and private four-year institutions, expanding distance learning and workforce training. With recent reports from the State Council of Higher Education in Virginia that by 2010, over 38,000 new students will enter college, there was a need to look for innovative ways to expand opportunities for our students to receive higher education.

After meeting in various communities across the Commonwealth, the Task Force, which consisted of representatives of the community college system, colleges and universities, legislative staff, and the Office of Attorney General, released a final report of recommendations for consideration as part of the Attorney General’s 2004 legislative package.
The General Assembly approved two of the Task Force’s recommendations. Delegate Tim Hugo sponsored legislation addressing higher education transfer agreements. The bill requires the State Council of Higher Education in Virginia to develop a state transfer module that would define those general education courses provided by Virginia community colleges that are transferable to each state supported college and university. This information will help students obtain the classes they need in order to transfer to 4-year colleges and obtain their degrees.

The other piece of higher education legislation related to distance learning. Delegate Bill Carrico carried legislation that requires state universities to include in their strategic plans information indicating how they will utilize distance learning to expand access, improve quality, and minimize the cost of education. The legislation also encourages the use of distance learning to address workforce-training needs, and requires the schools to update their plans every five years. These efforts by the Office of the Attorney General on behalf of education provide new and exiting opportunities for the expansion of higher education to all Virginians.

Safety in Public Housing

In 2003, the Supreme Court of Virginia reversed a trespass conviction of a defendant charged with violating a public redevelopment and housing authority’s trespass policy in the case of Commonwealth v. Hicks. The Court determined that the policy was overly broad and infringed upon the defendant’s First and Fourteenth Amendment protections.

Recognizing that residents of a redevelopment and housing authority complex in the inner City of Richmond have the same right to protection as gated communities in the suburbs, Attorney General Kilgore immediately sought review of this case by the Supreme Court of the United States. The Court granted review and ultimately reversed and remanded the case. Specifically, the United States Supreme Court held that the Housing Authority’s Trespass Policy was not overly broad. On remand, the Virginia Supreme Court held that the defendant could not bring a vagueness claim and, more importantly, that the policy did not infringe upon the defendant’s substantive due process right of intimate association. The victories in highest courts of both the Nation and the Commonwealth insure that all citizens—regardless of income—are able to be secure from those who would seek to disrupt their neighborhoods with illegal activities.

In response to the Office’s victory in the United States Supreme Court, Attorney General Kilgore pursued legislation during the 2004 Session to create no trespassing policies for public housing complexes. The statute requires housing authorities to develop and implement “no trespassing” policies designed to restrict the presence of individuals who have unlawful purposes to be on the premises. The legislation also allows housing authorities in Virginia to close the streets and convey them to the authorities. This Office developed and distributed a “model no trespass
policy” for housing authorities to enact. As a result of the statute and the subsequent adoption of the “model policy,” the residents of public housing authorities now have additional protections from those who would seek to turn public housing complexes into open air drug markets or battlefields for gang warfare.

Open Government

The 2004 General Assembly passed legislation proposed by Attorney General Kilgore to make government more accessible to citizens. This comprehensive open government package included a number of initiatives to increase Internet access and disclosure of state business and the requirement of statewide ethics training for those appointed to State boards and commissions.

Senator Bill Bolling and Delegate Thelma Drake sponsored legislation requiring Conflict of Interest and Ethics training on a statewide basis. State agencies are required to distribute conflict of interest information to state level appointees and certain state employees within two weeks of appointment and provide training on conflicts of interest on a semi-annual basis. The legislation allows for coordinated training by state agencies and authorizes the Attorney General’s Office to provide appropriate course content for use by state agencies.

Senator Ken Cuccinelli and Delegate Tim Hugo carried legislation that amends provisions requiring certain disclosures in land use proceedings in any county with the urban county executive form of government (Fairfax County) by reducing the $200 gift threshold to $100. Delegate Terrie Suit sponsored legislation that prohibits state agencies from entering into confidentiality agreements that prevent the agency or its employees from disclosing the amount of a civil settlement unless a court orders the state agency to enter such an agreement.

The remaining open government initiative passed by the General Assembly addresses the public’s accessibility to meetings of public bodies and disclosure of their state business. Legislation carried by Delegate Terrie Suit requires state agencies, boards, and commissions to post on the Internet information, including: (1) a plain description of the requestor’s rights under the Freedom of Information Act; (2) the responsibilities of governmental bodies in complying with the Freedom of Information Act; (3) the procedures to obtain public records from government entities, contact information for the agency’s designee to answer questions, or assist with requests; and (4) the policy of government entities concerning records routinely exempted from disclosure under the Freedom of Information Act.

The legislation also clarifies requirements of meeting minutes by a public body. The meetings are to include the date, time, location of meeting, a notation of members present or absent, a summary of matters discussed, proposed and decided, and a record of any votes taken. These measures have enhanced the public’s access to the operation of their government, and increased the information essential to making enlightened decisions in choosing elected officials. The good people of Virginia are
entitled to a government that recognizes they alone possess the sovereignty of our Commonwealth

CIVIL DIVISION

The Civil Litigation Division conducts a significant portion of the litigation involving the agencies and institutions of the Commonwealth. The work includes representing the Commonwealth as plaintiff in consumer protection and antitrust investigation and enforcement litigation, representing the interests of the citizens of the Commonwealth in the conduct of charities and serving as Consumer Counsel in cases pending before the State Corporation Commission. The Division also defends lawsuits brought against the Commonwealth, its agencies, institutions and employees alleging tort, construction, employment, and civil rights claims and often defends the statutes passed by the General Assembly when challenged. In addition, it provides advice on most of the Commonwealth’s significant real estate transactions as well as insurance and utilities matters and real estate issues.

Trial Section

The Trial Section represents the interests of the Commonwealth in lawsuits involving a variety of legal issues including breach of contract, personal injury, civil rights, denial of due process, defamation, employment law including grievances of State employees, election law, FOIA requests, workers’ compensation, and challenges to State statutes. The Section handled 633 new matters during the past year. The Section handled numerous cases for the State Bar relating to attorney disciplinary appeals and prosecution of persons engaged in the unauthorized practice of law. The Section defended suits against State judges. In addition, the Section provided legal advice to State courts and judges, Board of Bar Examiners, State Board of Elections, Department of Human Resource Management, Human Rights Counsel, and Office of Commonwealth Preparedness.

The Section successfully defended a challenge to the General Assembly’s 2001 Congressional redistricting plan in Hall v. Commonwealth, in which plaintiffs brought a vote dilution challenge under § 2 of the federal Voting Rights Act. The Fourth Circuit Court of Appeals affirmed the district court’s dismissal of plaintiffs’ claim (as of the publication date of this report, Spring 2005, the United States Supreme Court has denied the plaintiff’s petition for certiorari, thereby upholding Virginia’s Congressional redistricting plan).

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 for various state agencies, opening 337 new matters during the year, a 52% increase over 2003. Those matters included fifty-one new claims for the Virginia Department of
Transportation with a stated value of $33,092,399.19. The total number of claims received only increased by 19%. The dollar value of the claims, however, increased by 228%. The Section resolved a total of twenty-five claims during 2004. The total value of the claims when filed was $6,342,197.73. The claims were resolved for $1,668,068.45, or 26% of the claimed amount. This resulted in a savings of $4,674,129.28 off the original value of the claims.

Among the main cases covered by the Section were:

Representation of the Virginia State Bar in its efforts to enforce non-competition and document retention covenants contained in the Bar’s former service contract with the Reciprocal Insurance Agency, Ltd., which is a subsidiary of The Reciprocal Group placed in receivership and its successors in interest. This case was settled upon terms very favorable to the Bar and the Medical Society of Virginia; and

Representation of the Virginia Port Authority in analyzing and negotiating the favorable settlement of an approximately $8.0 million dollar claim for delay and acceleration damages submitted by Tidewater Skanska, Inc., arising out of the ongoing Norfolk International Terminals-South Renovation Project-Phase I. The resolution of this large claim eliminated numerous issues that threatened to cause even greater problems for the project as it proceeded.

The Section provided primary legal support for the first two Public-Private Educational Facilities Infrastructure Act of 2002 (PPEA) projects undertaken by the Commonwealth. Knowing more agencies would be utilizing PPEA projects, the Section worked with the Department of General Services to develop a form Comprehensive Agreement for use by agencies.

The STARS (Statewide Agencies Radio System) system will replace the aging infrastructure of the State Police radio system and accommodate the mobile radio needs of twenty other state agencies. The Section also provided legal and negotiations support to the State Police and the Secretary of Public Safety during the implementation of STARS. All twenty state agencies identified in the Executive Orders pertaining to STARS will either participate or be linked into the system. In addition, every county and city in Virginia will be able to link into the system at no cost to the locality. This will facilitate direct communications between local and state officials during emergencies. STARS will provide localities the ability to establish communications with other localities through a State Police dispatcher. The final signed contract has been approved.

**Antitrust and Consumer Litigation Section**

The Antitrust and Consumer Litigation Section obtained several significant results in the antitrust, consumer protection and charitable oversight areas.

Virginia joined the forty-nine other states and U.S. territories in a $36 million nationwide settlement with Organon USA Inc. and Akzo Nobel N.V. relating to the prescription medication Remeron, which is manufactured by Organon USA.
Inc. Mirtazapine is the active ingredient in Remeron, a popular brand name antidepressant commonly prescribed for depression. The multistate settlement resolved antitrust claims involving Remeron.

Virginia joined the Federal Trade Commission and forty-nine other states and U.S. territories in settlements with the only two FDA-approved manufacturers of generic over-the-counter versions of liquid suspension ibuprofen used to temporarily relieve fever and minor aches and pains in children. The settlements with Perrigo Company and Alpharma, Inc., ended an arrangement begun in 1998 between the drug companies not to compete with each other, in violation of state and federal antitrust laws. The states received $1.5 million in total, with each state receiving $10,000 to pay for its litigation and consumer education expenses. The drugs these companies manufacture are generic versions of Children’s Motrin®, which is a registered trademark of Johnson & Johnson, who was not a party in the lawsuit.

Virginia and forty-seven other states entered into a settlement with Salton, Inc., the manufacturer of the George Foreman Grills®, in September 2002. In November 2004, using funds from the settlement, Attorney General Kilgore presented $150,000 to the Federation of Virginia Food Banks, the largest hunger relief network in the Commonwealth, and $50,000 to the Soho Center, a Madison, Virginia-based organization that provides nutritional information and literacy education to children and low-income families.

Attorney General Kilgore announced a settlement with compact disk distributors. The lawsuit alleged that music distributors and retailers entered into illegal conspiracies to raise the price of prerecorded music by restricting CD advertising. As part of the settlement, Attorney General Kilgore announced the distribution of approximately 138,000 compact discs valued at $1.8 million to hundreds of public schools, public libraries, hospices, domestic violence shelters, cancer centers and public radio stations. In addition to the distribution of compact discs, the defendants reimbursed 93,916 Virginians for compact discs they purchased at the alleged inflated prices resulting in a total return of more than $1.3 million. The total value of the multi-state settlement was $143,075,000 comprised of $67.3 million cash and $75.7 million worth of music CDs.

As part of a multistate antitrust settlement between Bristol-Myers Squibb Co., Virginia, and all of the other U.S. states and territories, the states developed a plan to distribute approximately 13,000 vials of free Taxol® to medically indigent patients who cannot otherwise pay for the drug. The primary use of Taxol® is to treat breast and ovarian cancer, and the program is expected to last for about one year and to treat between 1,000 to 2,000 patients nationwide. Virginia, on behalf of the other Plaintiff States in the litigation, contracted with an administrator, RxHope, Inc., to accept applications from doctors on behalf of their medically indigent patients who have been prescribed Taxol® infusions as part of their cancer chemotherapy treatments. In order to qualify to receive the free Taxol®, a patient may not have any
public insurance program, such as Medicare or Medicaid, and may not have private health insurance that includes coverage for chemotherapy drugs.

**Charitable Solicitation/Trust**

The Office’s nonprofit review panel, which includes representatives from the Antitrust, Commerce and Financial Law and Health Sections, completed review of two transactions: (a) agreement by Continuing Care Corporation, a subsidiary of Prince William Health System, to sell assets to, and enter a joint venture partnership with, HH Gainesville Health Investors and Manassas Health Investors, LLC, relating to operation of successor nursing home facilities; and (b) the sale of units in Fredericksburg Ambulatory Surgery Center, L.L.C., a limited liability company subsidiary of Snowden Services, Inc., to physician investors.

The Office filed a bill of complaint and consent judgment relating to allegations that U.S. Historical Society solicited charitable contributions in Virginia without being registered with the Office of Consumer Affairs in violation of the Virginia Solicitation of Contributions statute (VSOC law), and that it engaged in deceptive practices in violation of the VSOC law and the Virginia Consumer Protection Act. The conduct at issue related primarily to the solicitation by the Historical Society for sales of, and actual sales of, certain replica statues in connection with its proposal to install a statue at the Tredegar Iron Works in Richmond. The consent judgment provided for injunctive relief, and payment of monetary amounts for restitution ($8,800), civil penalties ($10,000) and attorney’s fees ($4,200).

The Alexandria Circuit Court entered a decree approving the Commonwealth’s plan of distribution for the charitable assets recovered in *Commonwealth ex rel. Kilgore v. Tauber*. The Court approved a plan to establish a nonprofit charitable health foundation to receive the charitable assets. The foundation’s purposes are to promote and support programs, projects, studies, and similar activities to improve the health of the people of the service area of the former Jefferson Memorial Hospital, with a primary emphasis on the communities of the city of Alexandria, Arlington County, and Fairfax County. These purposes are to include supporting and/or improving the provision of primary health care services to individuals who are indigent, low-income, medically uninsured or underinsured, or otherwise medically underserved as well as supporting and/or improving the provision of health education, prevention of disease, and wellness programs. The foundation also is to consider assisting in the funding of one or more nonprofit organizations in their efforts to establish and operate a community health center, a federally qualified health center, or a similar nonprofit primary health care center serving individuals within the service area of the former Jefferson Memorial Hospital. The foundation expects to receive in excess of $39 million dollars. The suit, originally filed in 1995, alleged that various individuals and their corporate and partnership entities breached fiduciary duties and wrongfully appropriated the assets of Jefferson Memorial Hospital, Inc., which was a nonprofit,
Virginia joined 36 other states to reach a settlement with Ford Motor Credit and over 1,300 participating Ford and Lincoln Mercury dealers that impacts more than 150,000 consumers who overpaid when purchasing their leased vehicles from certain dealers. Under the settlement, Ford Motor Credit must notify and pay restitution checks of $100.00 each to qualifying consumers. The cooperating dealers paid over $150,000 to this Office’s Revolving Fund.

Virginia joined the other forty-nine states and the District of Columbia in a settlement with Warner-Lambert Company LLC, relating to its production, marketing and distribution of Neurontin, an anti-epilepsy drug, for a variety of off-label purposes. In addition to injunctive relief, which includes corrective advertising and consumer education, this Office received over $25,000 in attorneys’ fees for its Revolving Fund.

Virginia joined thirty-two other states in settlements with three of the nation’s largest wireless telephone carriers, Verizon, Cingular, and Sprint. The settlements resolved investigations of the carriers focused on alleged misleading advertisements and unclear disclosures relating to service agreement terms and wireless coverage areas. The agreements require the companies to: (a) provide coverage maps to consumers; (b) give consumers at least two weeks to terminate service contracts without incurring any penalties; and (c) change the way they advertise and sell their services and coverage.

Attorney General Kilgore filed Virginia’s first “Do Not Call” enforcement action alleging violations of state and federal laws. The action against Real Time International, Inc., a Newport News-based telemarketing firm that sells timeshares and vacation packages, seeks injunctive relief, civil penalties, damages for consumers, and attorney’s fees. The suit was prompted after more than sixty Virginians reported “Do Not Call” violations by the company.

Attorney General Kilgore presented more than $830,000 in much-needed prescription drug funding to two organizations who supply health care services to Virginians through community-based clinics and primary care centers. The Attorney General presented checks for $417,177.69 each to the Virginia Primary Care Association and the Virginia Association of Free Clinics to supply low-income, elderly, and disabled Virginians with the prescription drugs they need to survive. The funds are the result of a twenty-state settlement finalized in April 2004 with Medco Health Solutions, the world’s largest pharmaceutical benefits management company.

**Insurance and Utilities Regulatory Section**

The Insurance and Utilities Regulatory Section was particularly active in 2004 in a number of significant matters before both the Virginia General Assembly and state and federal regulatory commissions. These activities were in the Attorney General’s capacity as consumer counsel for the Commonwealth.
In the 2004 Session of the General Assembly, the Attorney General, together with the Governor, led support for Senate Bill 651 that amended the Virginia Electric Utility Restructuring Act. Because a competitive retail market for electricity has been slow to develop in Virginia, and elsewhere, the General Assembly extended the capped rate transition period under the Act for an additional three and one-half years. The legislation froze the fuel factor rate of Virginia’s largest electric utility, Dominion Virginia Power, through mid-2007. It is estimated this measure saved Virginia consumers approximately $190 million in 2004 in increased power costs that otherwise would have been collected from customers.

Additionally, the Office played a key role in working with legislators, telecommunications companies, and other stakeholders in achieving consensus on legislation sponsored by Verizon, which as originally proposed could have significantly reduced the State Corporation Commission’s regulatory authority over many aspects of local exchange telephone service. The compromise bill resulted in a competition policy statement that preserved the State Corporation Commission oversight.

This Office continued to play an important role before the Commission on Electric Utility Restructuring, which is the legislative commission charged with monitoring the implementation of the Restructuring Act. A Commission resolution directed the Office to prepare a report on the status of stranded cost recoveries of Virginia’s electric utilities. The first report contained stranded cost recoveries and potential stranded cost exposure for sixteen electric utilities and was presented in September 2004.

The Office participated in many energy, telecommunications, and insurance proceedings before the State Corporation Commission. Significant energy cases included the applications of Virginia’s major investor-owned electric utilities to join the PJM Interconnection, a regional transmission organization. We negotiated settlements with the parties in the cases of Appalachian Power and Dominion Virginia Power. These settlements contained provisions designed to ensure continued transmission reliability for Virginia customers, and also attempted to ensure that customers will not suffer adverse rate impacts from the utilities’ costs associated with joining PJM. The Office also intervened at the companies’ related PJM cases before the Federal Energy Regulatory Commission. In Appalachian Power’s case, we defended the Commonwealth against possible federal preemption of state jurisdiction. In Dominion’s pending proceeding, we are challenging FERC’s jurisdictional findings that could adversely affect retail rates in Virginia. The Office continued to participate in various other electric utility matters at the SCC arising out of the Restructuring Act, including rulemaking proceedings and retail access pilot programs.

The Office was again active in a number of natural gas utility rate cases. We were co-appellees with the State Corporation Commission in an appeal by Washington Gas before the Supreme Court of Virginia. The Court affirmed the Commission in
this case, which involved several complicated accounting and ratemaking issues, including a contested $43 million depreciation issue. Other natural gas rate cases in which the Office participated have included applications by Atmos Energy, Roanoke Gas, Southwestern Virginia Gas, and a second Washington Gas case. In each of these cases the increase approved by the Commission was appreciably lower than that sought by the company, and in one case no increase was awarded. In two of the cases the Office also secured certain customer protections to accompany weather normalization rate adjustments mechanisms.

In telecommunications, the Office intervened and provided expert testimony in a case at the State Corporation Commission brought by Verizon to modify its existing Alternative Regulatory Plan. We took positions that would mitigate potential rate increases that might otherwise be permitted by law. The Commission made modifications to the company’s proposed plan that will ensure rates for basic service will not exceed 1994 charges adjusted for inflation. In another Verizon case, we supported a reduction in access charges that long distance carriers must pay to Verizon for completing calls. It is anticipated that the reductions ordered by the Commission will result in lower long distance rates.

In insurance matters, the Office continued its active participation in the National Council on Compensation Insurance annual workers’ compensation rate cases at the State Corporation Commission where particular focus has been on rates for coal producers. Our efforts in the 2004 rate case resulted in reductions in rates for the coal classes of up to 5.5% in the assigned risk market and 12.2% for the lost cost multiplier component of rates in the voluntary market. We continue to explore alternative ratemaking methods to ensure that workers’ compensation premiums are maintained at the lowest possible levels.

HEALTH, EDUCATION AND SOCIAL SERVICES DIVISION

The attorneys in the Division of Health, Education and Social Services provide advice to the Virginia Department of Education, the public colleges and universities of Virginia, and to those 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 tax-paying Virginians 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.

Education Section

The Education section provides guidance that ensures quality education for students from kindergarten through college. For K-12, this advice and guidance very often directly impacts the local schools in implementing the Standards of Learning
and Standards of Quality, providing access to technology for disadvantaged students, maintaining discipline and safety on school grounds, complying with federal education programs and improving school facilities. Virginia’s fourteen colleges and twenty-three community colleges are individual communities with the full range of legal needs: campus safety and security, admission and educational quality issues, personnel issues, the proper relationship between the college and the Commonwealth, contracts, procurement and financing.

In an extremely complex and nationally publicized case, *Equal Access Education v. Merten*, the Office successfully defended a lawsuit brought anonymously by several illegal aliens applying or intending to apply to college. The plaintiffs challenged the policies and procedures of seven of Virginia’s public institutions of higher education, including the University of Virginia, Virginia Tech, and VCU, in excluding illegal aliens from admission. Our attorneys were successful in getting the Court to rule that the plaintiffs could not proceed anonymously, but in order to proceed, must reveal their identities. Following that ruling, and upon the motion of this Office, the Court ruled that the policies of the colleges and universities regarding illegal aliens were constitutional. Significantly, the Court also decided that colleges and universities may inquire into the status of applicants and may request documentation proving their immigration status. The Commonwealth prevailed on every issue, the case did not go to trial, and the plaintiffs did not appeal.

**Health Section**

Attorneys in the Mental Health, Mental Retardation, and Substance Abuse Section undertook a detailed analysis of state and federal law to finalize most of the operating policies for the sexually violent predator program. Attorneys in the Section also worked with the Joint Commission on Health Care to study and compare Virginia law regarding the use and disclosure of health records with the federal regulations promulgated pursuant to the Health Insurance Portability and Accountability Act. The Section presented a number of training programs on legal issues related to mental health in partnership with the University of Virginia Institute of Law, Psychiatry and Public Policy, and the Department of Mental Health, Mental Retardation and Substance Abuse Services.

This Office made a significant impact on an over fifty-year-old dispute. The water system serving the Woodrow Wilson Rehabilitation Center and the Augusta County School System is a sixty-year-old system constructed by the federal government for the facility when it was designated a temporary rehabilitation center for returning World War II disabled veterans. The system had received only “necessary maintenance” over the years, resulting in the need of major replacement. Because of the intermingling of the Rehabilitation Center campus buildings, the Augusta County
School System’s buildings and other segments of Augusta County, the situation among the involved entities has resulted in an ongoing dispute spanning almost fifty years. The goal of this Office was to help resolve the dispute prior to expending monies for repairs or replacement, so that the most economically feasible approach to turning over water lines, no longer wanted by the Rehabilitation Center, to the Augusta County Service Authority is achieved. A new agreement has been drafted between the Augusta County Service Authority and the Department of Rehabilitative Services, Woodrow Wilson Rehabilitation Center. In the agreement, all parties concur that the water system on the Rehabilitation Center campus will be updated and basic responsibility for the system will be transferred to the Authority. Hence, the Authority will maintain and operate the system, thus relieving the Rehabilitation Center of its long burden of maintaining and operating the water system.

Virginia faced a crisis similar to other states in the shortage of flu vaccinations. The Division provided advice to the State Health Commissioner regarding the shortages, responded to inquiries regarding complaints of price gouging, and provided advice regarding the extent of the Commissioner’s authority to order health care providers to distribute the vaccine only to those falling in high-risk categories. The Division also assisted the General Assembly in comprehensively rewriting the sections in the Code of Virginia on isolation and quarantine. In taking these steps, the Commonwealth was able to avoid the problems linked to flu shortages that plagued other states.

In cooperation with the Virginia Office for Protection and Advocacy Dispute, this Office addressed the interpretation of federal and state statutes and regulations involving “transitional” services to an increased population of citizens. Our guidance provided additional communication and outreach to those who may become potential clients and benefit from “transitional” services, especially services to young people.

**Social Services Section**

In wake of the devastating effects of Hurricane Isabel, this Office provided guidance to the Department of Social Services in its investigation of state and local social services department employees who received disaster relief food stamps.

Attorneys in the Social Services Section successfully defended a civil rights case in the United States District Court for the Eastern District of Virginia against eight employees of the Department of Social Services, both in their professional and individual capacities, in a collaborative effort with the Civil Litigation Division, in which the plaintiffs sought monetary damages in excess of $29 million. The Court dismissed the case upon our motion for summary judgment.

By far, the most complex and time-consuming responsibility of the Social Services section is the guidance and advice given on the myriad of issues connected
with Medicaid reimbursement. The Department of Medical Assistance Services reimburses over 44,000 different providers for thousands of different services to ensure that the poorest of Virginians receive proper health care. In addition, prescription drug coverage is an optional Medicaid benefit that all states participating in the Medicaid program have elected to cover. In Virginia, both “fee-for-service” and managed care programs provide this coverage. The five attorneys in the Section provide constant guidance on complicated issues arising from these issues and a host of federal and state laws and regulations.

**Child Support Enforcement**

The Division for Child Support Enforcement had one of its most successful years in protecting the children of the Commonwealth. Attorneys in this section participated in 110,482 hearings resulting in $8,547,878 in lump sum and purge amounts collected and sending non-custodial parents to jail for a total of 639,644 days.

**SEXUAL PREDATORS, TOBACCO, ALCOHOL AND GAMING DIVISION**

The Sexual Predators, Tobacco, Alcohol, and Gaming Division is responsible for providing comprehensive legal services in a number of diverse areas. Attorneys in the Division provide counsel to: (1) all gaming agencies, including the Virginia Lottery, the Racing Commission, and the Department of Charitable Gaming; (2) the Workers’ Compensation Commission; (3) the agencies funded by the proceeds from the tobacco Master Settlement Agreement, the Tobacco Indemnification and Community Revitalization Commission and the Tobacco Settlement Foundation; (4) the Department of Alcoholic Beverage Control; (5) the Commonwealth Health Research Board; and (6) the Virginia Birth-Related Neurological Injury Program. The Division is responsible for representing the Commonwealth in the civil commitment of sexually violent predators. Additionally, the Division enforces and supports the Master Settlement Agreement and related statutory requirements and litigates on behalf of our client agencies. Although the subject matter covered by this Division is very broad, the tasks are connected by some common bonds. In virtually all cases, the work of the Division involves assisting agencies that produce substantial revenues for the citizens of the Commonwealth. The Division works to assure continuation of needed revenues and to provide counsel and guidance on matters that rightfully are the subject of significant public interest and scrutiny.

In addition to the specific matters referenced below, this Division provided ongoing agency counsel and advice to the Workers’ Compensation Commission, the Virginia Racing Commission, the Charitable Gaming Commission, the Virginia Tobacco Settlement Foundation, the Virginia Lottery, and the Commonwealth Health Research Board. The typical issues before these agencies were: extensive assistance
to the Racing Commission regarding regulation of account wagering; appellant litigation on behalf of the Workers’ Compensation Commission; and working with other state lotteries as additional states jointed multi-state jackpot lottery games.

**Civil Commitment of Sexually Violent Predators Unit**

The Civil Commitment of Sexually Violent Predators Act was funded in the spring of 2003, and this Unit has reviewed fifty-four cases since the Act was funded. During the past year, the Unit filed thirteen petitions, which are still pending.

The cases that concluded this year resulted in fifteen persons being declared “sexually violent predators.” Of those, eleven were civilly committed, four were conditionally released.

The sexually violent predators that are civilly committed under the Act are entitled to an annual review hearing for the first five years and biannually thereafter. This past year the Office represented the Commonwealth at two annual hearings in which the Court concluded that the person remains a sexually violent predator.

There have been a total of thirteen petitions for appeal filed in these cases. Two of the appeals were filed by the Office, and the remaining eleven were filed by sexually violent predators that were civilly committed.

**Virginia Birth-Related Neurological Injury Compensation Representation**

The Division handled seventeen new petitions for benefits under the Virginia Birth-Related Neurological Injury Compensation Act. Of those cases, the Birth Injury Program accepted eight petitions for benefits without a hearing. By agreement, the Workers’ Compensation Commission ordered that each of the eight children be admitted into the Program. The Program took no position in two cases. Of those two, the Commission admitted one child and denied admission for one child. Three petitions for benefits were withdrawn by the child and the Program opposed three cases. Of those three, the Commission admitted one child and denied entry for the other two.

The Division provided general counsel assistance to the Program involving legal advice, legal research, monthly meetings, advice and research on property issues, and outside correspondence on behalf of the Program.

The Division handled six Program appeals in 2004. Three appeals are pending before the full Commission, one is pending before the Court of Appeals, one was withdrawn and one is still pending.

**Tobacco**

The Tobacco Unit continued to administer and enforce the Master Settlement Agreement, the landmark settlement that the Commonwealth and other states entered into with leading tobacco product manufacturers in November 1998. In April, in accordance with the terms of the Settlement Agreement, the Commonwealth of
Virginia received $128,532,755.85 in payments from the participating manufacturers. In addition, the Unit continued to diligently enforce the sections which apply to non-participating manufacturers, filing thirty-one lawsuits against non-participating manufacturers alleging violations of the Virginia Tobacco Escrow Statute and reaching settlements with numerous other companies. The Tobacco Unit obtained judgments in twenty-four cases totaling $53,309,338.28 in penalties and escrow obligations; three cases were resolved without further litigation, and four remain pending. The Unit also continued to maintain the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, together with their brand families. During the past year, the Unit certified 62 tobacco product manufacturers and 432 brand families for listing on the Virginia Tobacco Directory. Finally, the Tobacco Unit continued 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.

**Alcohol Beverage Control**

Counsel to the ABC Board represented the Board in twelve cases. Additionally, the Section monitored three appeals, provided agency advice on a variety of topics, and responded to citizen inquiries.

**PUBLIC SAFETY AND ENFORCEMENT DIVISION**

The Public Safety and Enforcement Division is composed of the Corrections Litigation, Criminal Litigation, and Special Prosecutions Sections. This Division handles a wide range of criminal and related legal matters. Each Section represents a variety of state agencies, handles litigation, and performs critical core functions related to public safety and enforcement actions.

The Corrections Litigation Section handles federal and state court litigation where state adult and juvenile prisoners raise challenges related to: (1) the conditions of their confinement; (2) the calculation of their terms of imprisonment; and (3) the parole process. The Section also provides advice on a daily basis to the Department of Corrections, the Department of Juvenile Justice, the Department of Correctional Education, and the Department of Correctional Enterprises. Further, the Section provides legal counsel to the Boards of these various agencies. The breadth of advice matters ranges from daily operational issues to contract and lease reviews, to legislative and regulatory matters, and to relations with other state, federal, and local offices (including, the United States Department of Justice and the Environmental Protection Agency). Additionally, the Section frequently fields advice inquiries from local governmental officials. Finally, the Section provides guidance to state officials with regard to prisoner transfers associated with criminal charges in other jurisdictions and interstate and international extraditions.
The Criminal Litigation Section handles an array of post-conviction matters in which state prisoners attack their convictions. This litigation includes all awarded criminal appeals, state and federal habeas corpus proceedings, petitions for writs of innocence and other extraordinary writs. The Section’s Capital Litigation Unit also defends against appellate and collateral challenges to all capital murder convictions and sentences of death. In addition, lawyers in the Section review wiretap applications and provide informal advice and assistance to local prosecutors. Finally, the Section represents the Capitol Police, the Indigent Defense Commission, state magistrates, and the Commonwealth’s Attorneys’ Services Council.

The Special Prosecutions Section is composed of four units - Environmental, Health Professions, Organized Crime, and Medicaid Fraud Control. The Environmental Unit represents the agencies of the Natural Resources Secretariat, as well as certain other related agencies. The services to these agencies include providing legal advice to them and their respective boards. Attorneys in this Unit also handle litigation, as well as review of regulations, contracts, and proposed legislation. Further, the Unit’s environmental prosecutor assists local Commonwealth’s Attorneys in handling criminal cases under the environmental statutes. The Health Professions Unit evaluates and presents cases of violations of state laws and regulations on behalf of the Commonwealth at administrative proceedings before the various boards of the Virginia Department of Health Professions. These proceedings often result in findings of violations with penalties ranging from simple monetary fines to revocation of professional licensure. The Organized Crime Unit assists in the investigation of state and federal criminal matters, ranging from public corruption to financial crime. Prosecutors within this Unit handle criminal cases in state and federal courts on behalf of the Attorney General and at the request of local Commonwealth’s Attorneys or the United States Attorneys. Additionally, the Unit provides legal advice and representation on criminal matters to the Virginia Departments of State Police, Military Affairs, and Criminal Justice Services, including the Division of Forensic Science. Further, the Unit is primarily responsible for the Attorney General’s Anti-Gang initiatives. The Medicaid Fraud Control Unit is mandated to investigate fraud and abuse committed by providers under Virginia’s Medicaid Program and to recover monies illegally obtained by them during the course of such activity. This Unit’s criminal and civil investigations regularly result in the criminal prosecution and conviction of health care providers and the recovery of millions of dollars for the Virginia Medicaid Program through enforcement actions initiated in state and federal court. Finally, the Section provides legal advice to Virginia’s Fair Housing Board and files suits for alleged violations of fair housing laws in the Commonwealth. The lawsuits allege discriminatory housing practices based on the applicant’s disability, familial status, or race.
Criminal Litigation Section

The Criminal Litigation Section handles all post-conviction litigation filed by state prisoners attacking their convictions.

The Section defended against 1,489 petitions for writs of habeas corpus filed in state and federal courts and represented the Commonwealth in 503 appeals in state and federal courts. In addition, the Section received fifty-four writs of actual innocence from prisoners, and has so far been required to respond to seven of them.

The Criminal Litigation Section’s Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. Five executions were carried out in 2004 and four new death penalty appeals were received. Of the many capital cases handled by the Unit, three were of particular significance. In Muhammad v. Commonwealth, the “sniper” case, the Capital Unit handled an appeal in the Supreme Court of Virginia brought by the death-row inmate challenging his capital murder convictions and death sentences for his and his accomplice’s sniper shooting spree during which ten persons were murdered; this is the first conviction and appeal under Virginia’s new terrorism statutes, which were originally proposed by Attorney General Kilgore in 2002.

Correctional Litigation Section

The Correctional Litigation Section provides day-to-day advice to the Department of Corrections, the Department of Juvenile Justice, the Parole Board, the Department of Correctional Education and their citizen policy-making 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 the last year, the Section was responsible for handling 217 Section 1983 cases, 21 employee grievances, 243 habeas corpus cases, 472 mandamus petitions, 52 tort claims, and 15 warrants in debts.

Special Prosecutions Section

The Special Prosecutions Section, which is authorized to prosecute criminal and administrative cases, is comprised of four distinct units — the Medicaid Fraud Control, Health Professions, Environmental, and Organized Crime Units.

Medicaid Fraud Control Unit

The Medicaid Fraud Control Unit investigated and prosecuted many major fraud cases throughout Virginia. Last year, the Medicaid Fraud Control Unit’s criminal and civil investigations broke another record regarding the recovery of money stolen from Virginia’s Medicaid program. There were many challenges this year for the members of the Medicaid Fraud Control Unit. These challenges included training twelve additional employees, setting up four regional offices, and maintaining their
usual significant case load, which resulted in the convictions of twelve health care providers and over $14.3 million recovered for the Virginia Medicaid program. This record recovery exceeds their highest year by over $2.2 million.

The Unit, the FBI, and the United States Attorney’s Office for the Eastern District of Virginia conducted a joint investigation involving Healthy Transitions, LLC, a Fredericksburg-based intensive in-home mental health services provider. Healthy Transitions fraudulently billed the Virginia Medicaid Program approximately $2.5 million for services that were not provided, that were up-coded and billed at higher reimbursement levels, as well as billing for services that were not covered as part of Medicaid’s reimbursement policies. The owner/operators pled guilty in United States District Court in Richmond. One owner pled guilty to one count of conspiracy to commit health care fraud and was sentenced to forty-six months incarceration. The other owner pled to one count of misprision of a felony and was sentenced to six months incarceration and six months of electronic monitoring. The owner/operators were jointly ordered to repay the Virginia Medicaid program $2.5 million. This is the largest Medicaid fraud conviction in the history of the Unit, which was successful due to the joint efforts of the Unit, the FBI (Fredericksburg Office), and the United States Attorney’s Office in Richmond.

Another successful Medicaid Fraud Control Unit investigation and prosecution involved the owner of an Xtra Care Home Health Agency, located in Norfolk. The owner billed the Virginia Medicaid program for services not provided and confessed to fraudulently billing the Medicaid program, then fled Virginia. After negotiating his surrender to federal authorities, the owner pled guilty in the United States District Court in Norfolk to one count of health care fraud. The owner subsequently was sentenced to twenty-seven months incarceration with restitution to the Virginia Medicaid program in the amount of $360,761. This was a joint investigation between the Unit, the FBI, and the United States Attorney’s Office in Norfolk.

The owner/operators of Friendly Transportation, a Richmond-based Medicaid non-emergency transportation provider, transported ambulatory recipients and fraudulently billed the Department of Medical Assistance Services at the wheelchair rate, resulting in an overpayment of $450,000. A Federal Grand Jury in Richmond returned a fifteen-count indictment charging the owner/operators with health care fraud, conspiracy, and money laundering. Both targets fled the country prior to trial and are wanted on outstanding federal arrest warrants.

Medicaid Fraud Multistate State/Federal Global Settlements

The Medicaid Fraud Control Unit continued its participation in the cooperative effort between federal and state authorities to protect the Medicare/Medicaid programs from fraud committed by healthcare providers conducting business across the United States. The Medicaid Fraud Control Units of all affected
states are notified about ongoing investigations when the Department of Justice contacts the National Association of Medicaid Fraud Control Units (NAMFCU) and requests the assistance of the state MFCUs. All negotiations and recoveries are allocated based upon assessment of actual damages incurred by each state. A NAMFCU settlement team, with the Department, negotiates for the best settlement possible with damages and penalties to cover state Medicaid losses.

The Unit assisted the NAMFCU Negotiating Team on a joint investigation involving the fraudulent billing practices of Schering Plough Corporation. The allegations against the company arose from a qui tam lawsuit filed in United States District Court in Philadelphia alleging the company’s misreporting of “Best Price” information to the federal Centers for Medicare and Medicaid Services for its drug Claritin. As a result of this joint investigation, a settlement was reached with a significant recovery for Virginia. The Virginia Medicaid share combining state and federal money was $6,794,630. Virginia’s share, combining restitution penalties and interest, was $3,275,915. This agreement recovered double damages for the Virginia Medicaid program.

The Department of Justice and the Unit investigated Wal-Mart for partially filling Medicaid recipient’s prescriptions (prescription shorting). Overpayments occurred when Wal-Mart pharmacies dispensed partial prescriptions due to low inventory. If the customer did not return to obtain the balance of the prescription, no adjustment was made to Medicaid. Virginia’s share of the $2.8 million settlement was $38,243.00.

The Department of Justice and the Unit investigated Parke-Davis, the pharmaceutical manufacturer, for its marketing and promotion of the drug Neurotin, a medication used to treat seizure disorders. Parke-Davis’ employees actively promoted uses of Neurotin for non-FDA-approved usage, including pain management and bipo-lar disorder treatment. Virginia’s portion of the $152 million was approximately $2.8 million.

Medicaid Fraud Civil Enforcement

For the twelfth straight year, the Medicaid Fraud Control Unit worked with the Offices of the United States Attorneys for the Eastern and Western Districts of Virginia in the Affirmative Civil Enforcement (ACE) program, pursuing providers through the federal False Claims Act. The ACE program has been a great recovery tool for the Unit. Since its inception twelve years ago, the ACE program has resulted in the recovery of millions of dollars for the Virginia Medicaid Program.

A joint investigation of Manor Care-Alexandria (previously Oak Meadow Nursing Home) was conducted for allegations of substandard care, resulting in a civil settlement. The settlement required Oakwood Nursing Home to place $151,000 into a trust fund for improvements of the facility to enhance resident care, particularly
in the areas of nutrition, medication management, and staff training. A corporate consultant was also required to be present in the home for at least three days per month over a nine-month period to ensure compliance with the settlement.

After the Virginia Department of Health issued several chronic negative surveys of the Beverly Healthcare-Fredericksburg, the Unit and the Office of the United States Attorney for the Eastern District of Virginia in Alexandria initiated a joint investigation. A negative survey is the result of the Department of Health finding multiple chronic deficiencies relating to the quality of care of the residents of the institution. As a result, Beverly placed $522,400 in an escrow fund to cover needed repairs and increased staffing.

The ACE program continues as a pilot program, consistent with the advice of United States Department of Health and Human Services—Office of the Inspector General. The MFCU believes that the pursuit of providers through this initiative has the potential to result in substantial recoveries for the program in the future, in addition to encouraging compliance with all rules and regulations of the program.

**Health Professions Unit**

The Health Professions Unit primarily prosecutes cases before the various health regulatory boards under the Department of Health Professions, including the Boards of Medicine, Nursing, Pharmacy, and Dentistry. The Unit provides a more focused and effective administrative prosecution of cases involving violations of health care-related licensing laws and regulations.

The Unit participated in several Department of Health Professions cases, including a case against a chiropractor. The chiropractor was summarily suspended for allegedly touching multiple female patients inappropriately. Prior to the hearing, the respondent entered into a consent order whereby his actions were determined to be a danger to the health and welfare of his patients or to the public and that he performs acts likely to deceive, defraud, or harm the public in violation of § 54.1-2914.A(8), (11). The order suspended the chiropractor’s license for a period of not less than eighteen months, and he has the burden to demonstrate his competency, skill, and safety to the Board of Medicine before his license would be reinstated.

**Fair Housing Unit**

The Office filed five lawsuits alleging violations of Virginia’s Fair Housing Law and handled eleven complaints without having to file suit. The lawsuits allege discriminatory housing practices based on the applicant’s disability, familial status, or race. Three of the cases are scheduled for trial. In the case of Commonwealth v. Bazzle, the Defendants agreed to settle the case based on familial status (i.e., presence of a child or children under the age of eighteen in the household with a parent or guardian). The settlement provided: (1) a payment of $6,300 to the complainant;
(2) an agreement prohibiting the Defendants from interfering with the fair housing rights of any person; and (3) an agreement requiring the Defendants to obtain a minimum of two hours of instruction on applicable state and federal fair housing laws.

The Office filed a lawsuit seeking to compel enforcement of a subpoena issued in a fair housing case wherein the complainant alleged sexual harassment by her landlord. In the case of Commonwealth v. Schmidt, the Court ruled that the subpoena was enforceable and ordered the Defendants to comply with the subpoena. This ruling recognized the Commonwealth’s argument that sexual harassment is a form of sex discrimination in housing which violates § 36-96.3.A.2, which provides a ban on discriminatory terms and conditions in the rental of a dwelling.

**Environmental Unit**

The Environmental Unit primarily represents the agencies of the Secretary of Natural Resources. The Unit provides legal advice to the agencies and their respective boards. The services include litigation, regulation and contract review, legislative review, and related matters. The Unit’s environmental prosecutor assists local Commonwealth’s Attorneys in handling criminal cases under the environmental statutes.

The Unit remained busy with high-visibility matters. It led two coalitions of states in intervening in the Court of Appeals for the District of Columbia to assist the EPA in defending its New Source Review regulations under the Clean Air Act. The Unit handled the negotiation of a consent decree with the EPA and Maryland to cover the Mirant plant in Alexandria. If that decree is approved, a major improvement in the air quality in the Northern Virginia area will be achieved. The Unit also recovered over $800,000 in joint consent decrees with the EPA involving paper mills that had violated federal and state law. The Unit continued to handle the expansive litigation over the Page County landfill. An attorney in the Unit handled approximately 250 new cases filed before the Gas and Oil Board.

**Organized Crime Unit**

The Organized Crime Unit covers a wide range of criminal and enforcement matters. The Unit is responsible for initiating 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 a host of 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 ABC Board on behalf of the ABC Bureau of Law Enforcement Operations.

Further, the Unit provides representation before various federal and state courts throughout the Commonwealth for all divisions of the State Police and the Department of Criminal Justice Services, including the Division of Forensic Science.

The Unit, in addition to providing legal representation to several state criminal justice agencies, prosecuted in excess of sixty cases in state and federal court. Those cases ranged from embezzlement by a public official to possession with the intent to distribute narcotics. Two cases of particular interest involved commercial robbery with the use of a firearm and identity fraud.

An Assistant Attorney General, cross-designated as a Special Assistant United States Attorney, hired under the Project Exile program prosecuted a case in which a defendant was sentenced in U.S. District Court in Richmond to 1,135 months incarceration for three counts of commercial robbery and three counts of using a firearm to commit those robberies. During a two-month spree, the defendant, armed with a 9mm handgun, robbed numerous hotels in the Richmond area. The case, investigated by several local police departments as well as the Bureau of Alcohol, Tobacco, Firearms, and Explosives, was adopted by the United States Attorney’s Office in Richmond under the Project Safe Neighborhoods/Project Exile Program. That program is aimed at reducing violent crimes, particular those involving illegally obtained firearms, in and around the Richmond Metropolitan area.

The United States District Court in Richmond sentenced a defendant to fifty-one months incarceration for conspiracy to commit identity fraud and mail fraud and ordered him to pay $103,921.00 in restitution. The defendant had received personal identification information from the billing records of patients of a regional hospital in the Richmond area. He used the information to assume the patients’ identities and to open fraudulent credit accounts in their names at retail stores throughout the Mid-Atlantic. The defendant fraudulently obtained merchandise with a value in excess of $85,000.00. The York County Sheriff’s Office, with the concurrence of the local Commonwealth’s Attorney, brought the investigation to this Office. The case was then presented to the Richmond United States Attorney’s Office, and a Senior Assistant Attorney General was cross-designated as a Special Assistant United States Attorney to prosecute the case.

TECHNOLOGY AND TRANSPORTATION DIVISION

The Technology and Transportation Division is comprised of three Sections. The Computer Crime unit is a specially trained and equipped group of prosecutors and investigators skilled in computer, communications, and other Internet technologies.
The Unit vigorously investigates and prosecutes illegal activities, such as spam and identity theft, with an emphasis on the protection of children that may be targeted by predators on the Internet. The Civil Technology Section represents the Virginia Information Technologies Agency and other communications agencies that provide information technology resources, oversight, and guidance necessary for government operations and programs. The Section also provides advice to the Commonwealth’s central procurement agencies. The Transportation Section represents the Department of Transportation, the Department of Rail and Public Transportation, the Department of Aviation, the Department of Motor Vehicles, the Virginia Port Authority, and the Motor Vehicle Dealer Board and provides advice to those agencies on all matters relating to transportation within the Commonwealth. The agencies represented by the Section directly affect the economic health and quality of life of the Commonwealth’s citizens by promoting the mobility of people and goods on the roads, in the water, and in the air.

**Computer Crime Unit**

In 1999, the Virginia General Assembly authorized and funded the creation of a Computer Crime Unit within the Office of the Attorney General with the long-term vision of spearheading Virginia’s computer-related criminal law enforcement in the twenty-first Century. In accordance with § 2.2-511, the Attorney General has concurrent and original jurisdiction to investigate and prosecute such crimes as are committed by means of computer and dealing with the exploitation of children and identity theft. The Computer Crime Unit continued to travel throughout the state to investigate and prosecute computer crime cases during the year. Some of the jurisdictions in which the Unit has investigated and prosecuted either computer fraud, theft of computer services, computer invasion of privacy, or computer facilitated child exploitation cases this year include Virginia Beach, Loudoun County, Jonesville, Prince George County, Newport News, Richmond, and Bristol. Since all of the attorneys within the Unit are cross-designated as Special Assistant United States Attorneys, they have prosecuted cases in federal as well as state courts.

With the explosion in Internet crime over the last several years, Attorney General Kilgore created the Virginia Cyber Crime Strike Force (VCCSF) in the summer of 2004 to better coordinate the prosecution of Internet crime and provide Virginia with a single location to report Internet-related crimes. The VCCSF is a partnership between federal, state, and local law enforcement agencies and is comprised of the United States Attorney’s Office for the Eastern District, this Office, the FBI, the Virginia State Police, and other federal, state, and local agencies. The VCCSF handles crimes committed via computer systems, including computer intrusion/hacking, Internet crimes against children, Internet fraud, computer or Internet-related extortion, cyber-stalking, and identity theft.
In addition to investigating and prosecuting computer crime throughout the Commonwealth, the members of the Unit received specialized training in computer law enforcement. The Unit shared that expertise through training programs with local Commonwealth’s Attorneys and law enforcement officers. Members of the Unit attended the Virginia Association of Commonwealth Attorney’s Spring Conference in Williamsburg where they presented a four-hour block of training entitled “Cyber Crime, CyberCop and CyberCA’s- Prosecution in the 21st Century.” During this block, they explained the capabilities of the Computer Crime Unit and provided training on tracking down criminals in cyberspace.

The Unit continued to present Identity Theft Institutes across the state. Members of the Unit trained law enforcement officers in Bristol, Fredericksburg, Lynchburg, and Hampton Roads on the changes in the law regarding identity theft and focused on investigation and prosecution of identity theft cases. The Unit advised the trainees about the new Identity Theft Passport Program administered by the Office of the Attorney General in cooperation with the Virginia State Police. The program has been very successful, and several states have adopted similar measures.

In 2003, Attorney General Kilgore’s 2003 legislative package included Virginia’s Anti-Spam law, which became effective on July 1, 2003. Using this new law, the toughest Anti-Spam law in the nation, the Unit was able to pursue the criminal prosecution of the number eight spammer in the world, as listed by the Registry of Known SPAM Operations. This spammer was convicted in Loudoun County, and the jury recommended a nine-year prison sentence for his crimes. This was a first-of-its-kind prosecution in the nation. The Unit also indicted two other SPAM criminals, and the cases are set to go to trial.

The Unit worked closely with the Joint Commission on Technology and Science and with the Joint Legislative Task Force on Computer Crimes to draft comprehensive legislation to address the growing problem of “phishing”. Phishing is yet another cyber-crime where a criminal uses modern technology to perpetrate old-fashioned identity theft by sending a false email in order to induce their targeted victim to unintentionally disclose the details of their financial accounts. Attorney General Kilgore announced his plan to submit an “anti-phishing” bill to the 2005 Session of the General Assembly. This new law would be punishable as a Class 6 felony and proscribes fraudulently obtaining, recording, or accessing from a computer the certain identifying information of another.

The Computer Crime Unit 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 crime. One of the fastest growing areas of Internet exploitation involves sexual predators using computers to make contact with children. Several notable convictions include those of a Portsmouth schoolteacher, a Richmond youth hockey coach, and a convicted
sex offender on the state’s registry. 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 located in Bedford. The program is designed to make children and parents aware of the dangers of surfing the Internet. The Safe Surfin’ presentation is given to middle schools, high schools, and parent groups. This past year, Attorney General Kilgore and members of the Unit presented the program to schools in Roanoke, Jonesville, Blacksburg, Winchester, and Woodbridge.

**Civil Technology Section**

The Civil Technology Section provided the legal support and representation needed by numerous Commonwealth agencies and institutions during 2004 to implement their technology-related agendas. This included many technology acquisitions, licensing of Commonwealth data and software to other parties, addressing intellectual property claims and Internet-related concerns such as cybersquatting and electronic contracting, ongoing support for the Public-Private Education Facilities and Infrastructure Act initiatives, and consolidation of the Virginia Information Technologies Agency. Our Office obtained a favorable decision in the Virginia Supreme Court in *MABC v. Department of Motor Vehicles*, reinforcing the ability of public bodies to rely on prescribed procedures for administering contractual claims. The Section helped numerous agencies structure procurement transactions to avoid successful protest challenges and assisted the Secretary of Administration’s effort to introduce alternative dispute resolution procedures in public procurement. The Section also provided well-received educational or training sessions at state-wide programs for procurement professionals by the Capital Area Purchasing Association and the Department of General Services’ 2004 Public Procurement Forum, was instrumental in our Office’s preparation of the conflict-of-interests training program mandated by the General Assembly in 2004, and implemented a procurement reducing our Office’s online legal research service costs by approximately 40%.

**Transportation Section**

The Transportation Section represents the state agencies and boards falling under the Secretary of Transportation. This includes the Virginia Department of Transportation, the Department of Motor Vehicles, the Department of Aviation, the Department of Rail and Public Transportation, the Virginia Port Authority, and the Motor Vehicle Dealer Board. The Department of Transportation continues to occupy a majority of the Section’s time as many legal issues arise on a daily basis. During the past year, a number of legal issues and litigation arose from the construction of the Woodrow Wilson Bridge. The Commonwealth’s commitment to the Public/Private Transportation Act of 1995 saw the Section’s involvement in the successful negotiation and execution of a Comprehensive Agreement between the Virginia
Department of Rail and Public Transportation and Dulles Transit Partners, LLC, to design and construct the Dulles Corridor Rapid Transit project. Additionally, the Section participated in the beginning of negotiations for improvements to the Interstate 81 Corridor and construction of high occupancy toll lanes along I-495 in Northern Virginia.

Over the past year, the Section’s lawyers, in advising and representing their client agencies, have been involved in issues involving licensing and disciplining of automobile dealers and sales persons; driving schools regulated by the Department of Motor Vehicles; automobile manufacturer and dealer disputes; design-build contracts for major projects in the Hampton Roads and Northern Virginia areas; homeland security issues; bid protests; disadvantage business enterprise hearings; inverse condemnation matters; procurement disputes; *qui tam* matters; and outdoor advertising and logos, just to name a few. Attorneys in the Section have appeared throughout the court system in the Commonwealth from general district courts to the Supreme Court of Virginia. Finally, the Section provided legal support to the Governor’s Commission on Rail in the 21st Century.

**COMMERCE AND FINANCE DIVISION**

The attorneys in the Division of Commerce and Finance provide advice to those agencies and boards reporting to the Secretaries of Commerce and Finance in the Commonwealth. These agencies include the Virginia Department of Taxation, the Virginia Department of the Treasury, the Virginia Economic Development Partnership, the Virginia Employment Commission, as well as numerous other state agencies and boards charged with administrative and regulatory responsibility for the Commonwealth’s economic and fiscal policies, and the issuance of the Commonwealth’s bonds and other obligations. By providing counsel to these various agencies, the attorneys within the Division ensure that these agencies receive the best legal advice possible. Therefore, the citizens of Virginia are being provided with the highest caliber of legal services in these areas.

**Task Force on Regulatory Reform and Economic Development Section**

The Commerce and Finance Section staffed the Attorney General’s Task Force on Regulatory Reform and Economic Development, which studied the challenges facing the Commonwealth in these areas. The Task Force was comprised of various business and economic development leaders from around the state and held meetings in all regions of the Commonwealth. After studying these areas and potential solutions, the Task Force submitted its Final Report with recommendations to Attorney General Kilgore. Many of the recommendations became part of the Attorney General Kilgore’s 2004 legislative package, which the General Assembly
passed. The legislation included an extension and reform of the Commonwealth’s Enterprise Zone Act and the Small Business Regulatory Flexibility Act, which will help the Commonwealth’s small businesses to compete effectively.

**Third-Party Administrator for Virginia Sickness and Disability Program**

The Office assisted and advised the Virginia Retirement System in requesting and evaluating proposals, and negotiating the final contract for, third-party administration services for the Virginia Sickness and Disability Program. The Retirement System selected Maine-based UnumProvident, the largest provider of disability insurance and disability claims administration services in the country. The Office provided the necessary legal services to facilitate the change in third-party administrators and ensure a smooth transition to the Disability Program’s claims administration with UnumProvident. The contract calls for administration of short-term and long-term disability claims in an annual amount exceeding $25 million.

**DIVISION OF DEBT COLLECTION**

The mission of the Division of Debt Collection is to provide efficient and professional debt collection services to all state agencies. The attorneys and staff of the Division protect the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth’s receivables. The Division’s attorneys provide advice on collection and bankruptcy issues to agencies and to other Divisions within this Office.

The Division of Debt Collection operates on a fiscal-year basis and collects debts owed the Commonwealth and its agencies. In fiscal year 2004, the Division collected total revenues of approximately $13,150,000.00, which represents a 2% increase in collections from the prior fiscal year.

**CONCLUSION**

It has been my honor to serve the people of the Commonwealth as Attorney General upon the resignation of The Honorable Jerry W. Kilgore. The accomplishments of the attorneys and staff are unparalleled. It is impossible to detail all the accomplishments in this report; 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 this Commonwealth are well-served by the efforts of these individuals.

During 2004 we reached many goals and accomplished much; however, much is yet to be done. I look forward to the challenges of serving the Commonwealth during 2005.
With kindest regards, I am

Very truly yours,

[Signature]

Judith Williams Jagdmann
Attorney General
PERSONNEL OF THE OFFICE

Jerry W. Kilgore ................................................................. Attorney General
Joseph R. Carico .............................................................. Chief Deputy Attorney General
Christopher R. Nolen ....................................................... Chief Counsel to the Attorney General
Thomas M. Moncure Jr. ..................................................... Senior Counsel to the Attorney General
Francis S. Ferguson .......................................................... General Counsel
Richard B. Campbell ......................................................... Deputy Attorney General
Judith Williams Jagdmann .................................................. Deputy Attorney General
David E. Johnson ............................................................. Deputy Attorney General
Richard L. Savage III ....................................................... Deputy Attorney General
William H. Hurd ............................................................. State Solicitor General
William R. Thro .............................................................. State Solicitor General
Maureen R. Matsen .......................................................... Deputy State Solicitor General
Stephanie L. Hamlett ........................................................ Chief, Opinions/Special Counsel to Attorney General
C. Meade Browder Jr. ........................................................ Sr. Assistant Attorney General/Chief
Craig M. Burshem ........................................................... Sr. Assistant Attorney General/Chief
Marla G. Decker .............................................................. Sr. Assistant Attorney General/Chief
Ronald C. Forehand ........................................................ Sr. Assistant Attorney General/Chief
M. Seth Ginther .............................................................. Sr. Assistant Attorney General/Chief
Jane D. Hickey ................................................................. Sr. Assistant Attorney General/Chief
Lisa M. Hicks-Thomas ...................................................... Sr. Assistant Attorney General/Chief
David B. Irvin ................................................................. Sr. Assistant Attorney General/Chief
Alan Katz ........................................................................ Sr. Assistant Attorney General/Chief
Edward M. Macon .......................................................... Sr. Assistant Attorney General/Chief
Steven O. Owens ............................................................ Sr. Assistant Attorney General/Chief
Kim F. Piner ................................................................. Sr. Assistant Attorney General/Chief
Jerry P. Slonaker ............................................................. Sr. Assistant Attorney General/Chief
Richard L. Walton Jr. ....................................................... Sr. Assistant Attorney General/Chief
John S. Westrick ............................................................ Sr. Assistant Attorney General/Chief
Robert H. Anderson III ................................................... Senior Assistant Attorney General
John J. Beall Jr. ............................................................... Senior Assistant Attorney General
Howard M. Casway ......................................................... Senior Assistant Attorney General
George W. Chabalewski .................................................. Senior Assistant Attorney General
Roger L. Chaffè .............................................................. Senior Assistant Attorney General

1This list includes all persons employed and compensated, on a full-time basis, by the Office of the Attorney General during calendar year 2004, as provided by the Office's Division of Administration. The most recent title is used for each employee whose position changed during the year.
<table>
<thead>
<tr>
<th>NAME</th>
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<tr>
<td>Ellen E. Coates</td>
<td>Senior Assistant Attorney General</td>
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<td>Samuel E. Fishel IV</td>
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<td>W. Clay Garrett</td>
<td>Assistant Attorney General/Prosecutor</td>
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<td>J. David Adams</td>
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<td>Kristine E. Asgian</td>
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<td>Daniel R. Averill</td>
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<tr>
<td>Robert S. Bailey</td>
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<td>Danita Renee Barnes</td>
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<td>Delilah Beaner</td>
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<td>Domestic Violence Program Assistant</td>
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<td>Rosemary C. Foreman</td>
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<td>Melissa P. Joseph</td>
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<td>Tammy P. Kagey</td>
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<td>Sara I. Martin</td>
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<td>Sharon P. Petersen</td>
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<td>Bruce W. Popp</td>
<td>Computer Systems Engineer</td>
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<td>Jacquelin T. Powell</td>
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<td>N. Jean Redford</td>
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<td>Bobbie T. Saunders</td>
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<td>Lisa W. Seaborn</td>
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<td>Tijwana L. Simmons</td>
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<td>Charles H. Slemp III</td>
<td>Assistant Scheduler</td>
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<td>Debra L. Smith</td>
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<td>Faye H. Smith</td>
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<tr>
<td>Kimberly F. Steinhoff</td>
<td>Exec. Asst. to Attorney General &amp; Chief Deputy</td>
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<td>Anne M. Stickley</td>
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<td>Patricia L. Tyler</td>
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<td>John H. Vance</td>
<td>Director, Finance and Budget</td>
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<tr>
<td>Corrine Vaughan</td>
<td>Victim Notification Program Assistant</td>
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<tr>
<td>Zella L. Waggoner</td>
<td>Claims Representative</td>
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<tr>
<td>Esther M. Welch</td>
<td>Project Coordinator, Gang Reduction Program</td>
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<td>Christopher B. West</td>
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<td>Samuel M. Wharton III</td>
<td>Special Counsel Administrator</td>
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<td>Kimberly Wilborn</td>
<td>Legal Secretary</td>
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<tr>
<td>Tameka S. Winston</td>
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<td>Amanda C. Wood</td>
<td>Grant Administrator/Fiscal Support Tech.</td>
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<tr>
<td>Amy R. Wight</td>
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<td>Brenda K. Wright</td>
<td>Legal Secretary</td>
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<tr>
<td>Michael J. Wyatt</td>
<td>Investigator</td>
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<tr>
<td>Abigail T. Yawn</td>
<td>Legal Secretary</td>
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</table>
ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 2005

Edmund Randolph ................................................................. 1776–1786
James Innes ........................................................................ 1786–1796
Robert Brooke ...................................................................... 1796–1799
Philip Norborne Nicholas .................................................. 1799–1819
John Robertson .................................................................... 1819–1834
Sidney S. Baxter .................................................................... 1834–1852
Willis P. Bocock .................................................................. 1852–1857
John Randolph Tucker ....................................................... 1857–1865
Thomas Russell Bowden .................................................... 1865–1869
Charles Whittlesey (military appointee) ......................... 1869–1870
James C. Taylor ................................................................... 1870–1874
Raleigh T. Daniel .................................................................. 1874–1877
James G. Field ...................................................................... 1877–1882
Frank S. Blair ........................................................................ 1882–1886
Rufus A. Ayers ..................................................................... 1886–1890
R. Taylor Scott ...................................................................... 1890–1897
R. Carter Scott ..................................................................... 1897–1898
A.J. Montague ...................................................................... 1898–1902
William A. Anderson .......................................................... 1902–1910
Samuel W. Williams ............................................................. 1910–1914
John Garland Pollard ............................................................ 1914–1918
J.D. Hank Jr. 1 ..................................................................... 1918–1918
John R. Saunders ................................................................. 1918–1934
Abram P. Staples 2 ................................................................ 1934–1947
Harvey B. Apperson 3 ........................................................... 1947–1948
J. Lindsay Almond Jr. 4 ......................................................... 1948–1957
Kenneth C. Patty 5 ................................................................. 1957–1958

1 The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.
2 The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders, and served until October 6, 1947.
3 The Honorable Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of the Honorable Abram P. Staples, and served until his death on January 31, 1948.
4 The Honorable J. Lindsay Almond Jr. was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of the Honorable Harvey B. Apperson, and resigned September 16, 1957.
5 The Honorable Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of the Honorable J. Lindsay Almond Jr., and served until January 13, 1958.
Frederick T. Gray\(^6\) .......................................................... 1961–1962
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
Richard Cullen \(^10\) ............................................................. 1997–1998
Mark L. Earley ................................................................. 1998–2001
Randolph A. Beales\(^11\) ....................................................... 2001–2002
Jerry W. Kilgore ............................................................... 2002–2005
Judith Williams Jagdmann\(^12\) .............................................. 2005–

\(^6\) 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.

\(^12\) The Honorable Judith Williams Jagdmann was elected Attorney General by the General Assembly on January 27, 2005, and was sworn into office on February 1, 2005, to fill the unexpired term of the Honorable Jerry W. Kilgore upon his resignation on February 1, 2005.
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*. 
CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

Alger v. Commonwealth. Holding that § 18.2-308.2 prohibited convicted felon from possessing firearm in her home.

Austin v. Commonwealth. Affirming Court of Appeals decision holding that circuit court obtained jurisdiction over a juvenile’s case as a result of the appeal from the juvenile and domestic relations court, and the circuit court retained such jurisdiction under § 16.1-297 at the time when the parole revocation proceedings were initiated.

Barrett v. Commonwealth. Affirming Court of Appeals decision and holding that the evidence was sufficient to sustain the defendant’s conviction under § 18.2-371.1(A) of a Class 4 felony for criminal neglect of her ten-month-old son, resulting in his death, and her conviction pursuant to § 18.2-371.1(B) of a Class 6 felony for criminal neglect of her daughter, aged two years and ten months. Changes in the charges after a prior reversal of her convictions were not shown to be vindictive, and trial court correctly refused to quash the additional indictment.

Bell v. Warden. Dismissing petition for writ of habeas corpus challenging conviction for capital murder and sentence of death from Winchester.

Commonwealth v. Duncan. Reversing decision of Court of Appeals en banc, which ruled that the evidence was insufficient to sustain Duncan’s conviction for felony child neglect under § 18.2-371.1(B). Unanimous finding that Duncan’s actions: (a) leaving 6-month-old baby for several hours with people he had just met and without providing food or formula for the infant; (b) leaving child no nourishment for over 7 hours; and (c) preparing a baby bottle of wine cooler to have someone feed it to the baby constituted reckless disregard for human life.

Commonwealth v. Hicks. Holding in a proceeding remanded from the United States Supreme Court, that a redevelopment and housing authority’s trespass policy is not void for vagueness under the Fourteenth Amendment to the United States Constitution and that the authority’s policy does not violate a defendant’s right of intimate association guaranteed by the Fourteenth Amendment. The judgment of the Court of Appeals is reversed and final judgment is entered affirming the defendant’s trespass conviction.

Commonwealth v. Jones. Clarifying and expanding application of the doctrine of inevitable discovery and upholding trial court’s decision that refused to suppress the evidence. Defendant was convicted of attempted possession of cocaine.

Commonwealth v. Jones. Reversing decision of Court of Appeals and ruling that the defendant committed robbery and use of firearm in the commission of robbery where
defendant took merchandise from a store without paying for it, was followed into the parking lot by the store manager, and threatened the manager with a firearm in the parking lot in order to complete the taking.

*Commonwealth v. Minor.* Affirming Court of Appeals decision holding that circuit court abused its discretion in denying a motion for separate trials of indictments for offenses against three victims occurring on three different dates. In this case, evidence of the other crimes was not relevant to the only contested issue, whether each victim consented to sexual intercourse.

*Commonwealth v. Norman.* Reversing Court of Appeals, affirming trial court, and holding that circuit court order conditionally restoring driving privilege to habitual offender did not terminate his habitual offender status.

*Commonwealth v. Sanchez.* Reversing Court of Appeals, affirming trial court, and holding that felony hit-and-run defendant’s pretrial proffer of why he needed additional funds to pay private DNA expert to testify was too vague to establish particularized need for testimony and prejudice without it.

*Cook v. Commonwealth.* Affirming Court of Appeals decision and holding that under § 16.1-271, the juvenile and domestic relations district court lacks jurisdiction over a juvenile who previously has been certified to the circuit court and indicted by a grand jury as an adult on charges that were later dismissed by the entry of a nolle prosequi.

*Covil v. Commonwealth.* Affirming Court of Appeals and holding that the circumstances properly considered by the trial court were sufficient to support defendant’s conviction for grand larceny resulting from possession of recently stolen property.

*Daniel v. Commonwealth.* Holding that an individual was not entitled to expungement of his criminal record where his assault and battery charge was taken under advisement for one year and then dismissed. Further, the expungement statute did not contemplate a hearing to permit the petitioner to assert his innocence of the original criminal charge.

*Edwards v. Commonwealth.* Affirming Court of Appeals affirmance of conviction for felony assault of a police officer. Conviction affirmed despite the fact that this offense not a lesser offense of charged crime and not separately charged.

*Elliott v. Commonwealth.* Affirming conviction for capital murder and sentence of death.

*Elliott v. Commonwealth.* Holding that the prima facie evidence provision of § 18.2-423, Virginia’s cross-burning statute, is unconstitutionally overbroad under
the First Amendment and Article I, § 12 of the Constitution of Virginia. The statute is severable and the core provisions of the statute that remain are constitutional. The convictions of the two defendants for cross-burning were affirmed in a proceeding remanded by the U.S. Supreme Court.

_Frazier v. Commonwealth._ Affirming Court of Appeals decision and holding that Court did not err in upholding the defendant’s conviction for aiding and abetting her boyfriend’s failure to appear in court for his drug/weapons trial, or in ruling that defendant’s own testimony, given at her boyfriend’s trial for failure to appear, was admissible in her own case under § 19.2-270 because it was given in her own behalf as well as in her boyfriend’s behalf.

_Holland v. Commonwealth._ Affirming Court of Appeals decision holding that admission of prior statements the victim made to his mother and a detective under the recent complaint exception to the prohibition against hearsay.

_Horner v. W. State Hosp._ Reversing and remanding Court of Appeals decision to uphold the termination of a physician formerly employed at hospital.

_Jaccard v. Commonwealth._ Reversing Court of Appeals and remanding to trial court. Court held that in sentencing proceeding before jury on malicious wounding charge, trial court erred in admitting defendant’s past probation revocation as a “record of conviction” under § 19.2-295.1.

_Jackson v. Commonwealth._ Reversing Court of Appeals and holding that an anonymous tip lacked sufficient indicia of reliability to justify an investigatory stop of a vehicle in which defendant was a passenger. Thus, the stop and subsequent search of the defendant were illegal, and the trial court erred in refusing to grant pre-trial suppression of the firearm and narcotics evidence seized.

_Jones v. Commonwealth._ Affirming trial court decision granting plea in bar based upon Workers’ Compensation Act. Contractor was injured when he cut through live wire on University of Virginia’s property and sued under the Tort Claims Act.

_Jones v. Jones._ Dismissing appeal from circuit court of permanent injunction prohibiting appellant from operating an assisted living facility without a license issued by Department of Social Services because appeal was not properly perfected by preserving error or filing transcript or written statement of facts.

_Kingsbur v. Commonwealth._ Affirming Court of Appeals decision that the firearm possessed by the defendant, a convicted felon, had not lost its characteristics as a firearm, even though it was in a state of disrepair and was missing several internal parts.
**Lenz v. Warden.** Dismissing petition for writ of habeas corpus attacking Augusta County Circuit Court capital murder conviction and death sentence.

**Lewis v. Commonwealth.** Affirming conviction for capital murder and sentence of death.

**Maddox v. Commonwealth.** Affirming trial court dismissal of nuisance claim arising out of alleged defectively designed sidewalk.

**Milteer v. Commonwealth.** Affirming in part and reversing in part Court of Appeals decision and remanding to trial court. Court upheld conviction for possession of pirated videocassettes for purposes of sale, rental, etc., but held that indictment and conviction order for possession of improperly labeled compact discs for purposes of sale, rental, etc., had been improperly worded. Court dismissed that charge and remanded probation revocation for reconsideration in light of charge dismissed.

**Nelson v. Commonwealth.** Holding that trial court correctly interpreted the rules of court in concluding it had the authority to limit disclosure of certain records to the defendant and properly denied a hearing on allegations of juror bias. The defendant was convicted of a number of sexual offenses against a minor.

**Orbe v. Johnson.** Dismissing appeal from trial court and denying motion for stay of execution concerning denial of complaint for declaratory judgment concerning constitutionality of lethal injection.

**Peyton v. Commonwealth.** Reversing Court of Appeals decision that affirmed the trial court's revocation of the defendant's sentence and remanded the case for further proceedings. The trial court abused its discretion in revoking the suspended sentence because the defendant's inability to complete an alternative sentencing program was not willful behavior on defendant's part.

**Powell v. Commonwealth.** Affirming Court of Appeals and holding that trial court could rely on defendant's assertion that the defendant had a firearm to convict him of using a firearm in commission of a robbery, even though the gun was not seen and the police did not recover a gun when they arrested him shortly after the offense.

**Powell v. Commonwealth.** Affirming conviction for capital murder and sentence of death.

**Raymeur v. Townley.** Reversing trial court and holding that a letter written by the petitioner to the trial court should have been treated as a petition for a writ of habeas corpus. Consequently, the petition was improperly dismissed as untimely.

**Rector and Visitors v. Carter.** Reversing and remanding circuit court court decision. Trial court erred when it failed to grant public university's plea of sovereign immunity
because limited waiver of such immunity in the Virginia Tort Claims Act leaves intact sovereign immunity of Commonwealth’s agencies.

*Rice v. Va. State Bar.* Affirming suspension of license to practice law imposed for lack of diligence aiding a client and reversing and remanding for failure to provide information to a district committee.

*Riner v. Commonwealth.* Affirming Court of Appeals and holding that trial court had properly denied motion for change of venue, mistrial motions based on juror misconduct, evidentiary challenges, a motion to disqualify a private prosecutor, and a sufficiency of the evidence challenge in a murder/arson case.

*Schwartz v. Commonwealth.* Affirming Court of Appeals holding that trial court properly convicted Schwartz of two counts of arson of personal property and one count of arson of an occupied dwelling. Schwartz argued that the single larceny theory applied to him and that he could only be convicted of one arson because there was only one point of ignition. The Court found the plain language of the arson statutes demonstrates that the General Assembly intended to allow multiple arson convictions under the circumstances presented in this case.

*Solomon v. Commonwealth.* Affirming Court of Appeals decision that trial court did not err in denying a motion to remove a member of the venire for cause.

*Stroupe v. Rivero.* Refusing petition for appeal and denying petition for rehearing from Court of Appeals. Counsel for the Stroupes was found in contempt of court during the trial in circuit court. He appealed to the Court of Appeals, which sustained the circuit court decision. Supreme Court refused the petition stating, there was no reversible error.

*Tucker v. Commonwealth.* Holding that to prove the unauthorized use of a vehicle, the Commonwealth need not establish that the initial taking of the vehicle was against the owner’s consent.

*Va. Polytech. Inst. & State Univ. v. Interactive Return Serv., Inc.* Affirming judgment that in a breach of contract action, the trial court correctly denied University’s motions to strike and to vacate the final order and for summary judgment in this breach of contract action. Further, based on the unique facts of the case, the trial court did not err by instructing the jury on the issue of waiver to prompt payment under the contract.

*Washington Gas Light Co. v. State Corp. Comm’n.* Affirming State Corporation Commission decision in utility rate case. Commission did not err in treating Company’s depreciation reserve deficiency as a regulatory asset and subjecting the asset to an earnings test. This accounting adjustment did not constitute a retroactively
applied rule and fell within the Commission’s reasonably wide area of legislative discretion in setting rates that are just and reasonable.

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

*Winston v. Commonwealth.* Affirming conviction for capital murder and sentence of death.

### CASES PENDING IN THE SUPREME COURT OF VIRGINIA

*Carter v. Commonwealth.* Appealing decision of circuit court. At issue is whether the Commonwealth must prove the actual ability to inflict harm to convict a defendant of criminal assault, as when a defendant points an unloaded or toy weapon at a police officer.

*Cobbs v. Commonwealth.* Appealing Court of Appeals denial of appeal. Cobbs argues that the evidence was insufficient to prove her guilt of petit larceny from her employer.

*Collins v. Commonwealth.* Appealing the trial court’s revocation of previously suspended sentence. There is no appellate decision since Court of Appeals denied the petition. Defendant was convicted of possession of marijuana with intent to distribute and sentenced, then given an appeal bond. While on bond, he incurred new convictions, and his previously suspended sentence was revoked. Defendant argues that the trial court erred by revoking sentence since the sentencing order specified that his probationary period would begin upon his release from incarceration.

*Commonwealth v. Hudgins.* Appealing Court of Appeals en banc decision that grand larceny from the person is a lesser included offense of robbery and found that Hudgins’ trial and conviction for grand larceny of the person after having been previously acquitted of robbery violated the Double Jeopardy Clause.

*Correll v. Commonwealth.* Appealing Court of Appeals panel decision that the evidence was sufficient for conviction of felony abuse and neglect of an adult.

*Fisher-Davenport v. Little-Bowser.* Appealing denial of petition for a writ of mandamus and motion for summary judgment to require issuance of new birth certificates following out-of-state adoptions listing both names of the same sex adoptive couple.

*Emmett v. Warden.* Petitioning for writ of habeas corpus attacking capital murder conviction and death sentence.
Herrity v. Commonwealth. Appealing circuit court order granting demurrer and plea of sovereign immunity based upon lack of standing, failure to state a cognizable claim, and sovereign immunity in a challenge of Department of Rail and Public Transportation project.

Hinton v. Commonwealth. Appealing Court of Appeals denial of appeal. Hinton argues that a flare gun is not a firearm for purposes of § 18.2-308.2 which prohibits possession of firearm by a convicted felon.

Jackson v. Warden. Petitioning for writ of habeas corpus attacking circuit court capital murder conviction and death sentence.

Jefferson v. Commonwealth. Appealing probation revocation from circuit court on earlier conviction for grand larceny. Jefferson claims trial court erred in revoking probation when original sentencing order was never signed or entered until probation revocation hearing.

Lewis v. Commonwealth. Appealing Court of Appeals finding that the trial court did not err in refusing the defendant’s request based on improper impeachment. After questioning a defense witness about his felony distribution conviction, the prosecutor asked the witness if his connection to the defendant was drug dealing. Court of Appeals held that the question was proper impeachment and, insofar as the witness’ response was “no,” there can be no prejudice to the defendant.

Lewis v. Warden. Appealing habeas corpus case challenging conviction for capital murder and sentence of death from circuit court.

Martin v. Ziherl. Filing amicus curiae brief in case challenging the constitutionality of Virginia’s fornication statute.

Mattaponi Indian Tribe v. Commonwealth. Appealing Court of Appeals decision, which dismissed an appeal by the Mattaponi Indian Tribe of an order prohibiting the Tribe from intervening in an administrative suit involving the King William Reservoir Project. Virginia Marine Resources Commission initially denied the City of Newport News’ application for a permit to build a fresh-water intake which is a component of the reservoir. The City appealed that decision and the Tribe sought to intervene in support of the denial. The Tribe appealed the circuit court’s decision overruling their intervention motion, arguing that the Tribe had the right to be a party under both the Administrative Process Act and a colonial treaty. Court of Appeals dismissed the Administrative Process Act appeal as premature. Court certified the question whether the treaty enabled the Tribe to become a party to the case.
Mid-Atlantic Bus. Communs., Inc. v. Va. Dep't of Motor Vehicles. Appealing circuit court decision dismissing breach-of-contract case as untimely filed under Virginia Public Procurement Act. Vendor claims that limitations period on contractual claim begins only if agency head issues claim decision; limitations period does not run if, after issuing its decision, agency internally discusses the claim or gives Comptroller a recommendation for responding to correspondence from vendor.


Palmer v. Commonwealth. Appealing Court of Appeals decision denying petition for appeal regarding whether juvenile convictions submitted by the Commonwealth were sufficient to prove Palmer was a previously convicted felon, thereby supporting his conviction for possession of a firearm by a convicted felon.

Parker v. Commonwealth. Appealing Court of Appeals decision affirming conviction for operating food manufacturing plant without prior inspection. Parker contends this is not a crime under Virginia law.

Powell v. Warden. Petitioning for writ of habeas corpus attacking circuit court capital murder conviction and death sentence.

Viney v. Commonwealth. Appealing Court of Appeals panel decision that the evidence was sufficient to prove Viney acted with lascivious intent when he revealed himself to 2 young girls and support his convictions for two counts of taking indecent liberties with a minor.

Wolfe v. Warden. Petitioning for writ of habeas corpus attacking circuit court capital murder conviction and death sentence.

Yarbrough v. Warden. Petitioning for writ of habeas corpus attacking circuit court capital murder conviction and death sentence.

XL Specialty Ins. Co. v. Va. Dep't of Transp. Appealing circuit court ruling that the Plaintiff’s cause of action was barred by sovereign immunity based on the lack of a direct contractual relationship between the Commonwealth as Owner of a construction project and XL Specialty as Surety on the performance bond.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Bailey v. Warden. Petition for certiorari, seeking review of Fourth Circuit decision denying application for stay of execution from decision affirming dismissal of writ of habeas corpus challenging capital murder conviction and death sentence, pending.

Boy Scouts of Am. v. Wyman. Petition for certiorari, seeking review of Second Circuit decision excluding Boy Scouts from state employees’ charitable fundraising campaign, denied. Virginia filed an amicus curiae brief in support of petition.

Cent. Va. Cmty. Coll. v. Katz. Petition for certiorari, seeking review of Sixth Circuit decision denying sovereign immunity in bankruptcy case; specifically, may Congress use the Article I Bankruptcy Clause to abrogate the state’s sovereign immunity, pending. Elliott v. Virginia. Petition for certiorari, seeking review of Supreme Court of Virginia decision, upholding capital murder conviction and death sentence, pending.

Hall v. Virginia. Petition for certiorari, seeking review of Fourth Circuit decision affirming that no violation of Section 2 of the Voting Rights Act occurs where members of minority group allege ability to “elect representatives of their own choice,” but do not allege that members of minority group constitute an arithmetical majority of the district, pending.

In re Williams. Petition for certiorari, seeking review of Fourth Circuit decision denying petition for writ of mandamus, where state inmate sought to compel Fourth Circuit to review his motion for authorization to file a successive 28 U.S.C. § 2254 petition on the merits and to apply a relaxed standard to his claim of actual innocence, pending.

Jackson v. Virginia. Petition for certiorari, seeking review of Supreme Court of Virginia decision upholding capital murder conviction and death sentence, pending.

Johnson v. Virginia. Petition for certiorari, seeking review of Supreme Court of Virginia decision upholding capital murder conviction and death sentence, pending.

Kreiger v. Virginia. Petition for certiorari, challenging right to counsel in civil contempt proceedings where there is a possibility of imprisonment, pending.

Lewis v. Virginia. Petition for certiorari, seeking review of Supreme Court of Virginia decision upholding capital murder conviction and death sentence, pending.

Litman v. George Mason Univ. Petition for certiorari, seeking review of Fourth Circuit decision concerning the scope of the private right of action to enforce Title IX, pending.
Lovitt v. Director. Petition for certiorari, seeking review of Fourth Circuit decision denying writ of habeas corpus challenging capital murder conviction and death sentence, pending.


Mellon v. Bunting. Petition for certiorari, seeking review of Fourth Circuit concerning the constitutionality of supper prayers at a state military school, denied.

Orbe v. Director. Petition for certiorari, seeking review of Fourth Circuit decision denying application for stay of execution concerning declaratory judgment complaint challenging constitutionality of lethal injection, pending.

Powell v. Virginia. Petition for certiorari, seeking review of Supreme Court of Virginia decision upholding capital murder conviction and death sentence, pending.

Reedy v. Virginia. Petition for certiorari, seeking a review of Fourth Circuit decision denying petition for certiorari from decision refusing appeal of denial of habeas relief in a case of murder and arson, pending.

Reid v. Director. Petition for certiorari seeking review of Fourth Circuit decision granting application to vacate stay of execution and denying application for preliminary injunction concerning civil rights action challenging constitutionality of lethal injection, pending.

Rumsfeld v. Padilla. Decision on the merits regarding the constitutionality of detaining an enemy combatant who was a U.S. citizen and seized at a border. Virginia filed an amicus curiae brief on the merits.

Spencer v. Earley. Granting, vacating and remanding a judgment of Fourth Circuit concerning sovereign immunity and Title II of the Americans with Disabilities Act in the prison context.

Spencer v. Easter. Granting, vacating and remanding a judgment of Fourth Circuit concerning sovereign immunity and Title II of the Americans with Disabilities Act in the prison context.

Va. Dep't of State Police v. Washington Post. Petition for certiorari, seeking review of Fourth Circuit decision concerning the application of the First Amendment presumptive right of access to potential grand jury documents, pending.


Williams v. Johnson. Petition for certiorari, seeking review of Fourth Circuit decision holding that 28 U.S.C. § 2244(b) requires rejection of a motion for authorization to file a successive § 2254 petition that relies entirely on evidence and law that were available to the prisoner at the time of a prior motion, denied.
Section 2.2-505 of the *Code of Virginia* authorizes the Attorney General to render official written advisory opinions 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 of county sheriffs and treasurers; commissioners of the revenue; electoral board chairmen or secretaries; and state agency heads.

Each opinion in this report is preceded by a main headnote briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the opinion number preceding the opinion first appears. Cite an opinion in this report as follows: 2004 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 LEXISNEXIS, 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.
ISSUE PRESENTED

You ask whether Chapter 291 of the 2003 Acts of Assembly authorizes the Board of Accountancy to promulgate changes to its regulations, as discussed below, as emergency regulations pursuant to the Administrative Process Act.

RESPONSE

It is my opinion that Chapter 291 manifests the intent of the General Assembly to grant the Board of Accountancy authority to promulgate its proposed amended regulations as emergency regulations within the meaning of the Administrative Process Act.

APPLICABLE LAW AND DISCUSSION

The 2003 Session of the General Assembly enacted Chapter 291, relating to the Board of Accountancy. Chapter 291 amends the statutory framework governing public accountants. For example, Chapter 291 (1) makes certain definitional and nomenclature additions, changes, and deletions; (2) adds an ethics requirement to the continuing professional education for accountants; (3) requires the use of computer testing, instead of the former pencil and paper method; and (4) conforms the changes resulting from the aforesaid revisions throughout the Board’s authorizing statutes in Title 54.1. Chapter 291 brings into conformity the Board’s testing, licensing, and renewal requirements with those of the Uniform Accountancy Act and Uniform Accountancy Act Rules. Some of the changes result from the separation of the Board from the Department of Professional and Occupational Regulation. Most of the changes, however, incorporate substantive provisions affecting accountants, including those related to disciplinary matters.

The second enactment clause in Chapter 291 provides “[t]hat the Board of Accountancy shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment.” Pursuant to this mandate, you relate that the Board filed a revised set of comprehensive regulations with the Department of Planning and Budget (“original revised regulations”). You advise, however, that the Department declined to accept the original revised regulations. You relate that the Department questions whether Chapter 291 authorizes the Board to promulgate, as emergency regulations, regulatory revisions indirectly occasioned by the amendments to the statutes in that act (“2003 amendments”). You further advise that in response to the Department, the Board separated the original revised regulations into two packages. The first package contains the revisions directly occasioned by the 2003 amendments.
The second package contains the revisions that indirectly resulted from the 2003 amendments ("package 2 regulations"). Finally, you advise that the Department accepts the first package of regulations as emergency regulations, but questions the status of the package 2 regulations. You ask for a statutory interpretation of the enabling legislation contained in Chapter 291.

"The ultimate purpose of all rules of construction is to ascertain the intention of the legislature, which must prevail in all cases. All rules are subservient to that intent. Moreover, into the construction of every act must be read the purpose of the legislature." On its face, the second enactment clause of Chapter 291 appears to be both a simple and broad grant of authority to the Board of Accountancy to "promulgate regulations to implement the provisions of this act." The authority granted in the second enactment clause includes changes in both Titles 2.2 and 54.1. Therefore, such authority is not only confined to the substantive provisions applicable to accountants, but also is applicable to the Board's power to discipline regulants.

The package 2 regulations contain the Board of Accountancy's changes that are occasioned indirectly or as a consequence of the underlying 2003 amendments. These changes naturally occur when there are definitional nomenclature changes, and changes to the basic precepts of the testing, licensing, and renewal scheme. For example, the package 2 regulations require that an accountant seeking reinstatement to active status obtain forty credits of continuing professional education per year, multiplied by the number of years the accountant has been inactive, including "the most recent Ethics CPE course." The package 2 regulations also stipulate that an accountant, who has not been licensed for ten or more years, may be reinstated only by demonstrating computer literacy by taking the computer examination. If the package 2 regulations require approval pursuant to the Administrative Process Act, many months will pass before all of these rules become combined into an integrated whole.

The definition of "emergency regulations" in the Administrative Process Act evinces a legislative intent not to provide such a convoluted result. Section 2.2-4011(A) of the Act defines "emergency regulations" to mean regulations that an agency finds are necessitated by an emergency situation. For the purposes of this subsection, 'emergency situation' means a situation ... in which Virginia statutory law ... requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.... The regulations shall be limited to no more than twelve months in duration. During the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation. [Second and third emphases added.]
In specifying the 280-day period in the second enactment clause of Chapter 291, the General Assembly recognizes the need for emergency action to conform the regulations of the Board of Accountancy to the national standards in the earliest possible time frame. The package 2 regulations proposed by the Board of Accountancy to implement the provisions of Chapter 291 clearly qualify as emergency regulations pursuant to § 2.2-4011(A). Moreover, § 2.2-4011(A) recognizes the possibility that additional emergency regulations may be required to avoid the type of convoluted result described above. Accordingly, agencies are authorized to issue additional such regulations “as needed addressing the subject matter of the initial emergency regulation.” Certainly, the package 2 regulations squarely fit within that envisioned situation and must qualify as “additional emergency regulations.”

Therefore, the General Assembly’s grant of authority to the Board of Accountancy is sufficient to encompass the promulgation of the package 2 regulations as emergency regulations.

CONCLUSION

Accordingly, it is my opinion that Chapter 291 manifests the intent of the General Assembly to grant the Board of Accountancy authority to promulgate its proposed amended regulations as emergency regulations within the meaning of the Administrative Process Act.

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1. 2003 Va. Acts ch. 291, at 319 (amending and reenacting §§ 2.2-3711, 54.1-4400, 54.1-4402, 54.1-4409 to 54.1-4413, and 54.1-4417, and adding § 54.1-4423 in Chapter 44 of Title 54.1). Section 54.1-4410(A) authorizes the Board of Accountancy to “promulgate regulations establishing procedures and requirements for the renewal of a CPA certificate granted by the Board.”
5. See, e.g., 2003 Va. Acts, supra note 1, § 54.1-4423, at 326 (authorizing Board to contract with consultants to investigate and evaluate violations of statutes and regulations of Board).
11. Id. § 376, at 388; see also Ambrogii v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982) (noting that plain language of statute should be given its clear and unambiguous meaning).
"See cite supra note 6 (emphasis added).

See Board of Accountancy Regulations, supra note 9 (adding 18 VA. ADMIN. CODE 5-21-90(A)(8)). Section 54.1-4410(D) requires the Board of Accountancy to “establish by regulation a requirement for continuing professional education in ethics for CPAs.”

See Board of Accountancy Regulations, supra note 9 (adding 18 VA. ADMIN. CODE 5-21-90(B)). The package 2 regulations require a former regulant to pass a national uniform examination approved by the Board of Accountancy. See id. (adding 18 VA. ADMIN. CODE 5-21-90(B) and amending 18 VA. ADMIN. CODE 5-21-30(C)(1)). Thus, the implication is that the accountant be computer literate.

The original intent was that the original revised regulations become effective immediately. In order to accommodate a time period for the receipt of public comments, the Board amended the package 2 regulations to make the retesting requirement effective December 31, 2004. See Board of Accountancy Regulations, supra note 9 (adding 18 VA. ADMIN. CODE 5-21-90(B)). In practice, it may require longer than that for the package 2 regulations to complete the procedures required by the Administrative Process Act.


Section 2.2-4006(A)(4) provides that regulations shall be exempted from the requirements of the Administrative Process Act if they are (a) “[n]ecessary to conform to changes in Virginia statutory law ... where no agency discretion is involved;” (b) “[r]equired by order of any state or federal court ... where no agency discretion is involved;” or (c) “[n]ecessary to meet the requirements of federal law or regulations.”

See cite supra note 6.

Section 2.2-4011(A) (LexisNexis Repl. Vol. 2001).

Id.

OP. NO. 04-016
ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES — GENERAL PROVISIONS.

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

COUNTIES, CITIES AND TOWNS: GOVERNING BODIES OF LOCALITIES — PRESIDING OFFICERS AND VACANCIES IN CERTAIN OFFICES.

No authority for board of supervisors or circuit court to appoint temporary replacement for supervisor called to active military duty without having received notice from supervisor requesting appointment of temporary replacement member. Supervisor's position is not vacant unless or until supervisor provides notice of his absence due to active military duty. No requirement to hold special election under facts presented.

MR. DARVIN E. SATTERWHITE
COUNTY ATTORNEY FOR CUMBERLAND COUNTY
MARCH 22, 2004

ISSUES PRESENTED

You seek guidance concerning questions arising from the recent call to active military duty of a member of the Cumberland County Board of Supervisors. You first ask whether the notice from the board member specified in § 2.2-2802 is a required prerequisite for appointment of a temporary replacement to the board. Next, in the event the notice from the board member does not request the appointment of a temporary replacement member, you ask whether the board of supervisors may make such an appointment. Additionally, if the board of supervisors does not make any appointment
of a temporary replacement member, you ask whether the position remains vacant until the board member returns from his tour of duty, or whether the circuit court may appoint a temporary replacement member under the provisions of § 24.2-228. Finally, you ask, should a temporary appointment be made, whether §§ 24.2-226 and 24.2-228 require that a special election be held at the next general election.

RESPONSE

It is my opinion that the notice specified in § 2.2-2802 is a prerequisite to the appointment by the Cumberland County Board of Supervisors of a temporary replacement member. It is also my opinion that, in the event the notice given by the board member does not request the appointment of a temporary replacement member, the board is not authorized to make such an appointment. It is further my opinion that the position of the affected member on the board is not vacant unless or until he provides the notice. Consequently, neither the board of supervisors nor the circuit court is authorized to make an appointment of a temporary replacement member. Finally, it is my opinion that §§ 24.2-226 and 24.2-228 do not require that a special election be held at the next general election under the facts presented.

BACKGROUND

You advise that in November 2003, the citizens residing in District 2 elected a supervisor to represent them on the Cumberland County Board of Supervisors ("affected member"). You relate that the affected member assumed office and began serving at the initial meeting of the board in January 2004. Furthermore, you advise that the affected member serves in the United States Army Reserve and recently received notification of a call to active military duty. The affected member anticipates that the tour of active duty will last approximately 545 days, which includes service in Afghanistan as part of Operation Enduring Freedom. The duty in Afghanistan will begin on or about February 28, 2004, and the affected member will be unavailable to serve on the board until his release from active military duty.

APPLICABLE LAW AND DISCUSSION

In your written opinion, you note that a 2002 opinion of the Attorney General responds to questions regarding a county treasurer who involuntarily is recalled to active military duty. Among other issues, the opinion concludes that § 2.2-2802 does not require such a county officer to relinquish his office when involuntarily recalled to active military duty. The opinion notes that the Supreme Court of Virginia specifically held that a city councilman, who was inducted into active military service as an officer of a National Guard unit, did not forfeit his office. Section 2.2-2802 provides:

No ... county ... officer ... shall forfeit his title to office ... or vacate the same by reason of either engaging in the war service of the United States ... or when called to active duty in the armed forces of the United States. Any such officer ... who, voluntarily or otherwise, enters upon such war service or is called to service may
notify the ... body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office ... during the period of such service. The ... body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in such service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting. [Emphasis added.]

You observe that by using the word "may" in the second sentence of § 2.2-2802, the General Assembly evinces an intent that the vacating board member may elect whether or not to provide notice to the board of supervisors. Assuming that intent, you also observe that when notice is not given by the affected member, the position on the board of supervisors simply remains vacant until the board member returns from active military duty.

The use of the word "may" in statutes implies that the provision is discretionary, and not mandatory. It is also true, however, that the Virginia Supreme Court has held that the word "may," while ordinarily importing permission, will be construed to be mandatory when it is necessary to accomplish the manifest purpose of the legislature. On the other hand, the word "shall" used in a statute ordinarily implies that its provisions are mandatory. The context in which the term "may" is used in the second sentence of § 2.2-2802 clearly is discretionary, and not mandatory. Use of the term "may," in the discretionary context, occurs from the time the 1950 Session of the General Assembly enacted the predecessor statute to § 2.2-2802. The 2002 opinion discusses the reasoning for a public official's use of discretion concerning official duties and responsibilities. In that opinion, the location of the public officer's duty station allowed him to fulfill the duties of his public office. Thus, it obviously was not necessary for the public officer to vacate his office to permit a temporary appointee to fulfill the required public duties.

In the facts you present, however, the affected member will be stationed in Afghanistan and unable to fulfill his public duties. Prior opinions of the Attorney General list the criteria to consider in determining whether a position constitutes a "public office":

One important consideration is that, to constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office.

The affected member clearly is a public officer. "[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. Furthermore, it is presumed that public officials will discharge their duties in accordance with law.
Therefore, the affected member is provided total discretion regarding whether the notice contemplated by § 2.2-2802 is, in fact, provided to the board of supervisors. A board member is a servant of the people holding office for the benefit of the people who elected him. As such, the member is presumed to act in the best interests of the citizens he represents. The decision regarding the continued representation is for the affected member to make. Thus, it follows that the affected member does not vacate the position unless and until that member provides the notice contemplated by § 2.2-2802.18

The 1997 Session of the General Assembly repealed Title 15.1, recodified the laws pertaining generally to counties, cities and towns within Title 15.2, and added § 15.2-1424.17 Section 15.2-1424 generally provides that vacancies in the local governing body “shall”19 be filled as provided for in Title 24.2, which governs elections held in Virginia. The drafting note following § 15.2-1424 in the 1997 Code Commission report on the recodification of Title 15.1 states:

No substantive change in the law; provides for continuity of government by appointed officials, as provided in (§ 24.2-225 et seq.), until appointed officials are replaced by elected ones.18

Section 24.2-228(A) authorizes “the remaining members of the [local governing] body ..., within forty-five days of the office becoming vacant, [to] appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy.” The 1993 Session of the General Assembly recodified the Commonwealth’s election laws within Title 24.2 (“1993 recodification”). Prior to the 1993 recodification, § 24.1-76, the successor statute to § 136, provided that interim appointments to fill vacancies in any county, city, town or district office were to be made by the appropriate circuit court judges when “no other provision is made for filling the same.”24 The provisions of former § 24.1-76 were consistent with the provisions of former § 136.23 The 1975 Session of the General Assembly first enacted § 24.1-76.1, establishing an exception for vacancies in county governing bodies and providing for interim appointments by the remaining members of the governing body.23 Prior to the 1993 recodification, city and town council members had the authority to fill such vacancies by appointment only if so provided in their charters.24 The enactment of § 24.1-76.1 by the 1975 General Assembly created a separate mechanism for a county to fill a vacancy occurring in the membership of its governing body.

The 1993 recodification resulted in the amendment and recodification of §§ 24.1-76 and 24.1-76.1 at § 24.2-226, dealing only with special elections; and at §§ 24.2-227 and 24.2-228, dealing with interim appointments.25 Section 24.2-226(A) provides that “[a] vacancy in any elected local office ... shall be filled by special election [held at] ... the next ensuing general election ... in November.” The drafting note following § 24.2-226 in the Code Commission report on the recodification of Title 24.1 provides:

The provisions of existing § 24.1-76 A. for interim appointments by circuit judges are moved to proposed § 24.2-227 so that it is clear
that the basic principle of ... [A]rticle 6, Chapter 2 of Title 24.2 is to fill vacancies by election.\textsuperscript{[28]}

The drafting note following § 24.2-227 provides:

Proposed § 24.2-227 is based on existing subdivision A of § 24.1-76. The only significant change in language occurs in the first sentence, where all local governing bodies are excluded from the court’s power to make interim appointments to fill vacancies. This already is the case for vacancies in county governing bodies which occur during a member’s term because existing § 24.1-76.1 authorizes the governing body to make the appointment.\textsuperscript{[27]}

Section 24.1-76.1 clearly was the basis for drafting § 24.2-228, as the drafting note provides:

Proposed § 24.2-228 is based on existing § 24.1-76.1 provisions for counties and makes no substantive change with regard to the governing body’s authority to make an interim appointment when a vacancy occurs during a member’s term in office. The proposed section would expand the governing body’s interim appointment power to include vacancies arising when a member-elect did not qualify.\textsuperscript{[27]}

Under § 24.2-228(A), “[w]hen a vacancy occurs in a local governing body ..., the remaining members ..., within forty-five days of the office becoming vacant, shall appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy.” If the governing body fails to make the appointment within forty-five days, the circuit court must make the appointment.\textsuperscript{[28]}

When it is not clear which of two statutes applies, the more specific statute prevails over the more general.\textsuperscript{[29]} In addition, when statutes provide different procedures on the same subject matter, “the general must give way to the specific.”\textsuperscript{[30]} The more specific statutory provision in the matter of your inquiry is § 2.2-2802. The provisions of Titles 15.2 and 24.2 apply generally, and not specifically, to the situation where an officer involuntarily is called to active military duty. Thus, they do not apply to the facts you present. A fair construction is that when a board member is called to active military duty, the General Assembly provides that a vacancy in his office does not occur until he provides the notice specified in § 2.2-2802. When a member provides such notice, the remaining members of the board must appoint “some suitable person”\textsuperscript{[32]} to perform the duties of the affected member during the period of active military service. Finally, § 2.2-2802 authorizes the appointee to perform the duties of the affected member “during the period the regular officer is engaged in such service,” and no longer.

Therefore, a person appointed as a member on the board of supervisors will serve as a temporary member of the board while the affected member is engaged in active military service. 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.  

CONCLUSION

Accordingly, it is my opinion that the notice specified in § 2.2-2802 is a prerequisite to the appointment by the Cumberland County Board of Supervisors of a temporary replacement member. It is also my opinion that, in the event the notice given by the board member does not request the appointment of a temporary replacement member, the board is not authorized to make such an appointment. It is further my opinion that the position of the affected member on the board is not vacant unless or until he provides the notice. Consequently, neither the board of supervisors nor the circuit court is authorized to make an appointment of a temporary replacement member. Finally, it is my opinion that §§ 24.2-226 and 24.2-228 do not require that a special election be held at the next general election under the facts presented.

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1Any 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).


3Id. at 59.

4Id. at 61 n.7 (citing City of Lynchburg v. Suttenfield, 177 Va. 212, 13 S.E.2d 323 (1941) (interpreting § 290, predecessor to § 2.2-2802)).

5“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 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.

6See, e.g., Chesapeake & Oh. Ry. Co. v. Pulliam, 185 Va. 908, 41 S.E.2d 54 (1947) (holding that statute abolishing contributory negligence as bar to recovery in actions against railroad company for injury or death caused by failure of railroad employees to give statutory warning signals upon approaching grade crossing, and providing that failure of traveler to exercise due care at such crossing “may” be considered in mitigating damages, must be construed as mandatory, rather than permissive, and jury must consider contributory negligence in mitigation of damages).

7See, e.g., Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that statute using “shall” required court to summon nine disinterested freeholders in condemnation case); cf. Ladd v. Lamb, 195 Va. 1031, 1034-36, 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); see also 1986-1987 Op. Va. Att’y Gen. 210, 211 (“shall” frequently is construed to be directory when used to specify time within which public official is to act); 17 MICHIE’S JUR. Statutes § 60, at 436-37 (1994).

8See 1950 Va. Acts ch. 173, at 242, 242-43 (adding § 2-27.1 to Title 2, providing that county officer voluntarily or otherwise entering war service “may” notify body authorized to fill vacancies).


10Id. at 59 (fulfilling duties as treasurer of New Kent County while serving as member of United States Army Reserve stationed in Suffolk).


12See VA. CODE ANN. § 15.2-1400(A) (LexisNexis Repl. Vol. 2003) (providing that qualified voters shall elect governing body for each locality).


See 1975 Va. Acts ch. 515, at 1042, 1053 (adding § 24.1-76.1 (codified as amended at § 24.2-228)).


Issues Presented

You ask whether a legislative caucus is a “public body” as that term is defined in The Virginia Freedom of Information Act. You next ask whether the notice and open meeting requirements for public meetings set forth in the Act apply to meetings of legislative caucuses. Finally, you ask whether the discussion of expected votes on matters pending before the General Assembly constitutes “the discussion or transaction of any public business” as that phrase is used in § 2.2-3707(G) of the Act.

Response

It is my opinion that the discussion of expected votes on matters pending before the General Assembly constitutes the discussion or transaction of public business. Consequently, it is my opinion that an informal assemblage of three or more legislators at a meeting prearranged or called for the purpose of discussing expected votes on matters pending before the General Assembly constitutes a meeting under The Virginia Freedom of Information Act, requiring that such a meeting be open to the public. I note, however, that an informal assemblage of three or more legislators under certain circumstances, as discussed in this opinion, does not require such an assemblage to be open to the public. It is further my opinion that a legislative caucus is not a “public body” as that term is defined in § 2.2-3701 of the Act. It is also my opinion that since a legislative caucus is not a public body, the notice and open meeting requirements of the Act do not apply to such organizations.

Applicable Law and Discussion

Enacted in 1968, The Virginia Freedom of Information Act “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein
the business of the people is being conducted. Section 2.2-3700(B) of the Act states the policy of the Commonwealth that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Moreover, the Act shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to ... meetings shall be narrowly construed and no ... meeting closed to the public unless specifically made exempt pursuant to [the Act] or other specific provision of law.

You ask three questions concerning the application of The Virginia Freedom of Information Act to legislative caucuses organized by the Republican and Democratic members of the General Assembly. I find no prior opinions of this Office directly answering these questions. Since the Act was enacted thirty-six years ago, it is surprising this specific issue has not previously been addressed.

I note that in June 2002, the executive director of the Virginia Freedom of Information Advisory Council, which you formerly chaired, provided members of the Council a memorandum outlining the issues involved regarding the application of the Act to legislative caucuses. The memorandum indicates that "this is a very complex issue and one that should not be decided without considerable deliberation." Unfortunately, you do not provide facts with your request that may be applied to the statutory requirements of the Act. Consequently, I am required to make certain assumptions based upon my own knowledge of the legislative process and organization of the Republican and Democratic caucuses.

You ask whether a legislative caucus is a "public body" as that term is defined in The Virginia Freedom of Information Act. Section 2.2-3701 of the Act defines "public body" to mean

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth ...; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include ... any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members.

A private entity may be considered a public body if it receives substantial support from public funds. Although you indicate that the Republican and Democratic caucuses regularly meet during the legislative session and occasionally throughout the year, you do not provide specifics concerning their organization, funding, or the purposes of such meetings. I do not find where either caucus is wholly or principally supported by public funds. Additionally, neither caucus is created by a public body, e.g., the General
Assembly. A legislative caucus does not perform a delegated function of, nor does it officially advise, a public body.

The Virginia Freedom of Information Act is “liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” The purpose of the Act is to promote the public policy of conducting the business of government in the public eye. Certain functions of a legislative caucus, however, are unrelated to matters pending before the General Assembly.

It is my understanding that legislative caucuses perform many functions, most of which are politically based. The basic purpose of a legislative caucus is to maintain or attain political majority status. For instance, legislative caucuses raise money to fund legislative campaigns for the House of Delegates and Senate, pay staff, and conduct other political activities. None of these functions may be interpreted to constitute a function of the General Assembly. Instead, legislative caucuses are associations of individuals, elected to either body of the General Assembly, that are organized for purely political purposes. Neither the Republican nor the Democratic caucus has the ability to conduct public business or officially advise the General Assembly. In addition, neither caucus is supported wholly or principally by public funds. Accordingly, I must conclude that such organizations are not public bodies within the meaning of § 2.2-3701.

You next ask whether the notice and open meeting requirements for public meetings set forth in The Virginia Freedom of Information Act apply to meetings of legislative caucuses. Section 2.2-3707(A) of the Act provides that “[a]ll meetings of public bodies shall be open, except as provided in § 2.2-3711.” Section 2.2-3707(C) requires public bodies to “give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted.” Such notices “shall be posted at least three working days prior to the meeting.” In concluding that legislative caucuses are not public bodies, I must also conclude they are not subject to the notice and open meeting requirements of § 2.2-3707(A) and (C).

Finally, you note that § 2.2-3707(G) allows “the gathering or attendance of two or more members of a public body … at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business.” You ask whether the discussion of expected votes on matters pending before the General Assembly constitutes “the discussion or transaction of any public business” as that phrase is used in § 2.2-3707(G).

Section 2.2-3701 defines “meeting” to include “sitting physically, … as an informal assemblage … as many as three members …, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.” When three or more legislators are assembled formally or informally, a meeting under the definition of § 2.2-3701 occurs.
Section 2.2-3707(G) provides:

Nothing in [the Act] shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting. The notice provisions of [the Act] shall not apply to informal meetings or gatherings of the members of the General Assembly. [Emphasis added.]

Section 2.2-3707(G) is often referred to as the “bump in” or “chance” meeting provision of the Act. The applicability of § 2.2-3707(G), however, does not require an informal meeting of members of a public body to be random. In essence, § 2.2-3707(G) recognizes that members of public bodies may be at the same social engagement, political event, community forum, or like events. It is an accepted principle of statutory construction that statutes be read in pari materia in order to give full force and effect to each provision. A statute is construed to promote the legislative purpose. Section 2.2-3707(G) must be read in conjunction with the general definition of “meeting” in § 2.2-3701. When read together, these two sections allow legislators to meet informally without implicating the definition of a “meeting” provided in § 2.2-3701 if (i) the meeting is not prearranged with the purpose of discussing or transacting public business, and (ii) there is no discussion or transaction of public business of the public body.

The notice provisions of The Virginia Freedom of Information Act “shall not apply to informal meetings or gatherings of the members of the General Assembly.” This language indicates that the General Assembly recognizes that it is subject to the Act; otherwise, there would be no need for the exception to the notice requirements. It appears, however, that the General Assembly may not have intended that legislative caucus meetings be subject to the Act. This is evidenced by the longtime practice of the Republican and Democratic legislative caucuses to not open their meetings to the public. I note that soon after becoming the minority party in the legislature, the Democratic legislative caucus voluntarily opened its meetings. In noting the long-standing practice of the two caucuses, however, it is evident that neither has operated under the belief that it was or is subject to the Act. Regardless, the plain language of the Act does not exempt General Assembly members from its provisions.

While I conclude that legislative caucuses are not public bodies under the Act, the meetings of such caucuses, under certain circumstances, are subject to the open meeting requirements of the Act. This determination is based, not on the status of the caucus
as an organization, but rather upon the assemblage of three or more legislators. When three or more legislators are assembled to discuss expected votes on matters pending before the General Assembly, a “meeting” occurs under the Act. When three or more legislators are assembled informally, however, and “no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the [General Assembly],” such informal assemblages do not implicate the open meeting requirements of the Act.

As indicated, not every assemblage of three or more legislators is subject to the open meeting requirements of the Act. Certain caucus meetings may be prearranged and called for purposes other than discussing expected votes on matters before the General Assembly. The determination in any particular circumstance is fact dependent. Your question assumes a bright line test that may be applied in any given circumstance without providing any supporting factual information upon which to draw a conclusion.

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. I may provide, however, a broad outline of the spectrum of situations that do and do not implicate the open meeting requirements of the Act. The Attorney General previously determined that a conference to prepare for litigation held by three members of a city council and the attorney representing the city did not constitute a public meeting, because the members were not gathered as an entity or even informal assemblage, and because of the absence of the deliberation of policy and the absence of preparation for the taking of action by the city council. When public business before the body upon which the public official serves is discussed by three or more members of the public body at an informal assemblage, then the open meeting requirements of the Act are implicated. Consequently, I must conclude that the discussion of expected votes by legislators in a caucus meeting attended by three or more legislators on matters pending before the General Assembly constitutes the deliberation of policy and the preparation for the taking of action by the General Assembly.

A gathering of caucus members, however, to discuss purely political considerations may not, in some instances, implicate the discussion of expected votes on matters pending before the General Assembly. Although a legislator is a member of a legislative caucus by virtue of his election to the General Assembly, his membership in such caucus, at times, is distinct from his role as a legislator. As indicated earlier, a legislative caucus does not exist to transact public business. It cannot bind the entire legislature nor can it conduct public business. A legislative caucus exists to maintain or attain political majority status. This is accomplished through several methods. Chief among those methods is advocating the election of other like-minded individuals to the General Assembly.
There may be occasions where legislators meet to discuss purely political issues, such as how to expend the privately raised funds of the caucus. On other occasions, a caucus may meet to discuss personnel issues or to select the officers of the organization. In each of these instances, it cannot be said that there is the discussion of public business that is before the General Assembly.

There are many scenarios, however, that fall into a gray area that is fact dependent. As you can see from this discussion, and as acknowledged by the Virginia Freedom of Information Advisory Council, the considerations involved in this issue are numerous and complex. The issue is not as clear cut as some assert. In each instance, whether an informal assemblage of legislators under the auspices of a “caucus” meeting is required to be open is fact dependent. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law. As such, I am unable to opine as a general matter, given the lack of specifics with your request. Absent clarifying legislation, this opinion is meant to offer at least a broad outline of the considerations involved in determining whether certain meetings or assemblages of legislators are required to be open to the public. Ultimately, whether any specific assemblage or meeting of three or more legislators is required to be open to the public will turn on the facts surrounding each such event.

CONCLUSION

Accordingly, it is my opinion that the discussion of expected votes on matters pending before the General Assembly constitutes the discussion or transaction of public business. Consequently, it is my opinion that an informal assemblage of three or more legislators at a meeting prearranged or called for the purpose of discussing expected votes on matters pending before the General Assembly constitutes a meeting under The Virginia Freedom of Information Act, requiring that such a meeting be open to the public. I note, however, that an informal assemblage of three or more legislators under certain circumstances, as discussed in this opinion, does not require such an assemblage to be open to the public. It is further my opinion that a legislative caucus is not a “public body” as that term is defined in § 2.2-3701 of the Act. It is also my opinion that since a legislative caucus is not a public body, the notice and open meeting requirements of the Act do not apply to such organizations.

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1 Please note that this opinion is based on certain assumptions as detailed herein. Additionally, when using the phrase “legislative caucus,” I am referring only to those entities organized by members of the General Assembly.


3 Section 2.2-3700(B) (LexisNexis Supp. 2003).

4 Id.

Acts chs. 26, 75, at 26, 78, respectively, and 2000 Va. Acts. chs. 917, 987, at 1966, 1968, 2192, 2193, respectively (providing in clause 2 that "the provisions of this act shall expire on July 1, 2002").

See memorandum from Maria J.K. Everett, Executive Director, to Members of the Virginia Freedom of Information Advisory Council (June 4, 2002) (on file with Council).


Section 2.2-3700(B).

Section 2.2-3711(A) lists thirty-one purposes for which a public body may hold a closed meeting.

Section 2.2-3707(C) (LexisNexis Repl. Vol. 2001).


See Op. Va. Freedom of Info. Advisory Council AO-02-02, at 2 (Mar. 1, 2002) ("Whether the three members of the public body may gather at a private meeting without the private meeting becoming a meeting under FOIA hinges on whether the members of the public body 'discussed' or 'transacted' public business and whether such gathering was prearranged to discuss or transact public business."); at http://dls.state.va.us/groups/foiacouncil/ops/02/AO_02.htm; see also Op. Va. Freedom of Info. Advisory Council: AO-46-01, at 2 (Oct. 5, 2001) ("[T]he procedural requirements for conducting a meeting would not be invoked if three or more members attended a function that was not arranged for the purpose of discussing or transacting public business, so long as no public business is actually discussed."); at http://dls.state.va.us/groups/foiacouncil/ops/01/AO_46.htm; AO-40-01, at 1 (Aug. 23, 2001) ("FOIA does allow members of a public body to gather and discuss issues not related to the public business without invoking the requirements of FOIA."); at http://dls.state.va.us/groups/foiacouncil/ops/01/AO_40.htm.

Section 2.2-3707(G).

In addition, § 2.2-3707(I) provides that "[m]inutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly."

Section 2.2-3701 (LexisNexis Supp. 2003) (defining "meeting"). But see § 2.2-3707(G).

Section 2.2-3707(G).


The discussion of political strategy, i.e., where to position the opposition during a legislative session or how to extract partisan gain on an issue, may not, under certain circumstances constitute the discussion or transaction of public business as contemplated by the Act. Any such determination, however, is fact dependent as previously noted in this opinion.

See supra note 6 and accompanying text.


See supra note 1.

OP. NO. 03-034

BOUNDARIES, JURISDICTION AND EMBLEMS: JURISDICTION OVER LANDS ACQUIRED BY THE UNITED STATES.

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT.
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS.

Virginia courts have jurisdiction to issue and enforce orders pursuant to Juvenile and Domestic Relations District Law for child-protective services cases arising within boundaries of United States Naval Weapons Station. York-Poquoson Department of Social Services is obligated to provide child welfare services within the Naval Weapons Station, including removal and protective orders. Department and local courts shall apply Virginia's current abuse and neglect law. Local courts may order social workers to enter Naval Weapons Station to perform home studies and conduct investigations regarding allegations of abuse, neglect, or delinquency. Any enforcement measures, however, must comply with security requirements of Naval Weapons Station.

MR. JAMES E. BARNETT
COUNTY ATTORNEY FOR YORK COUNTY
MARCH 3, 2004

ISSUES PRESENTED

You inquire concerning the obligation of the York-Poquoson Department of Social Services to provide child-protective services within the United States Naval Weapons Station, a federal enclave located partly in York County. Specifically, you inquire (1) whether Virginia courts have jurisdiction to issue and enforce orders pursuant to Chapter 11 of Title 16.1 and Title 63.2 for child-protective services cases arising within the boundaries of the Naval Weapons Station; (2) whether the York-Poquoson Department of Social Services is obligated to provide child welfare services, including removal and protective orders, within the Naval Weapons Station; (3) whether state courts should apply current child-protective services statutes or those statutes in effect at the time the Commonwealth deeded the Naval Weapons Station property to the United States; and (4) whether state courts may order social workers to enter onto the Naval Weapons Station to perform home studies and conduct investigations regarding allegations of child abuse and neglect.

RESPONSE

It is my opinion that (1) Virginia courts have jurisdiction to issue and enforce orders pursuant to Chapter 11 of Title 16.1 and Title 63.2 for child-protective services cases arising within the boundaries of the United States Naval Weapons Station; (2) the York-Poquoson Department of Social Services is obligated to provide child welfare services within the Naval Weapons Station, including removal and protective orders; (3) the York-Poquoson Department of Social Services and local courts shall apply current abuse and neglect statutes; and (4) local courts may order social workers to enter the Naval Weapons Station to perform home studies and conduct investigations regarding allegations of abuse, neglect, or delinquency. Any enforcement measures, however, must comply with the security requirements of the Naval Weapons Station.

BACKGROUND

The United States Naval Weapons Station occupies 10,624 acres in the counties of York and James City and the city of Newport News. On April 1, 1953, the United States and the Commonwealth entered into a Deed of Cession transferring to the Naval Weapons Station an
additional 500.90 acres, over which the United States has exclusive jurisdiction. The Deed of Cession includes land in York County.

You relate that Attorneys General in other states have issued opinions concerning whether local child-protective services agencies have jurisdiction to enter and investigate child abuse and neglect cases on military bases. The Attorneys General of South Carolina, Kansas, and Oklahoma have issued opinions concluding that “state child abuse laws are applicable in areas of exclusive federal jurisdiction.” In an unofficial opinion, however, the Attorney General of Georgia has stated that a juvenile court has no jurisdiction over juveniles who allegedly have committed delinquent acts on military bases. This Office previously has determined that the United States has exclusive jurisdiction over all property comprising the Naval Weapons Station.

You also include a letter from the Department of the Navy supporting the position that local departments of social services and juvenile and domestic relations district courts have jurisdiction to investigate and issue orders pertaining to child abuse and neglect of children in Navy housing areas.

**APPLICABLE LAW AND DISCUSSION**

Article I, Section 8, Clause 17 of the Constitution of the United States provides that Congress is empowered

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.

Traditionally, the federal government exercises exclusive jurisdiction over persons residing within a federal enclave. The field of domestic relations, including the adjudication of custody of an abused and neglected child, however, is under the purview of the states. It is understood that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” The Supreme Court of the United States has stated:

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim.

This reasoning does not conflict with exclusive federal jurisdiction over a federal enclave, since a state may exercise its power over federal areas within its boundaries, provided there is no interference with jurisdiction asserted by the United States.
This reasoning is similar to that adopted in a 1963 Supreme Court case invalidating California's milk price-fixing regulations as applied to purchases of milk for military consumption or for resale at federal commissaries. The Court reasoned that the state regulations conflicted with federal statutes and regulations governing the procurement, with appropriated funds, of goods for the Armed Services. The Court did not rule out, however, that state law might apply in those areas under exclusive jurisdiction:

Yet if there were price control of milk at the time of the acquisition [by cession] and the same basic scheme has been in effect since that time, we fail to see why the current one, albeit in the form of different regulations, would not reach those purchases and sales of milk on the federal enclave made from nonappropriated funds. Congress could provide otherwise and has done so as respects purchases and sales of milk from appropriated funds. But since there is no conflicting federal policy concerning purchases and sales from nonappropriated funds, we conclude that the current price controls over milk are applicable to these sales, provided the basic state law authorizing such control has been in effect since the times of these various acquisitions.

Thus, state law may apply in those areas under exclusive federal jurisdiction, if there is no conflicting federal policy, and the state law in question is the same “basic state law” that was in effect when the property was ceded to the federal government.

Although courts have held that issues involving domestic relations fall under the purview of the states, Congress has enacted several laws addressing child abuse and neglect and domestic relations. For example, § 620 of the Social Security Act authorizes grants to the states for “establishing, extending, and strengthening child welfare services.” The Act defines “child welfare services” as “public social services which are directed toward the accomplishment of ... protecting and promoting the welfare of all children” and “preventing ... the neglect, abuse, exploitation, or delinquency of children.” To qualify for funds allotted under the Social Security Act, a state must demonstrate that it has “a plan for child welfare services which has been developed jointly by the Secretary [of Health and Human Services] and the State agency.”

Similarly, § 5106a of the Child Abuse Prevention and Treatment Act provides grants to states that develop child abuse and neglect prevention and treatment programs. To qualify, a state must have a plan for child welfare services that includes

(i) provisions or procedures for the reporting of known and suspected instances of child abuse and neglect;

....

(iv) procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports; [and]

....

(vi) procedures for immediate steps to be taken to ensure and protect the safety of the abused or neglected child and of any other child
under the same care who may also be in danger of abuse or neglect and ensuring their placement in a safe environment[...]

In addition, the Adoption and Safe Families Act of 1997 places many requirements on a state welfare agency regarding adoption and the placement of children in foster care. All branches of the Armed Forces have implemented the Family Advocacy Program to provide a “continuous effort to reduce and eliminate child and spouse abuse.” The Family Advocacy Program assists with counseling, prevention, and victim safety, but does not have investigative or enforcement authority. Moreover, the Department of the Navy and the Family Advocacy Program actively seek child-protective services from the York-Poquoson Department of Social Services.

Chapter 15 of Title 63.2 governs child abuse and neglect in Virginia. Section 16.1-241(A)(1) grants juvenile courts exclusive original jurisdiction over “[t]he custody, visitation, support, control or disposition of a child” “alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent except where the jurisdiction of the juvenile court has been terminated or divested.” Section 63.2-1505 requires that local departments of social services investigate allegations of child abuse and neglect, which requires investigations by local departments of social services into allegations of abuse and neglect. Federal law requires states to provide basic child welfare services to qualify for funds to combat abuse and neglect. The purpose of Virginia’s child welfare laws is to protect children against abuse and neglect. Moreover, the Department of Defense requires local Family Advocacy Program offices to notify the local public child-protective services agencies in cases of child abuse and neglect. Thus, it appears that federal law does not conflict with Virginia law governing child abuse and neglect. Rather, “[a]ccommodation and cooperation are their aim.”

Prior to enforcing state law in areas with exclusive federal jurisdiction, the basic statutory scheme must have been in effect when the property was transferred to the federal government. A review of the state law in place at the time the property was ceded from the state to the federal government demonstrates that the same “basic scheme” remains in place. The same “basic scheme” does not require that the same statutes were in effect at the time of cession, but, rather, that the “basic scheme” determines the reach of state authority. At the time of the land transfer, the state possessed the authority under Chapter 12 of Title 63 to take custody and to make and enter orders for the protection of neglected children. Chapter 12 of Title 63 also granted juvenile courts exclusive original jurisdiction over child neglect matters. This power has since been recodified at Chapter 11 of Title 16.1. As noted previously, Virginia’s laws governing child abuse and neglect are codified at Chapter 15 of Title 63.2. The paramount goal of these laws has been the welfare of children, and the same holds true today. Although these laws have changed over the years, the basic scheme of investigating, protecting, and taking custody of abused and neglected children remains firmly in place. Therefore, given that the basic statutory scheme was in place at cession and that federal law leaves child protection and safety to the state, it is my opinion...
that the York-Poquoson Department of Social Services is obligated to provide child
welfare services within the boundaries of the Naval Weapons Station.

Finally, you ask whether state courts may order social workers to enter the Naval
Weapons Station to perform home studies and conduct investigations of allegations of
child abuse and neglect. I conclude that the courts may do so. Having determined that
state law regulates and enforces child protection within the Naval Weapons Station,
the state courts must be able to use the tools necessary to provide such enforcement.
Such enforcement measures, however, must necessarily comply with the basic security
requirements of the Naval Weapons Station.

CONCLUSION

Accordingly, it is my opinion that (1) Virginia courts have jurisdiction to issue and
enforce orders pursuant to Chapter 11 of Title 16.1 and Title 63.2 for child-protective
services cases arising within the boundaries of the United States Naval Weapons
Station; (2) the York-Poquoson Department of Social Services is obligated to provide
child welfare services within the Naval Weapons Station, including removal and
protective orders; (3) the York-Poquoson Department of Social Services and local
courts shall apply current abuse and neglect statutes; and (4) local courts may order
social workers to enter the Naval Weapons Station to perform home studies and
conduct investigations regarding allegations of abuse, neglect, or delinquency.

Any enforcement measures, however, must comply with the security requirements of
the Naval Weapons Station.

1 See U.S. Envtl. Prot. Agency, Mid-Atlantic Hazardous Site Cleanup, Current Site Information, Naval
Weapons Station – Yorktown, Site Description, at http://www.epa.gov/reg3hwmd/super/VA/ naval-yorktown/
pad.htm (last visited Feb. 17, 2004); Naval Weapons Station (NAVWPNSSTA), Yorktown, Virginia, at

2 See id.; see also 1918 Va. Acts ch. 382, at 568 (providing authority to cede to United States exclusive
jurisdiction over certain lands acquired for public purposes within State of Virginia).

3 You provide with your request a partial copy of the “Deed of Cession” dated April 1, 1953. The certificate
of recordation for the Deed of Cession is not attached. Therefore, I may not comment on the site of the
recordation of the instrument. The Deed of Cession references the U.S. Naval Mine Depot, Yorktown,
Virginia. The Naval Weapons Station originally was commissioned as the U.S. Mine Depot, Yorktown, on
July 1, 1918, and on August 7, 1958, was redesignated as the U.S. Naval Weapons Station, Yorktown. See
Naval Weapons Station (NAVWPNSSTA) Website, supra note 1.

4 See also VA. CODE ANN. § 7.1-21 (Michie Repl. Vol. 1999) (authorizing Commonwealth to cede additional
jurisdiction over lands to United States)). The Deed of Cession, however, provides that the Commonwealth
reserves jurisdiction and power concurrent with the United States in the 500.90 acres ceded to the United
States “to serve civil and criminal process, issuing under the authority of the Commonwealth, by the proper
officers of the Commonwealth or its political subdivisions, upon any person amenable to the same within
the limits of the . . . described land.” See also § 7.1-18.1(C) (Michie Repl. Vol. 1999).

5 In Virginia, each local department of social services is the public agency responsible for establishing
child-protective services and identifying, receiving, and responding to “complaints and reports of alleged
child abuse or neglect for children under 18 years of age.” VA. CODE ANN. § 63.2-100 (LexisNexis Supp.
The deputy sheriff has authority to act pursuant to Child Protection Act as to situations of abuse and neglect occurring on military reservations (citing 1981 Kan. AG LEXIS 277; 1978 Okla. AG LEXIS 103).


"Reno v. Flores, 507 U.S. 292, 310 (1993) (noting that states possess “special proficiency” in field of domestic relations, including child custody)."


Id.

Id. at 269.


42 U.S.C.A. § 5106a(b)(2)(A) (West 2003); see also § 622 (setting forth requirements for developing state plans for child welfare services).

"See supra note 25."
See supra note 26 and accompanying text; see also § 16.1-227 (stating intention of Juvenile and Domestic Relations District Court Law "that in all proceedings the welfare of the child ... [is] the paramount concern[ ] of the Commonwealth").

"The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government." Howard, 344 U.S. at 627. Where, as is the case here, the federal government intends state action, it concedes to the state the power to enforce such action.

Please note, however, that in the interest of national security, child-protective services investigators should work closely with the Navy's Family Advocacy Program to gain access to the Naval Weapons Station. In the case of Navy housing at the Naval Weapons Station, however, such buildings are not in restricted areas.

OP. NO. 04-028
CIVIL REMEDIES AND PROCEDURE: CERTAIN INCIDENTS OF TRIAL (JUDGMENT OR DECEDE FOR INTEREST).

 costs of recovery, such as court costs and attorneys' fees; legal or contractual interest accrued prior to judgment; and statutory penalties for nonpayment of debt generally are not included in term 'principal sum awarded' and do not accrue interest.

THE HONORABLE BARBARA J. GADEN
JUDGE, CITY OF RICHMOND GENERAL DISTRICT COURT
AUGUST 2, 2004

ISSUE PRESENTED
You ask whether the term "principal sum awarded," as used in § 8.01-382, includes not only the original amount of the obligation sought to be recovered, but also the costs of recovery, such as court costs and attorneys' fees. You further ask whether the term includes legal or contractual interest accrued prior to judgment; and finally, you ask whether "principal sum awarded" includes statutory penalties imposed for nonpayment of debt. Section 8.01-382 generally provides that "interest on any principal sum awarded" may be awarded in actions at law or suits in equity.

RESPONSE
It is my opinion that costs of recovery, such as court costs and attorneys' fees; legal or contractual interest accrued prior to judgment; and statutory penalties imposed for nonpayment of debt are not included in the term "principal sum awarded," and, therefore, do not accrue interest pursuant to § 8.01-382.

APPLICABLE LAW AND DISCUSSION
The first sentence of § 8.01-382 provides that, "[i]n any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence."

1. COSTS AND ATTORNEYS' FEES TYPICALLY DO NOT ACCRUE INTEREST
You ask how to determine the meaning of the term "costs." The term "costs" is not defined in the Virginia Code; however, the Court of Appeals of Virginia has defined "costs" as
“[a] pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action. Generally, ‘costs’ do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case.”

As a general rule, interest will not be allowed on an amount recovered as costs, as no statute in Virginia permits the accrual of interest on court costs. In Virginia, “[t]he general principle is, that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, ‘as an increase of damages by the court.’” A 1991 opinion of the Attorney General addresses the issue whether interest accrues on court costs or attorneys’ fees. The prior opinion determined that interest does not accrue on either attorneys’ fees or other costs awarded on a judgment for the balance of a note. The 1991 opinion also states that there is no express statutory provision for the accrual of interest on either costs or attorneys’ fees awarded to the prevailing party in any type of action.

In light of the foregoing, it is my opinion that neither costs nor attorneys’ fees are included in the “principal sum awarded,” to which interest is applicable under § 8.01-382.

2. LEGAL OR CONTRACTUAL INTEREST ACCRUED PRIOR TO JUDGMENT DOES NOT ACCRUE POSTJUDGMENT INTEREST

You also ask whether legal or contractual interest accrued prior to judgment is part of the “principal sum awarded.” No express statutory authority provides for the accrual of interest on legal or contractual interest accrued prior to judgment. As a general principal, interest should not bear interest absent such an expression of legislative intent. Moreover, “[t]he interest the law allows on judgments is not an element of ‘damages’ but a statutory award for delay in the payment of money due.” As a result, allowing postjudgment interest also to accrue on an award of prior interest would permit the compounding of interest and, therefore, provide an inappropriate windfall to the prevailing party. It is my opinion, therefore, that postjudgment interest generally does not accrue on prejudgment interest, regardless of whether such prejudgment interest is legal or contractual in nature.

3. STATUTORY PENALTIES IMPOSED FOR NONPAYMENT OF DEBT DO NOT ACCRUE INTEREST

Finally, you ask whether “principal sum awarded” includes statutory penalties imposed for nonpayment of debt. No express statutory authority provides for the accrual of interest on statutory penalties imposed for nonpayment of a particular debt. Moreover, I have not found any relevant Virginia case law or other authority addressing this issue. Similar to costs, attorneys’ fees and prejudgment interest, however, such penalties do not appear to be part of the “principal sum awarded.”
"statutory penalty" is defined generally as “[a] penalty imposed for a statutory violation; especially, a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered.” Since such penalties are separate and distinct from the “principal sum” awarded, i.e., damages, it is my opinion that “statutory penalty” amounts are not included in the term “principal sum awarded” and, therefore, do not accrue interest pursuant to § 8.01-382.

Notwithstanding the foregoing, interest may accrue on attorneys’ fees, court costs and/or penalties imposed by statute if such are expressly included in the “judgment” pursuant to statute and/or other applicable authority. For example, interest may accrue on unpaid fines and costs in certain criminal matters.

CONCLUSION

Accordingly, it is my opinion that costs of recovery, such as court costs and attorneys’ fees; legal or contractual interest accrued prior to judgment; and statutory penalties imposed for nonpayment of debt generally are not included in the term “principal sum awarded” and therefore do not accrue interest pursuant to § 8.01-382.

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1 O’Loughlin v. O’Loughlin, 23 Va. App. 690, 693, 479 S.E.2d 98, 99 (1996) (quoting BLACK’S LAW DICTIONARY 312 (5th ed. 1979)). Section 17.1-624 denominates an attorney’s fees as costs, insofar as it directs a clerk of court to assess costs against the nonprevailing party in certain types of cases and to “include therein … the fee of such party’s attorney, if he has one.” See 1991 Op. Va. Att’y Gen. 23, 24 (citing § 14.1-196, predecessor to § 17.1-624).

2 Ashworth v. Tranwell, 102 Va. 852, 859, 47 S.E. 1011, 1013 (1904) (citation omitted).

3 Scott v. Dougherty, 130 Va. 523, 527, 107 S.E. 729, 730 (1921). An exception to this general rule occurs when a party against whom costs have been assessed enjoins the collection of the judgment on grounds that do not affect its validity or furnish any foundation for restraining the plaintiff prosecuting to judgment his claim. See Shipman v. Fletcher’s Adm’r, 95 Va. 585, 589-91, 29 S.E. 325, 327 (1898). While it may be proper to stay payment of the judgment in such instances, the nonprevailing party would be liable for interest on the assessed costs from the time the injunction was granted. See id. at 591, 29 S.E. at 327.


6 Id. at 24. The 1991 opinion distinguishes judgment entered for the balance of the note (i.e., “principal sum awarded”) from the court’s ability to “tax” court costs and attorney fees in addition thereto. Id. at 23-24. The opinion discerns that interest accrues on the former, and not the latter. Id. The opinion also assumes that the note itself was silent regarding whether interest accrues on an award of court costs or attorney fees. Id. at 23.

7 Id. at 24.


10 BLACK’S LAW DICTIONARY 1154 (7th ed. 1999).

11 While statutory penalties are not subject to post or prejudgment interest, statutory damages can be. Statutory penalties are wholly punitive in nature and aimed at punishment. Id. Statutory damages, however, may be compensatory in nature and aimed at compensating defendants for damages incurred. See Feltner v. Columbia Pictures Telev., Inc., 523 U.S. 340, 352 (1998). The term “principal sum” includes damages. See Air Separation v. Underwriters at Lloyd’s of London, 45 F.3d 288, 291 (9th Cir. 1995) (interpreting...
Thus, a principal sum can encompass monetary sums awarded based on a statutory damage provision. See Sid & Marty Krofft Telev. Prods., Inc. v. McDonald’s Corp., 1983 U.S. Dist. LEXIS 20074, at *18 (C.D. Cal. Jan. 12, 1983) (awarding defendant postjudgment interest on $1,044,000 judgment based on statutory damage provision).


OP. NO. 04-061
CONSERVATION: BROWNFIELD RESTORATION AND LAND RENEWAL ACT.

Purchase of environmentally contaminated property by Shenandoah County at delinquent tax sale may constitute involuntary transfer or acquisition, qualifying county for protection from liability, provided county meets statutory conditions prescribed for ‘innocent land owner.’ Liability protection afforded Shenandoah County, or third party with knowledge of contamination, as ‘bona fide prospective purchaser,’ provided county or third party meets statutory conditions prescribed for such purchaser.

MR. DONALD D. LITTEN
COUNTY ATTORNEY FOR SHENANDOAH COUNTY
SEPTEMBER 7, 2004

ISSUES PRESENTED

You ask several questions regarding the sale of environmentally contaminated property for delinquent taxes and the potential liability of purchasers. Specifically, you ask (1) whether Shenandoah County’s purchase of such property at its delinquent tax sale would constitute an involuntary transfer or acquisition, such that the county would be protected from liability under § 10.1-1234(C)(v)(b); (2) whether the county would be protected from liability under § 10.1-1234(B) as a “bona fide prospective purchaser” if the county purchases the property, regardless of whether the transfer is involuntary; and (3) whether a third party, who purchases the real estate, knowing the property’s environmental conditions, would be protected from liability as a “bona fide prospective purchaser” under § 10.1-1234(B).

RESPONSE

It is my opinion that the purchase of environmentally contaminated property by Shenandoah County at its delinquent tax sale may constitute an involuntary transfer or acquisition and thereby qualify the county for protection from liability under § 10.1-1234(C), provided the county meets all conditions set forth in clauses (i) through (v) of that section and the site is not subject to the Resource Conservation and Recovery Act. It is further my opinion that § 10.1-1234(B) would provide liability protection to Shenandoah County, or a third party with knowledge of the contamination, as a “bona fide prospective purchaser,” provided the county or third party meets the conditions described in clauses (i) through (iv) of that section, and the site is not subject to the Resource Conservation and Recovery Act.

BACKGROUND

You present a scenario wherein Shenandoah County institutes a proper proceeding to sell real estate for the payment of delinquent real estate taxes. You relate that the
property is environmentally contaminated with hazardous materials. You do not provide any information regarding the types of activity that have taken place on the described property, nor is there any information as to the owner and/or operator of the property. You state that Shenandoah County not only seeks to sell the property for nonpayment of real estate taxes but also to purchase the contaminated property.

**APPLICABLE LAW AND DISCUSSION**

Article 4, Chapter 39 of Title 58.1, §§ 58.1-3965 through 58.1-3979, sets forth the procedure for selling land for delinquent taxes. Specifically, § 58.1-3965(A) provides:

> When any taxes on any real estate in a county, city or town are delinquent on December 31 following the second anniversary of the date on which such taxes have become due, or, in the case of real property upon which is situated any structure that has been condemned by the local building official pursuant to applicable law or ordinance, the first anniversary of the date on which such taxes have become due, or, in the case of real estate which is deemed abandoned as provided herein, and the taxes on any real estate are delinquent on December 31 following the second anniversary of the date on which such taxes have become due, such real estate may be sold for the purpose of collecting all delinquent taxes on such property.

Section 58.1-3967 requires that proceedings for the sale of delinquent tax lands shall be by bill in equity filed in the circuit court of the county or city in which the real estate is located, “to subject the real estate to the lien for such delinquent taxes.” Additionally, § 58.1-3970 allows a county to be “a purchaser at any sale [of land] for the enforcement of tax liens.” Shenandoah County clearly has authority to hold a sale of land for delinquent taxes and to purchase the property at the sale.

You ask whether Shenandoah County will incur any liability for cleanup of the environmentally contaminated property it purchases.

On December 11, 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). “As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.” CERCLA creates an excise tax on chemical and petroleum industries and provides broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Among other things, CERCLA establishes prohibitions and requirements concerning closed and abandoned hazardous waste sites; provides for liability of persons responsible for releases of hazardous waste at these sites; and establishes a trust fund to provide for cleanup when a liable party cannot be identified.

On January 11, 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act (the “Federal Act”), which amends CERCLA and adds the
following definition of “brownfield site”: “The term “‘brownfield site’” means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” Brownfields also are commonly known as “abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.” In addition to providing funds to assess and clean up brownfield sites and to enhance state response programs, the Federal Act clarifies the CERCLA liability provisions related to purchasers of contaminated properties.  

Chapter 12.1 of Title 10.1, §§ 10.1-1230 through 10.1-1237, comprises the Brownfield Restoration and Land Renewal Act (the “Virginia Act”). Section 10.1-1230 defines “brownfield” as “real property; the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” The Virginia Act is similar to, but is more limited in scope than, the Federal Act.  

Section 10.1-1231 states that “[i]t shall be the policy of the Commonwealth to encourage remediation and restoration of brownfields by removing barriers and providing incentives and assistance whenever possible.” Section 10.1-1234 limits the liability of a “bona fide prospective purchaser,” an “innocent land owner,” and a contiguous property owner who may be responsible for containment or cleanup costs at a brownfield site, if the party meets the statutory elements for the exemption. Section 10.1-1234(B) provides that a “bona fide prospective purchaser” shall not be held liable for a containment or cleanup that may be required at a brownfield site pursuant to the Virginia Waste Management Act (§ 10.1-1400 et seq.), the State Water Control Law (§ 62.1-44.2 et seq.), or the State Air Pollution Control Law (§ 10.1-1300 et seq.) if (i) the person did not cause, contribute, or consent to the release or threatened release, (ii) the person is not liable or potentially liable through any direct or indirect familial relationship or any contractual, corporate, or financial relationship or is not the result of a reorganization of a business entity that was potentially liable, (iii) the person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances, and (iv) the person does not impede the performance of any response action.

Section 10.1-1234(C) provides limitations on liability for an “innocent land owner who holds title, security interest or any other interest in a brownfield site.” Section 10.1-1234(C) tracks the same language in § 10.1-1234(B) through clause (ii) pertaining to liability protection, and designates the language in clause (iii) of § 10.1-1234(B) as clause (iv) of § 10.1-1234(C). Both subsections state that the provisions of § 10.1-1234(B)
and (C) "shall not apply to sites subject to the Resource Conservation and Recovery Act." Section 10.1-1234(C) further provides that an "innocent land owner" shall not be held liable if

(iii) the person made all appropriate inquiries into the previous uses of the facility in accordance with generally accepted good commercial and customary standards and practices, including those established by federal law, ... and (v) the person does not impede the performance of any response action and if either (a) at the time the person acquired the interest, he did not know and had no reason to know that any hazardous substances had been or were likely to have been disposed of on, in, or at the site, or (b) the person is a government entity that acquired the site by escheat or through other involuntary transfer or acquisition.

You relate that the property is contaminated with hazardous materials. You do not specify the previous use of the property. For the purposes of this opinion, I assume that the real estate in question meets the statutory requirements for a brownfield site.

While the Virginia Act does not define that which constitutes an involuntary transfer or acquisition under § 10.1-1234(C)(v)(b), the Department of Environmental Quality has issued a manual that provides some guidance on the issue. Construction of a statute by an agency charged with administration of such statute is entitled to great weight." The manual discusses involuntary acquisitions of brownfield properties by governmental entities. The manual notes that Virginia law provides liability protection as an "innocent landowner" to governmental entities that acquire brownfield properties through involuntary transfer or acquisition. The manual refers to three Environmental Protection Agency documents for clarification on the issue.

In particular, the Environmental Protection Agency published a fact sheet in 1995. The fact sheet recognizes that units of government "sometimes involuntarily acquire contaminated property as a result of performing their governmental duties." The fact sheet describes an "involuntary acquisition" as one where the government's interest in, and ownership of, the property exists "only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property." The fact sheet cites as an example of involuntary acquisition the government's acquisition of property due to a citizen's tax delinquency.

As the Virginia Act closely follows the Federal Act, the involuntary acquisition analysis is the same. In order to be protected from liability under § 10.1-1234(C), however, a governmental entity must also demonstrate that it meets the elements delineated in clauses (i) through (v).

Applying the guidance found in the manual, the fact sheet, and other federal policies addressing involuntary acquisitions by governmental entities, it is my opinion that if the statutory elements are met, the purchase by Shenandoah County at a sale of con-
taminated property for delinquent taxes may constitute an involuntary acquisition. As such, the county may be protected from liability as an “innocent land owner” under § 10.1-1234(C)(v)(b).

You next ask whether § 10.1-1234(B) would protect Shenandoah County from liability as a “bona fide prospective purchaser” if the county purchases the contaminated property at a sale for delinquent taxes, regardless of whether the transfer is involuntary. Section 10.1-1234(C)(v)(b) provides specific liability protection as an “innocent land owner” to a governmental entity that acquires brownfields through escheat or other involuntary transfers or acquisitions. Section 10.1-1234(B), however, is silent as to governmental entities. The term “bona fide prospective purchaser” in § 10.1-1234(B) refers to a “person” who acquires ownership of real property after the release of hazardous substances has occurred. The term “person,” as used in the Virginia Act, includes a “governmental body.” Accordingly, § 10.1-1234(B) contemplates that a governmental body may be considered a person for purposes of the Virginia Act. Thus, a governmental body may qualify as a “bona fide prospective purchaser,” provided it meets all the requirements of § 10.1-1234(B). To qualify for liability protection as a bona fide prospective purchaser, Shenandoah County must meet the statutory definition of a “bona fide prospective purchaser” who has complied with the requirements in § 10.1-1234(B)(i) through (iv).

In the alternative, § 10.1-1234(C)(v)(b) specifically provides liability protection as an “innocent land owner” for governmental entities that acquire property by involuntary transfer or acquisition, so the county need not demonstrate bona fide purchaser status if it is protected from liability as an “innocent land owner.” It is my opinion that § 10.1-1234(C)(v)(b) clearly provides liability protection to Shenandoah County as an “innocent land owner.”

Finally, you ask whether a third party having knowledge of the environmental conditions, who purchases the real estate at a delinquent tax sale, would be protected from liability as a “bona fide prospective purchaser” pursuant to § 10.1-1234(B). It is my opinion that a third party who meets the definition of “bona fide prospective purchaser” may be protected from liability under § 10.1-1234(B).

CONCLUSION

Accordingly, It is my opinion that the purchase of environmentally contaminated property by Shenandoah County at its delinquent tax sale may constitute an involuntary transfer or acquisition and thereby qualify the county for protection from liability under § 10.1-1234(C), provided the county meets all conditions set forth in clauses (i) through (v) of that section and the site is not subject to the Resource Conservation and Recovery Act. It is further my opinion that § 10.1-1234(B) would provide liability protection to Shenandoah County, or a third party with knowledge of the contamination, as a “bona fide prospective purchaser,” provided the county or third party meets the conditions described in clauses (i) through (iv) of that section, and the site is not subject to the Resource Conservation and Recovery Act.
Your request does not specify any type of hazardous material that may be present on the subject real estate. For the purposes of this opinion, I assume that the site is not subject to the Resource Conservation and Recovery Act, as such sites are specifically excluded from the limitations on liability provided by § 10.1-1234(B) and (C). See Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat.) 2795, 2795-2841 (amending Solid Waste Disposal Act) (codified as amended at 42 U.S.C.A. §§ 6901 to 6908a, 6911 to 6917, 6921 to 6939e, 6941 to 6949a, 6951 to 6967, 6971 to 6991i, 6992 to 7000 (West 2003)).

Your request does not specify any type of hazardous material that may be present on the subject real estate. For the purposes of this opinion, I assume that the site is not subject to the Resource Conservation and Recovery Act.


Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994).


See supra note 23, at 1.

Sections 222, 223, 115 Stat. at 2370-74 (defining “bona fide prospective purchaser,” “innocent landowners”) (codified at 42 U.S.C.A. §§ 9601(35), (40), 9607(q)-(r) (West Supp. 2004)).

Compare 42 U.S.C.A. §§ 9601(40) and 9607(r) with Va. Code Ann. § 10.1-1234(B) (LexisNexis Supp. 2004) (pertaining to bona fide prospective purchasers); §§ 9601(35) and 9607(q) with § 10.1-1234(C) (pertaining to innocent landowners).

Section 10.1-1234(B). “Bona fide prospective purchaser” means a person who acquires ownership, or proposes to acquire ownership of, real property after the release of hazardous substances occurred. Section 10.1-1230 (LexisNexis Supp. 2004).

Section 10.1-1234(C). “Innocent land owner” means a person who holds any title, security interest or any other interest in a brownfield site and who acquired ownership of the real property after the release of hazardous substances occurred. Section 10.1-1230.

Section 10.1-1234(D).

See supra note 2.


See id. at 9.
See id.

Id.


18 Id. at 1.

20 See cite supra note 18.

21 See cite supra note 23.

22 See, e.g., memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, United States Environmental Protection Agency, re: Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (June 30, 1997); undated memorandum from Jerry Clifford, Director, Office of Site Remediation Enforcement, and Lawrence E. Starfield, Acting Associate General Counsel, Solid Waste Emergency Response Division, Office of General Counsel, re: Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action.

23 See supra note 1.

24 OP. NO. 04-030

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS).

ELECTIONS: VOTER REGISTRATION.

Homeless residents of Commonwealth may register to vote in locality of Commonwealth, so long as they intend to remain in that locality for unlimited period of time.

THE HONORABLE JANET D. HOWELL
THE HONORABLE LINDA T. PULLER
THE HONORABLE MARY MARGARET WHIPPLE
MEMBERS, SENATE OF VIRGINIA
MAY 19, 2004

ISSUE PRESENTED

You ask whether homeless residents of the Commonwealth may register to vote in a locality of the Commonwealth.

RESPONSE

It is my opinion that homeless residents of the Commonwealth may register to vote in a locality of the Commonwealth, so long as they have an intention to remain in that locality for an unlimited period of time.
BACKGROUND
You observe that the Constitution of Virginia requires voters to be residents of the Commonwealth and of their voting precinct. You also note that the Constitution defines "residence" as domicile and place of abode.

You observe further that a 1992 opinion of the Attorney General concludes that the term "place of abode" should be construed to mean a "dwelling place."

You advise that, according to a 2003 committee report, emergency shelter and transitional housing programs were forced to turn away 46,610 persons during the year due to lack of bed space. As a result, thousands of people may have been without shelter in Virginia throughout the course of the year. You also observe that the lack of available shelter space means that thousands of homeless Virginia residents may not have a "dwelling place," a prerequisite to vote according to the 1992 opinion. You conclude that it appears that "residency" in the Commonwealth requires both domicile and place of abode—a dwelling place—which, if true, means that the homeless in Virginia may be disenfranchised under the current laws of the Commonwealth.

APPLICABLE LAW AND DISCUSSION

Article II, § 1, of the Constitution of Virginia provides:

[E]ach 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.

Section 24.2-400 provides:

Any person who is not registered to vote, but would otherwise be a qualified voter, is entitled to register to vote as provided in [Chapter 4 of Title 24.2]. Any person who is registered to vote and is a qualified voter shall be entitled to vote in the precinct where he resides.

Section 24.2-417 provides:

Each registrar shall register every resident of his county or city who has the qualifications required by the Constitution of Virginia and this title and who applies for registration or transfer of his registration from another county or city in the Commonwealth at the time and in the manner required by law.

Section 24.2-101 states that the term "'residence' or 'resident,'” for purposes of qualifying to register and vote,

means and requires both domicile and a place of abode. In determining domicile, consideration may be given to a person's expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, business pursuits,
employment, income sources, residence for income tax purposes, marital status, residence of parents, spouse and children, if any, leasehold, sites of personal and real property owned by the person, motor vehicle and other personal property registration, and other factors reasonably necessary to determine the qualification of a person to register or vote.

Following the 1992 opinion of the Attorney General, the Supreme Court of Virginia addressed the residency requirements for voter registration in the Commonwealth. In 1996, the Court decided that,

Before an individual can qualify to vote in Virginia, he must be a resident both of the Commonwealth and of the locality in which he seeks to vote. “Residence, for all purposes of qualification to vote, requires both domicile and [a] place of abode.” To establish domicile, a person must live in a particular locality with the intention to remain there for an unlimited time. A place of abode is the physical place where a person dwells.

The Court also determined that, for a voter to retain eligibility to vote in a particular locality, “the voter must continue to dwell in the locality with an intention to remain there for an unlimited time. A registrar may cancel a voter’s registration if that individual does not continue to meet these requirements.” The Court decided the 1996 case squarely on the provisions of Article II, § 1 and § 24.2-417 and, therefore, is binding authority. Consequently, I am required to conclude that homeless residents of the Commonwealth may register to vote in a locality of the Commonwealth, provided they intend to remain in the locality for an unlimited time.

CONCLUSION

Accordingly, it is my opinion that homeless residents of the Commonwealth may register to vote in a locality of the Commonwealth, so long as they have an intention to remain in that locality for an unlimited period of time.

Chapter 4 of Title 24.2, §§ 24.2-400 through 24.2-447, comprises the statutory scheme governing voter registration.

The term “intention” means “[t]he willingness to bring about something planned or foreseen; the state of being set to do something.” BLACK’S LAW DICTIONARY 814 (7th ed. 1999).


Id. (citing § 24.2-429) (citation omitted).

The Registrars Handbook, promulgated and maintained by the State Board of Elections pursuant to § 24.2103, advises local registrars of the Commonwealth to permit the homeless to register to vote “by using the site where they lay their head at night” as their residence. GENERAL REGISTRAR AND ELECTORAL BOARD MANUAL ch. 9, ex. A, at 26 (Aug. 15, 2003) (on file with State Board of Elections).
Supermajority is not required for Charlottesville city council to pass ordinance authorizing sale of approximately 9.2 acres of McIntire Park to Commonwealth for purpose of constructing Meadow Creek Parkway.

MR. S. CRAIG BROWN
CITY ATTORNEY FOR THE CITY OF CHARLOTTESVILLE
APRIL 16, 2004

ISSUES PRESENTED
You ask whether Article VII, § 9 of the Constitution of Virginia and § 15.2-2100(A) require the Charlottesville city council to pass, by three-fourths vote of all council members, an ordinance authorizing the sale of a portion of McIntire Park to the Commonwealth or, in the alternative, granting the Commonwealth an easement, for construction of a proposed parkway that has been requested by the City of Charlottesville.

RESPONSE
It is my opinion that the provisions of Article VII, § 9 and § 15.2-2100 are not invoked under the factual situation you describe. Therefore, a supermajority is not required for the Charlottesville city council to pass an ordinance authorizing the sale of approximately 9.2 acres of McIntire Park to the Commonwealth for the purpose of constructing a portion of Meadow Creek Parkway.

BACKGROUND
You relate that in January 1978, the Charlottesville city council passed a resolution formally requesting that the Department of Transportation establish and fund an urban highway project within the corporate limits of the city. You further relate that the proposed highway will be known as Meadow Creek Parkway. In 1994, the city council unanimously approved the proposed location of the parkway as recommended by the city planning commission. The parkway will traverse McIntire Park, a city-owned and operated park that is devoted both to active and passive public recreational uses traditionally associated with municipal parks. The parkway will intersect approximately 9.2 acres of McIntire Park’s 150 acres. The city’s comprehensive plan includes the parkway, and the Department of Transportation has included the project in its six-year plan for financing and construction. I must assume that the six-year plan to which you refer is that of Albemarle County, because no statutory authority provides for a city in the Commonwealth to adopt such a plan. I also note that the Commonwealth Transportation Board has authority only over roads outside cities.

You advise further that a five-member council elected at large governs the City of Charlottesville. Three council members are willing to sell to the Commonwealth the portion of McIntire Park needed for construction of the parkway. In lieu of a sale, the
three council members are willing to grant an easement of less than 40 years’ duration to the Commonwealth to facilitate the road construction. Two council members support neither the sale nor the transfer of any property rights.

You advise that the city council has requested guidance concerning the process for either selling 9.2 acres of McIntire Park to the Commonwealth, or granting an easement to the Commonwealth for construction of the road.

**APPLICABLE LAW AND DISCUSSION**

Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 impose two distinct restrictions on cities. First, a city may not sell a park without “a recorded affirmative vote of three fourths of all members elected to the governing body.” This requirement applies to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions. Second, the grant of any franchise, lease, or right to use city parks “or any other public property or easement of any description in a manner not permitted to the general public” is limited to forty years in duration.

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

The construction of a constitutional provision by the General Assembly is entitled to consideration, and if the construction is contemporaneous with adoption of the constitutional provision, it is entitled to great weight. In addition, “[I]ong acquiescence in such an announced construction so strengthens it that it should not be changed unless plainly wrong.” The report of the proceedings and debates pertaining to adoption of the 1902 Constitution, specifically § 125, contains a full discussion of the intent and purpose of this provision to safeguard public property and ensure that it not be appropriated by private self-interests for an extended term to the detriment of the public without due consideration by council members.
Based on the foregoing, the clear intent of Article VII, § 9 is to safeguard public property and ensure that it not be appropriated by private self-interests for an extended term to the detriment of the public without due consideration by the governing body. Accordingly, a 1990 opinion of the Attorney General concludes that a city may not grant an easement in perpetuity to a gas company to install a natural gas pipeline across city property. The grant of such an easement permits the use of city property "in a manner not permitted to the general public." Therefore, the City of Charlottesville may not grant an easement in perpetuity. Rather, the easement must be limited to the forty-year term prescribed in Article VII, § 9 and be subject to the advertising and bid provisions therein.

The General Assembly has not amended § 15.2-2100 in any manner that would indicate disagreement with the Attorney General’s conclusion that the intent of the constitutional and statutory provisions is to ensure that private business interests are not favored over the public interests in a city’s public property. The General Assembly is presumed to have knowledge of the Attorney General’s published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation. I must conclude that the numerous prior opinions correctly state the intent of both this statutory and constitutional provision.

The facts you provide do not suggest that a private business interest is being favored over public interests in the proposed sale of city property to the Commonwealth for construction of the parkway. Section 33.1-89(A) authorizes the Commonwealth Transportation Commissioner to acquire property only for the purpose of “construction, reconstruction, alteration, maintenance and repair of the public highways of the Commonwealth.” The acquisition of property for these purposes is a public purpose. The Commonwealth Transportation Commissioner ordinarily cannot take the land of one property owner for the sole purpose of constructing a road for the private use of another. "[W]here … the public purpose is established, the necessity or expediency of a road is a legislative question which has been delegated to the [Department of Transportation]." The determination whether a proposed road is a public road or one merely for the benefit of a private individual is not tested by the fact that such an individual will receive a greater benefit than the public generally. The test is not the length of the road, or how many actually use it, but how many have the free and unrestricted right in common to use it. It is a public road if it is free in common to all citizens.

Public highways belong entirely to the public at large. I am satisfied that the parkway will be a public road.

[A] transfer of municipal property to another public agency is not required to be made in strict compliance with statutes designed to regulate transfers generally of municipal property. As this rule is
sometimes stated, the statutes are not applicable to transfers among agencies
representing the common interest, i.e., the public. [26] I am advised that, as a matter of agency policy, the Department of Transportation requires title to property necessary for the construction of highways to be vested in the Commonwealth before it will begin a highway construction project. I am also advised that this Department policy does not distinguish between land owned by a municipality of the Commonwealth or a private landowner. [27] The Commonwealth Transportation Commissioner is vested with the power to acquire property for the construction of highways “by purchase, gift, or power of eminent domain.” [28] You indicate that in 1978 and 1994, the city desired to sell the property to the Department for construction of the parkway.

Section 33.1-89(B) provides:

The [Commonwealth Transportation] Commissioner is authorized to exercise the … power [to acquire property for public highways] within municipalities on projects which are constructed with state or federal participation, if requested by the municipality concerned. Whenever the Commissioner has acquired property pursuant to a request of the municipality, he shall convey the title so acquired to the municipality, except that rights-of-way or easements acquired for the relocation of a railroad, public utility company, public service corporation or company, another political subdivision, or cable television company in connection with said projects shall be conveyed to that entity in accordance with § 33.1-96. The authority for such conveyance shall apply to acquisitions made by the Commissioner pursuant to previous requests as well as any subsequent request.

In responding to your inquiry, I must take this statutory language as written. [29] By enacting § 33.1-89, the General Assembly appears to contemplate the acquisition of property for public highways from private landowners. It is my view that the 1978 adoption of the resolution by the city council requesting that the Transportation Department establish and fund the parkway satisfies the statutory requirement of such a request by the municipality. [30] Furthermore, the Commonwealth Transportation Commissioner must convey title of the property acquired for construction of a public highway back to the city. [31] The use of the word “shall” in a statute generally implies that the General Assembly intends its terms to be mandatory, rather than permissive or directive. [32] Accordingly, when construction of the parkway on the approximately 9.2 acres of the park is complete, the Commissioner will transfer title to that property back to the City of Charlottesville.

In the specific facts you provide, there cannot be any suggestion that the city council is disposing of valuable public property at a fraction of its worth for private benefit, or that some private business interests are being favored over the public interests in the specific property of the city’s public park property. Clearly, the city simply is changing
the use of its park property to city highway property. Both of these uses are for the benefit of, and use by, the general public. Although you suggest that council members have argued that the conversion of the city property from park use to highway use will not benefit the public, I cannot conclude that the provisions of Article VII, § 9 and § 15.2-2100 are implicated in any manner in this specific factual context. Accordingly, I must conclude that an affirmative vote of three fourths of all members elected to the Charlottesville city council is not required for passage of an ordinance authorizing the sale of city park property to the Commonwealth for construction of a public road that will ultimately be deeded back to the city.

CONCLUSION

Accordingly, it is my opinion that the provisions of Article VII, § 9 and § 15.2-2100 are not invoked under the factual situation you describe. Therefore, a supermajority is not required for the Charlottesville city council to pass an ordinance authorizing the sale of approximately 9.2 acres of McIntire Park to the Commonwealth for the purpose of constructing a portion of Meadow Creek Parkway.

Section 33.1-70.01 permits a county in the secondary system of state highways to formulate, in cooperation with the Department of Transportation representative(s), “a six-year plan for the improvements to the secondary highway system in that county.” The plan “shall be based upon the best estimate of funds to be available to the county for expenditure in the six-year period encompassed by the plan, and the plan “shall list the proposed improvements, together with an estimated cost of each project so listed.” VA. CODE ANN. § 33.1-70.1 (LexisNexis Supp. 2003). Once the county and Department representative reach an agreement on the plan and the list, it is binding. See 1978-1979 Op. Va. Att’y Gen. 132, 133-34. 1


VA. CONST. art. VII, § 9.

The quoted portion implements the first paragraph of Article VII, § 9, which provides: “No rights of a city or town in and to its ... parks ... or other public places ... shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all members elected to the governing body.” See § 15.2-2100(A) (parallel statutory provision); see also Stendig Dev. Corp. v. City of Danville, 214 Va. 548, 202 S.E.2d 871 (1974) (holding that city may adopt ordinance imposing three-fifths vote limitation on resolution to sell any of its property, i.e., all property owned by city and not just property set aside for public use); 1989 Op. Va. Att’y Gen. 125 (concluding that constitutional limits are applicable to city’s lease of property to state agency).


"Id.

"Id. at 853.
Section 33.1-89(F) authorizes the Commonwealth Transportation Commissioner “to reasonably control the use of public highways so as to promote the public health, safety and welfare.”

I assume that the Department of Transportation premises its policy on the protection of the interests of the Commonwealth in the expenditure of funds for construction of the parkway. Outright ownership of the subject property guarantees to the Commonwealth absolute control over the property and removes the potential that a private property owner will benefit or profit from continued ownership of the property improved by the construction of the parkway.


The powers to adopt ordinances to preserve police and order, to regulate streets and other public areas, and to impose fines and taxes are governmental powers incident to the sovereignty of the Commonwealth. 1985-1986 Op. Va. Att’y Gen. 97, 97. The General Assembly may, by general law or special act, delegate such powers to local governments, except as restricted by the Constitution of Virginia. See 2 Howard, supra note 9, at 810. Such delegated governmental powers generally are vested in local governing bodies. See § 15.2-1401 (LexisNexis Repl. Vol. 2003). The Constitution requires that “[t]he governing body of each county, city, or town shall be elected by the qualified voters of such county, city, or town in the manner provided by law.” Va. Const. art. VII, § 5.

See § 33.1-89(B).


Since I conclude that Article VII, § 9 and § 15.2-2100 are not applicable to the facts you present, there is no need to respond to your additional questions: (1) Whether an affirmative vote of three fourths of all
members elected to the members elected to the Charlottesville City Council required for passage of an ordinance that authorizes the conveyance of an easement of less than 40 years duration across municipal park property to the Commonwealth for construction of a public road; and (2) If not, and the easement in question may be authorized by a simple majority vote of the city council, is the city required to follow the advertisement and bid procedures of Article VII, § 9 where the easement is to be granted to the Commonwealth for construction of a public road.

OP. NO. 04-002

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).

TAXATION: TAX EXEMPT PROPERTY.

RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES: CEMETERIES.

Question whether family cemetery is being operated for profit, for purposes of tax exemption, is determination of fact to be made by local taxing official. Land dedicated for family cemetery is limited to 300 acres.

THE HONORABLE JUDY S. CROOK
COMMISSIONER OF THE REVENUE FOR FRANKLIN COUNTY
MARCH 30, 2004

ISSUE PRESENTED

You inquire concerning the proper amount of acreage of a family cemetery located in Franklin County that may be exempt from local real property taxation, where only a portion of the cemetery is being used as a burial ground, and the remaining portion, which a court of competent jurisdiction has set aside for future expansion purposes, currently is not being used for purposes of burial. You further inquire whether there is a limit to the amount of land that may be dedicated for a family cemetery.

RESPONSE

I am of the opinion that in interpreting the constitutional property tax exemption for "private or public burying grounds and cemeteries ... not operated for profit," the critical question is not what is the current use of property set aside for future expansion of the cemetery, but whether the cemetery is being "operated for profit" within the meaning of Article X, § 6(a)(3) of the Constitution of Virginia. This would also be the determining factor for purposes of the exemption found in § 58.1-3606(A)(3). It is further my opinion that whether the subject family cemetery is being "operated for profit," for purposes of constitutional and statutory tax exemptions is a question of fact for determination by the local taxing official. Finally, it is my opinion that no more than 300 acres of land may be dedicated to a family cemetery.

BACKGROUND

You relate that you have received a request to exempt from local taxation, a 33.33-acre parcel and a 2.918-acre parcel of land as a family cemetery, based on two orders entered by the Circuit Court of Franklin County on August 24, 1987, and October 21, 2003. The 2.918-acre parcel ("small parcel"), which contains the family cemetery, is enclosed by a brick wall and is exempt from local taxation. The trustees of the association that owns the cemetery are asking that the 33.33-acre parcel ("large parcel")
surrounding the enclosed burying ground be exempted from local taxation, based on the court orders. You state that the large parcel is not being used for interment, but may be used for other purposes, such as recreation.

The small parcel has been used for family burial since at least 1921. The trustees acquired the large parcel in 1973. The court orders have held that both parcels have constituted a “cemetery” since the acquisition of the large parcel in 1973. Both court orders deem the large parcel to be an enlargement of the small parcel burial site, effective retroactively as of the date of acquisition in 1973. The Franklin Circuit Court has approved the bylaw provision adopted by the family cemetery association that the caretakers’ lodge erected on the cemetery grounds shall never be used for monetary gain or profit. In addition, the court has authorized the association to cut and sell annually only the timber from the large parcel as is necessary to maintain the cemetery.

You relate that there has been no formal dedication restricting the future use of the large parcel for cemetery purposes, other than the court orders described above. The large parcel remains in its natural state at this time.

**APPLICABLE LAW AND DISCUSSION**

Article X, § 6(a)(3) of the Virginia Constitution exempts from real and personal taxation, “[p]rivate or public burying grounds or cemeteries, provided the same are not operated for profit.” The General Assembly has enacted a coordinate exemption in § 58.1-3606:

A. Pursuant to the authority granted in Article 10, Section 6 (a) (6) of the Constitution of Virginia to exempt property from taxation by classification, the following classes of real and personal property shall be exempt from taxation:

....

3. Nonprofit private or public burying grounds or cemeteries.

A 1984 opinion of the Attorney General notes that the only self-executing exemptions from property taxation are those for publicly owned property, church property, nonprofit cemeteries, public libraries and nonprofit institutions of learning pursuant to Article X, § 6(a)(1)-(4). The Franklin Circuit Court has twice ordered that the small and large parcels together constitute a cemetery, specifically with the large parcel constituting an enlargement of the existing cemetery which predates the 1971 Constitution and the 1950 Code of Virginia.

A “burying ground” or “cemetery” is “a place set apart for the interment of the dead.” “A cemetery … includes not only lots for depositing the bodies of the dead, but also such avenues, walks and grounds as may be necessary for its use or for shrubbery and ornamental purposes.” Under Virginia law, “[t]here is no particular form or ceremony necessary in dedicating land to public use [as a cemetery].” The intent of the owner and the fact that the land is being used for cemetery purposes are all that is required.
Should there be any uncertainty in the reservation of the land for cemetery usage, the grantor may act within a reasonable period to cure it. Moreover, it is equally clear that § 57-25 authorizes “enlargement” of a “cemetery already established.”

Notwithstanding this conclusion, in order to be entitled to property tax exemption, the cemetery must still be operated on a “nonprofit” basis. It is not the equivalent of “charitable.” Two circuit court opinions have considered the meaning of “nonprofit” in this context. In 1987, the Circuit Court of Henrico County ruled that income generated from a cemetery owned by an organization exempt from federal income tax must be used for cemetery purposes, in order for the land not being used for burial purposes to be exempt from property taxation:

It does not follow, however, that the [corporation owning the cemetery] is exempt from real estate taxes simply because it is exempt from income taxes. It is undisputed that real estate used for cemetery purposes is not subject to County real estate taxes. The question here is whether or not the real estate which is not being used for cemetery purposes is exempt from real estate taxes simply because it is owned by a cemetery corporation. The fact that the corporation is organized as a nonprofit cemetery corporation does not in and of itself exempt the corporation from the payment of real estate taxes where it is quite clear that the corporation is distributing money in the form of dividends to its stockholders and where the real estate held by the corporation is not being used as burial ground.

The Henrico Circuit Court relied on a 1984 decision in Arlington County as to the meaning of the words “profit” or “gain” in this context:

Whether a cemetery is operated for profit or not depends in a large measure on how the money derived from sales is used. The cases are clear that the mere fact of a profit, standing alone, does not equate with “operated for a profit.” The key is what does the cemetery do with the money? If it is used for cemetery purposes, then no violation of the Constitutional conditions occur. If, however, it is used for the benefit of private parties, particularly stockholders, then “profit” or “gain” has been realized and the exemption is jeopardized. In San Gabriel Cemetery Assn. v. Los Angeles County, 122 P.2d 330 (1942), the word profit was construed to mean “net earnings the benefit of which accrue directly or indirectly to the stockholders or members of the Association.”

Accordingly, the family cemetery is entitled to a self-executing exemption from property tax for the portion actually used as a burial ground, and the large parcel, which the Franklin Circuit Court specifically has set aside for its enlargement, is entitled
to exemption if it is not being operated for profit. This is a question of fact for determination by the local taxing official.\textsuperscript{18}

You further inquire whether there is a limitation on the amount of land that may be dedicated for a family cemetery. Section 57-26(2) authorizes a conveyance of no more than 300 acres of land for use as a cemetery.

**CONCLUSION**

Accordingly, I am of the opinion that in interpreting the constitutional property tax exemption for “private or public burying grounds and cemeteries ... not operated for profit,” the critical question is not what is the current use of property set aside for future expansion of the cemetery, but whether the cemetery is being “operated for profit” within the meaning of Article X, § 6(a)(3). This would also be the determining factor for purposes of the exemption found in § 58.1-3606(A)(3). It is further my opinion that whether the subject family cemetery is being “operated for profit,” for purposes of constitutional and statutory tax exemptions is a question of fact for determination by the local taxing official. Finally, it is my opinion that no more than 300 acres of land may be dedicated to a family cemetery.

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1. You enclose with your request, copies of the orders pertaining to the family cemetery.
2. The October 21, 2003, court order states that the trustees use the caretakers' lodge in carrying out their duties, such as taking care of the cemetery, and for receiving guests at funerals.
4. For purposes of this opinion, “profit” means gain in the pecuniary sense.
6. For purposes of this opinion, I assume that you do not inquire whether the enlargement of the family cemetery, the small parcel of which was in existence prior to the July 1, 1971, Constitution, is “grandfathered” under the rule that exemptions be liberally construed; rather, I apply the prospective rule of strict construction of property tax exemptions. See Manassas Lodge No. 1380 v. County of Prince William, 218 Va. 220, 223, 237 S.E.2d 102, 105 (1977) (concluding that Article X, § 6(f) prescribes rule of strict construction to apply prospectively to exemptions established or authorized by 1971 Constitution).
8. 3B MICHIE’S JUR. CEMETERIES § 1, at 218 (1996).
10. Id.
11. See id. at 406, 16 S.E. at 247-48 (noting that deed conveying land expressly stipulated and agreed that family burying ground and monument included within its limits are excluded from grant).
12. Section 57-25 authorizes the condemnation of land, in the manner prescribed in the statute, “to establish a cemetery for the use of a city, town, county or magisterial district, or to enlarge any such cemetery already established, [when] the title to land needed cannot be otherwise acquired.” See Temple v. City of Petersburg, 182 Va. 418, 29 S.E.2d 357 (1944) (noting distinction between meanings of terms “establish” and “enlarge,” as used in § 53, predecessor to § 57-25).
classification statute, as it was not clear that it was organization conducted exclusively as charity or that its property was used exclusively for charitable purposes; see also 1998 Op. Va. Att’y Gen. 125 (defining what constitutes “charitable,” “charitable purpose,” and “charity”).


See 2002 Op. Va. Att’y Gen. 64 (question whether church property, used for certain church-related activities while being developed for its intended use, may be tax exempt is reserved for local commissioner of revenue or other appropriate taxing official). The Attorney General refrains from issuing opinions on questions of fact rather than questions of law. See id. at 96, 99, and opinions cited at 101 n.27.

OP. NO. 04-071
COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT – ADDITIONAL POWERS.

No authority for locality to use public funds to repair or maintain roads of ingress or egress to private cemetery as part of cemetery’s care and upkeep. Phrase, “in which free burial space is provided” means free burial space that is provided to general public of locality.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
OCTOBER 19, 2004

ISSUE PRESENTED

You ask several questions regarding the authority of the Buchanan County Board of Supervisors (the “board”) to expend public funds pursuant to § 15.2-972. Specifically, you ask whether a locality is authorized to use public funds to repair or maintain roads providing ingress and egress to a private cemetery. Next, you ask whether the phrase in § 15.2-972, which states “in which free burial space is provided” means free burial space that is provided to the public. Finally, if § 15.2-972 requires that free burial space be provided to the public, you ask whether a cemetery authority, such as cemetery trustees, must enter into an agreement with the locality assuring nondiscriminatory use of such burial space.

RESPONSE

It is my opinion that a locality does not have the authority to use public funds to repair or maintain roads providing ingress and egress to a private cemetery pursuant to § 15.2-972. It is further my opinion that the phrase “in which free burial space is provided” means free burial space that is provided to the general public of a locality. Consistent with the historical practice of prior Attorneys General, I am unable to opine on whether a cemetery authority, such as cemetery trustees, must enter into an agreement with the locality assuring nondiscriminatory use of burial space to the public as it does not involve interpretation of a statutory scheme.

APPLICABLE LAW AND DISCUSSION

Section 15.2-972 provides:
Any locality may make appropriations in such sums and at such
times as the governing body of the locality deems proper, for the
care and upkeep of any cemetery in the locality in which free burial
space is provided.

A 1972 opinion of the Attorney General considers whether a board of supervisors may
expend public funds to build a road over its right of way from a state highway to a tract
of land owned by the county and used as a public sanitary landfill. 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.” The
powers of a county board of supervisors are limited to those “conferring expressly or
by necessary implication.” Any doubt as to the existence of power must be resolved
against the locality. The 1972 opinion concludes that a board of supervisors is not
authorized by the General Assembly to spend public funds for the construction of
private roads.

“The legislature is presumed to have had knowledge of the Attorney General’s
interpretation of the statutes, and its failure to make corrective amendments evinces
legislative acquiescence in the Attorney General’s view.” The General Assembly has
not taken any action to alter the 1972 opinion; therefore, counties do not have any
authority to operate and maintain private roadways.

The Dillon Rule requires a narrow interpretation of all powers conferred on local
governments since they are delegated powers. In addition, the “credit clause” of
Article X, § 10 of the Constitution of Virginia restricts the authority of the localities
to lend their credit or appropriate funds to promote private interests. Expenditures
which incidentally benefit private interests do not violate the credit clause, provided
that the animating purpose of the transaction is to promote the locality’s interests rather
than private interests. Article X, § 10 prohibits any locality, or regional government
from any financial commitment “in aid of any person, association, or corporation.”
In addition, § 15.2-953(A) clearly permits appropriations of public funds by local
governing bodies, but only to charitable institutions or associations “located
within their respective limits or outside their limits if such institution or association pro-
vides services to residents of the locality.”

“The ascertainment of legislative intention involves appraisal of the subject matter,
purposes, objects and effects of the statute, in addition to its express terms.” Thus,
consistent with Article X, § 10 and Article IV, § 16, a narrow reading of § 15.2-972
requires a conclusion that the phrase “in which free burial space is provided” means
the provision of free burial space to the public at large. Only when a locality’s citizens
will benefit from free burial in a cemetery, may public funds be used for the care and
upkeep of such cemetery. Clearly, the provision of free burial space to only certain
private interests does not promote the general interest of all of the residents of a
locality. Thus, any appropriation benefiting only the private interests of owners of a
private cemetery would violate the provisions of Article X, § 10.
I must, likewise, conclude that a narrow reading of § 15.2-972 does not authorize a locality to use public funds to repair or maintain roads providing ingress and egress to a private cemetery as part of the maintenance of such cemetery.

Section 2.2-505 articulates the authority of the Attorney General of Virginia to render official legal opinions. It is acknowledged that official opinions of the Attorney General must be confined to matters of law. Historically, the Office has limited responses to requests for official opinions to matters that concern an interpretation of federal or state law, rule or regulation. The final question you pose regarding an agreement to assure nondiscriminatory use of burial space does not involve a question of law. Whether a locality should or should not enter into an agreement assuring nondiscriminatory use of burial space would appear to fall into a category of “best management practice” and not one involving interpretation of an existing statutory scheme. Therefore, consistent with the historical practice of prior Attorneys General, I am unable to comment on such an agreement.

CONCLUSION

Accordingly, it is my opinion that a locality does not have the authority to use public funds to repair or maintain roads providing ingress and egress to a private cemetery pursuant to § 15.2-972. It is further my opinion that the phrase “in which free burial space is provided” means free burial space that is provided to the general public of a locality. Consistent with the historical practice of prior Attorneys General, I am unable to opine on whether a cemetery authority, such as cemetery trustees, must enter into an agreement with the locality assuring nondiscriminatory use of burial space to the public as it does not involve interpretation of a statutory scheme.

3See Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). This rule is corollary to the Dillon Rule that municipal corporations are similarly limited in their powers. Id. at 117, 215 S.E.2d at 455.
7See 1982-1983 Op. Va. Att’y Gen. 142, 144 (concluding that counties generally do not have authority to operate and maintain roadways).
8See Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 522 S.E.2d 610 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, and may include optional provisions contained in Act); Op. Va. Att’y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.
"Accord V.A. Const. art. IV, § 16 (authorizing General Assembly to authorize counties, cities, or towns to appropriate public funds, personal property, or real estate to any charitable institution or association).


See generally 1968-1969 Op. Va. Att’y Gen. 23 (concluding that county may pay portion of burial expenses for indigent person dying within county pursuant to § 63.1-106, predecessor to § 63.2-802).


OP. NO. 04-060
COUNTIES, CITIES AND TOWNS: GENERAL PROVISIONS.
Restriction on locality’s authority to regulate display of political campaign signs on private property does not apply to private homeowners’ associations.

THE HONORABLE H. RUSSELL POTTS, JR.
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 30, 2004

ISSUE PRESENTED
You ask whether the restriction imposed by § 15.2-109, regarding a locality’s ability to regulate the display of political signs on private property, also applies to private homeowners’ associations.

RESPONSE
It is my opinion that the restriction imposed by § 15.2-109 on a locality’s authority to regulate the display of political campaign signs on private property does not apply to private homeowners’ associations.

BACKGROUND
You relate that there is confusion regarding the applicability of § 15.2-109, not only to localities but also potentially to private homeowners’ associations that regulate or may seek to regulate the display of signs within their respective boundaries. There is concern that § 15.2-109 may supersede the authority of homeowners’ associations to regulate the conduct of their members by covenant, resolution, or guidelines, specifically relating to the display of signs on property within the associations’ boundaries and subject to the contractual authority of the association.

APPLICABLE LAW AND DISCUSSION
The 2004 Session of the General Assembly enacted § 15.2-109, which prohibits local regulation of political campaign signs displayed on personal property:

No locality shall have the authority to prohibit the display of political campaign signs on private property if the signs are in compliance with zoning and right-of-way restrictions applicable to temporary
nonpolitical signs, if the signs have been posted with the permission of the owner. The provisions of this section shall supersede the provisions of any local ordinance or regulation in conflict with this section. This section shall have no effect upon the regulations of the Virginia Department of Transportation.

Section 15.2-102 provides that, as used in Title 15.2 "unless such construction would be inconsistent with the context or manifest intent of the statute," the term "locality" or "local government" "shall be construed to mean a county, city, or town as the context may require." The General Assembly did not include homeowners' associations in this definition. Section 15.2-109, therefore, does not pertain to a homeowners' association or its ability to enter into covenants or to adopt resolutions or other guidelines. Because § 15.2-109 does not pertain to homeowners' associations, it would have no effect on their ability to regulate the conduct of their members by covenant, resolution, or guidelines, with respect to the display of signs on property subject to an association's contractual authority.

CONCLUSION

Accordingly, it is my opinion that the restriction imposed by § 15.2-109 on a locality's authority to regulate the display of political campaign signs on private property does not apply to private homeowners' associations.


OP. NO. 04-035

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES – SHERIFF.

Sheriff may not modify statutorily prescribed standard uniform specifications, unless alternate clothing exception applies. Exception allows sheriff or deputy sheriff to wear alternate clothing when duties of such officer would be adversely affected by wearing of standard uniform.; does not allow for uniform variation based on intangible factors. No financial impediment to sheriff's compliance with standard uniform specifications. Question whether sheriff's office is complying with standard uniform specifications would be determined by appropriate civil court proceeding. Failure to take corrective action ordered by court may result in criminal contempt penalties. Failure to adhere to statutory requirement may be grounds for removal of offending officer from his position.

THE HONORABLE RYANT L. WASHINGTON
SHERIFF FOR FLUVANNA COUNTY
OCTOBER 6, 2004

ISSUES PRESENTED

You inquire as to permissible variances from the standard uniform prescribed for sheriffs and their deputies under §§ 15.2-1610 and 15.2-1611. You first ask whether a variance from the specifications prescribed in § 15.2-1610(B) for sheriffs' uniforms
would be a criminal or civil violation, and if so, what would be the punishment. Next, you ask whether intangible factors, such as professionalism, morale concerns, competitive marketing, retention of deputies, and public perception of police officers and deputies, would meet the criteria allowed for uniform variance under § 15.2-1611. Further, you inquire as to the process for resolving an issue whereby a sheriff’s office believes it has met the criteria for uniform variance, but an individual or entity has a contrary view.

RESPONSE

I am of the opinion that a sheriff would violate § 15.2-1610 if the sheriff modifies the standard uniform specifications prescribed in § 15.2-1610(B), unless the alternate clothing exception in § 15.2-1611 applies. Section 15.2-1611 allows a sheriff or deputy sheriff to wear alternate clothing when the duties of such officer would be adversely affected by the wearing of a standard uniform. Section 15.2-1611 does not allow for uniform variation based on intangible factors. There should be no financial impediment to a sheriff’s compliance with the standard uniform specifications, because § 15.2-1613 requires counties and cities to provide, at their expense, a reasonable number of standard uniforms and items of personal equipment that are required by the sheriff’s office.

Ultimately, the decision whether a sheriff’s office is complying with the standard uniform specifications would be determined by a civil proceeding in the appropriate circuit court. Failure to take corrective action ordered by the court, however, may result in criminal contempt penalties. In addition, failure to adhere to a statutory requirement may be grounds for removal of the offending officer from his position.

BACKGROUND

You acknowledge that the intent of §§ 15.2-1610 and 15.2-1611 is to standardize all sheriffs’ offices across the Commonwealth. You believe that not all sheriffs’ offices are able to operate, staff and function in a similar manner. Therefore, a sheriff may have reasons, of an intangible nature, to deviate from the standard uniform, to ensure that the public receives quality service from the sheriff’s office.

You also state that the Compensation Board previously reimbursed sheriffs’ offices for a portion of their uniform expenses, but that localities now are responsible for funding sheriffs’ uniforms and equipment. Thus, you believe that this may justify a variance from the standard uniform requirements.

APPLICABLE LAW AND DISCUSSION

Section 15.2-1610 requires standard uniforms for all sheriffs’ offices in the Commonwealth. Section 15.2-1610(A) provides that “[a]ll uniforms used by sheriffs and their deputies and police officers under the direct control of a sheriff... while in the performance of their duties shall meet the standards designated in subsection B,... except as provided in § 15.2-1611.” (Emphasis added.) Section 15.2-1610(D) requires that “[a]ll sheriffs’ offices shall be in full compliance with specifications for uniforms ..., if the sheriff prescribes that uniforms be worn.” (Emphasis added.)
The plain and unambiguous words of § 15.2-1610(A) and (D) leave no doubt that the General Assembly intends sheriffs to wear standard uniforms that comply with the specifications set out in § 15.2-1610(B), except when § 15.2-1611 authorizes the wearing of alternate clothing. Section 15.2-1610(A) uses the word “shall” to require a sheriff’s compliance with the standard uniform specifications. The use of “shall” leaves no doubt that the specifications are mandatory, and that there is no discretion to modify them except in accordance with § 15.2-1611. Further, § 15.2-1610(D) reiterates that all sheriffs’ offices shall comply fully with the standard uniform specifications, if the sheriff prescribes the wearing of such uniforms.

Section 15.2-1610(D) could be interpreted to mean that sheriffs do not have to prescribe that a uniform be worn. If so, various forms of civilian attire would be acceptable. Such an interpretation, however, ignores the public’s interest in having uniformed peace officers, throughout the Commonwealth, who are easily and quickly recognizable. This public interest appears to be the policy reflected in § 15.2-1610 and in § 15.2-1612, which states:

Any unauthorized person who wears a uniform identical to or substantially similar to the standard uniform prescribed in § 15.2-1610 with the intent to deceive a casual observer or with the intent to impersonate the office of sheriff, shall be guilty of Class 3 misdemeanor. For purposes of this section, “substantially similar” means so similar in appearance as to be likely to deceive the casual observer.

As noted, § 15.2-1610(A) permits an exception from mandatory compliance with the standard uniform specifications. Section 15.2-1611 provides the limited circumstance in which sheriffs may wear alternate clothing:

When the duties of a sheriff or deputy sheriff are such that the wearing of the standard sheriff’s uniform would adversely limit the effectiveness of the sheriff’s or deputy sheriff’s ability to perform his prescribed duties, then clothing appropriate for the duties to be performed may be required by the sheriff. [Emphasis added.]

Section 15.2-1611 is expressly conditioned on a determination that a sheriff’s duties warrant wearing alternate clothing appropriate for the “prescribed duties.” This is a narrow grant of authority, specifically applicable to the particular duty(ies) to be performed. The exception in § 15.2-1611 is restricted to a situation where the wearing of a standard uniform would adversely affect a sheriff’s ability to perform his prescribed duties. In other words, a sheriff must wear the standard uniform, except where “alternate clothing” is necessary to facilitate the effective discharge of his prescribed duties.

Especially in light of §§ 15.2-1610 and 15.2-1612, this is an obvious reference to “plain clothes” or “undercover” work, or for example, extra hazardous duties, such
as a bomb squad member or hazardous materials unit, where the wearing of special protective clothing is required to perform those specific duties. The exemption is not intended to extend to intangible matters that affect sheriffs and deputies apart from the actual conduct of their prescribed duties, such as issues related to professionalism, morale, competitive marketing, retention of personnel, and public perception. The fact that the public’s elected representatives have deliberated and chosen to prescribe a standard uniform for all sheriffs is evidence of the public’s preference and expectation in this regard.

If each sheriff’s office were permitted to modify the specifications, the “standard uniform” under § 15.2-1610(B) no longer would exist. Variations from the standard uniform based on intangible considerations, which are subjective and speculative, could lead to a system whereby each jurisdiction essentially adopts its own unique uniforms and markings. The ability to easily and quickly identify actual peace officers by their uniforms is vital to public safety.

You also allude to the fact that cost considerations may impel a sheriff to consider a deviation from the standard uniform specifications in § 15.2-1610(B). Since 1990, § 15.2-1613 has required counties and cities to provide “a reasonable number of uniforms” to their sheriffs’ offices. The second paragraph of § 15.2-1613 states:

In addition to those items listed in § 15.2-1615.1, counties and cities shall provide at their expense in accordance with the standards set forth in § 15.2-1610 a reasonable number of uniforms and items of personal equipment required by the sheriff to carry out his official duties. [Emphasis added.]

Like § 15.2-1610, § 15.2-1613 mandates that counties and cities provide “a reasonable number of uniforms” and equipment to their sheriffs’ offices.

You also inquire as to the entity responsible for determining whether a sheriff’s office is in compliance with the standard uniform requirements. Although a sheriff generally has discretion in the day-to-day operations of his office, § 15.2-1610(B) sets forth mandatory specifications for uniforms to be worn by sheriffs. Ultimately, the determination as to a sheriff’s compliance with the standard uniform requirements would be resolved by an appropriate circuit court proceeding that is civil in nature. The Supreme Court of Virginia has original jurisdiction over any matter seeking a writ of mandamus or of prohibition to force a sheriff to comply with the standard uniform requirements.

Virginia law does not prescribe a civil penalty for violation of § 15.2-1610. Any violation of an injunction or a writ of mandamus enforcing that statute, however, would subject the violator to contempt of court, and criminal penalties may be imposed.

In the final analysis, flagrant violations of the law may result in a sheriff being subject to removal from office for misfeasance or malfeasance in office. “[A] circuit court
may remove from office any elected officer or officer who has been appointed to fill an elective office" within the court’s jurisdiction upon the filing of a petition "signed by a number of registered voters who reside within the jurisdiction of the officer equal to ten percent of the total number of votes cast at the last election for the office that the officer holds." These persons’ signatures are to be made “under penalties of perjury.” The petition must state “with reasonable accuracy and detail the grounds or reasons for removal.” One of the grounds specified for removal of an elected officer is “neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office.” Whether a sheriff’s deviation from the standard uniform specifications constitutes a violation of § 15.2-1610(B) is a question for the courts.

CONCLUSION

Accordingly, I am of the opinion that a sheriff would violate § 15.2-1610 if the sheriff modifies the standard uniform specifications prescribed in § 15.2-1610(B), unless the alternate clothing exception in § 15.2-1611 applies. Section 15.2-1611 allows a sheriff or deputy sheriff to wear alternate clothing when the duties of such officer would be adversely affected by the wearing of a standard uniform. Section 15.2-1611 does not allow for uniform variation based on intangible factors. There should be no financial impediment to a sheriff’s compliance with the standard uniform specifications, because § 15.2-1613 requires counties and cities to provide, at their expense, a reasonable number of standard uniforms and items of personal equipment that are required by the sheriff’s office.

Ultimately, the decision whether a sheriff’s office is complying with the standard uniform specifications would be determined by a civil proceeding in the appropriate circuit court. Failure to take corrective action ordered by the court, however, may result in criminal contempt penalties. In addition, failure to adhere to a statutory requirement may be grounds for removal of the offending officer from his position.

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1This opinion is based on state law of general application, and does not consider the charter, ordinances or practices of any particular locality.

2You ask a fourth question that is not set out, because it is answered in the response to your other questions.

3For purposes of this opinion, when the term “sheriff(s)” is used, it may include deputy sheriffs and police officers under the supervision of a sheriff.

4Section 15.2-1610(B) designates specifications for shirts, shoulder patches, badges, trousers, hats, shoes, leather accessories, ties, blouses, jackets and coats.

5See Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (“When the word ‘shall’ appears in a statute it is generally used in an imperative or mandatory sense.”), quoted in Mayo v. Dep’t of Commerce, 4 Va. App. 520, 523, 358 S.E.2d 759, 761 (1987); Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959) (“In its ordinary signification, ‘shall’ is a word of command, and is the language of command, and is the ordinary, usual, and natural word used in connection with a mandate. In this sense ‘shall’ is inconsistent with, and excludes, the idea of discretion, and operates to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public
officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless an intent to the contrary appears ....” (Citation omitted.).


A Class 3 misdemeanor is punishable by “a fine of not more than $500.” VA. CODE ANN. § 18.2-11(c) (LexisNexis Repl. Vol. 2004).

“Alternate clothing” is a reference to attire of a nonuniform nature.


See, e.g., Kelley v. Johnson, 425 U.S. 238, 245, 248 (1976) (noting that rule of New York’s Suffolk County Police Department requiring, among other things, police to wear standard uniform makes police officers “readily recognizable” to public); Livingston v. State, 225 Ga. App. 512, 513, 484 S.E.2d 311, 312 (1997) (noting that deputy sheriff making traffic stop was wearing standard uniform); Amundson, 670 N.E.2d at 1084.

1990 Va. Acts ch. 68, at 127 (amending and reenacting § 15.1-137.3, predecessor to § 15.2-1613, relating to operation of sheriff’s department).

Section 15.2-1613 does not require that counties and cities provide uniforms that do not comply with the specifications set forth in § 15.2-1610(B).


See VA. CONST. art. VI, § 1; VA. SUP. CT. R. 5:7; VA. CODE ANN. § 17.1-309 (LexisNexis Repl. Vol. 2003); § 8.01-644 (Michie Repl. Vol. 2000); see, e.g., City of Richmond v. Hayes, 212 Va. 428, 184 S.E.2d 784 (1971) (invoking original jurisdiction of Supreme Court of Virginia in mandamus action to compel Director of Department of Public Health for City of Richmond to perform ministerial duties imposed upon him by city ordinance).

See 4A MICHIE’S JUR. Contempt § 5, at 238 (1999) (“The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity, implied because it is necessary to the exercise of all other powers. Without such power, the administration of the law would be in continual danger of being thwarted by the lawless.”).

See generally Narrows Grocery Co. v. Bailey, 161 Va. 278, 286, 170 S.E. 730, 733 (1933) (stating that it is incumbent upon sheriff to serve warrants in mode prescribed by law, or to properly account for his nonperformance of duty, in order to avoid liability for his misfeasance).


Id.

Section 24.2-233(1).
ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS – REMOVAL OF PUBLIC OFFICERS FROM OFFICE.

No requirement that governing body of locality provide local sheriff with unmarked vehicle for official use. 2004 Senate Bill 592, if enacted, will not change conclusion. May require service as agent for purchase or lease of marked or unmarked motor vehicle for sheriff.

THE HONORABLE FLOYD H. MILES, SR.
MEMBER, HOUSE OF DELEGATES
OCTOBER 12, 2004

ISSUES PRESENTED

You ask whether local governing bodies are required to supply unmarked vehicles to their sheriffs under the terms of § 15.2-1610,1 and whether 2004 Senate Bill 592, if passed, would affect the answer to this question.

RESPONSE

It is my opinion that there is no requirement that the governing body of a locality provide to the local sheriff an unmarked vehicle for official use under the terms of § 15.2-1610(C). It is also my opinion that 2004 Senate Bill 592, if enacted in its current form, will not change this conclusion. A constitutional officer, such as a sheriff, has exclusive authority to determine the equipment needs and specifications of his office, within available resources.2 The county’s governing body would have no authority to review, approve, or deny purchases by a constitutional officer where such officer has available funds.3 A locality, however, may be required to serve as purchasing agent for the purchase or lease of such equipment, including marked or unmarked motor vehicles, for its sheriff should such an expenditure be approved by the Compensation Board or constitute part of the approved budget of the office.

APPLICABLE LAW AND DISCUSSION

Section 15.2-1610(C) sets forth the required colors and markings for “[a]ll marked motor vehicles used by sheriffs’ offices.” (Emphasis added.) Section 15.2-1610(D) provides that “[a]ll sheriffs’ offices shall be in full compliance with specifications for ... motor vehicle markings, if the sheriff prescribes that ... marked motor vehicles be utilized.” No provision of § 15.2-1610 mandates that a local governing body purchase or provide any motor vehicle, whether marked or unmarked, to the sheriff for the locality. Although localities may be required to advance costs for the maintenance for sheriffs’ automobile radio equipment and accessories5 and sheriff’s vehicles6 no statute specifically requires localities to provide motor vehicles to their sheriffs’ departments.

The current wording of 2004 Senate Bill 5927 will not change this conclusion. The legislation merely restates a prior opinion of the Attorney General, concluding that former § 15.1-90.1 expressly reserves to a sheriff the option not to use marked motor vehicles in his department, and that it is his prerogative to prescribe the color of such unmarked cars.8
It should be noted, however, that there is a procedure to be followed for the preparation and approval of budgets for constitutional offices, to which both the Commonwealth and locality contribute. "Constitutional officers" are those county and city officers who are elected by the qualified voters, i.e., treasurers, sheriffs, Commonwealth’s attorneys, clerks of courts of record, and commissioners of the revenue.

Generally, a local sheriff prepares the budget for his office and submits it to the Compensation Board for review, possible modification, and approval. Such budget includes salaries, permitted expenses, and other allowances necessary for operating a sheriff’s office. A copy of the proposed budget is concurrently submitted to the governing body of the locality. Once the budget is set, and subject to appropriated funds, the Commonwealth and locality generally participate in funding the approved budget, with certain exceptions. In the event of disagreement, the sheriff, the locality, or the Commonwealth may appeal the decision of the Compensation Board. The purchase or lease of motor vehicles is not an expense that is specifically listed in the applicable statutes.

Although cities and counties previously purchased and owned vehicles used by the local sheriffs’ departments, without funding from the Compensation Board, the current policy of the Board is to include as reimbursable office expenses for sheriffs, expenses for vehicle lease or purchase, and maintenance expenses for such vehicles. Consequently, sheriffs may request such expenses in the budgets they submit for approval to the Compensation Board. Section 15.2-1609.7 requires the Commonwealth to pay or reimburse to localities any such expenses approved by the Compensation Board for sheriffs. As an operational matter, counties generally serve as purchasing agents to obtain vehicles meeting the specifications of local sheriffs. A constitutional officer, such as a sheriff, has exclusive authority to determine the equipment needs and specifications of his office, within available resources. The county’s governing body would have no authority to review, approve, or deny purchases by a constitutional officer where such officer has available funds.

The current practice of the Compensation Board, as described above, however, is subject to the constraints imposed upon it by recent appropriation acts. The Compensation Board provides the following in its policies and procedures as related to sheriffs’ vehicle expenses:

Due to budget reduction options chosen by the Virginia Sheriffs’ Association, base budget office expense funding will not be available in [fiscal year 2004]. If funds are transferred to the office expense budget category in accordance with the FY04 Fund Transfer Policy, or if base funds become available in [fiscal year 2005], [certain] reimbursement policies [including vehicle purchase/lease/expenses] will apply.
Further, the Board prohibits the display of a sheriff’s name on the exterior of any vehicle purchased or leased with public funds on and after July 1, 2002.24

Notwithstanding these limitations, if there are excess appropriated funds remaining in a sheriff’s budget, the sheriff may require his or her locality to purchase a motor vehicle meeting his or her specifications for use by the sheriff’s office, within the amount of the excess funds.25 As stated previously, the county’s governing body has no authority to review, approve, or deny the purchase.

CONCLUSION

Accordingly, it is my opinion that there is no requirement that the governing body of a locality provide to the local sheriff an unmarked vehicle for official use under the terms of § 15.2-1610(C). It is also my opinion that 2004 Senate Bill 592, if enacted in its current form, will not change this conclusion. A constitutional officer, such as a sheriff, has exclusive authority to determine the equipment needs and specifications of his office, within available resources.26 The county’s governing body would have no authority to review, approve, or deny purchases by a constitutional officer where such officer has available funds.27 A locality, however, may be required to serve as purchasing agent for the purchase or lease of such equipment, including marked or unmarked motor vehicles, for its sheriff should such an expenditure be approved by the Compensation Board or constitute part of the approved budget of the office.

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1For purposes of this opinion, I assume that you are requesting a generic answer to this question, and that it is not directed to any particular Virginia locality. For that reason, this opinion is based on state law of general application, and does not consider the charter, ordinances, or practices of any locality.


2Id. at 73.

3Section 15.2-1610(A) and (B) relates to standard uniforms worn by sheriffs and their deputies and police officers performing their duties under the sheriff.

4Section 15.2-1609.4 requires sheriffs and full-time deputy sheriffs to record and report all expenses incurred for repairs to their automobile police radio equipment, radio transmitter systems, and accessory radio equipment.


7Senate Bill 592 amends and reenacts § 15.2-1610(C) to provide: “Nothing in this section shall prevent sheriffs’ offices from using unmarked vehicles.” 2004 S.B. 592, available at http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+SB592. Senate Bill 592 has been continued until the 2005 Session of the General Assembly.


12See, e.g., § 15.2-1609.2 (salaries of sheriffs and certain full-time deputy sheriffs); § 15.2-1609.4 (various expenses of sheriffs and full-time deputy sheriffs); §§ 15.2-1609.7 to 15.2-1609.9 (LexisNexis Repl. Vol.
2003) (salary and expense allowances paid to sheriffs and full-and part-time deputy sheriffs, and compensation paid to part-time deputy sheriffs).

13See § 15.2-1636.7.

14See § 15.2-1609.7.

15See, e.g., § 15.2-1613 (LexisNexis Repl. Vol. 2003) (providing that localities “shall provide at their expense in accordance with standards set forth in § 15.2-1610 a reasonable number of uniforms and items of personal equipment required by the sheriff to carry out his official duties”).

16See § 15.2-1636.9.


19See § 15.2-1231 (LexisNexis Repl. Vol. 2003) (providing for system of centralized competitive purchasing in any county having chief administrative officer); see also 1989 Op. Va. Att’y Gen. 71, 72, and opinions cited therein (concluding that constitutional officer subject to county’s centralized purchasing system retains power to determine equipment needs of his office and specifications for such equipment). If the sheriff is excluded from a county’s centralized purchasing system, the sheriff is free to proceed with his or her own procurement, subject to the requirements of the Virginia Public Procurement Act. 1993 Op. Va. Att’y Gen. 271, 275 n.4. In the absence of such a local procurement system, the procedures set forth in the Virginia Public Procurement Act must be followed. 1984-1985 Op. Va. Att’y Gen. 354, 355 n.7.

20See supra note 2.

21See supra note 3.


23Compensation Board Web site, supra note 18.

24Id.; see also 2004 Appropriation Act, supra note 6; 2003 Appropriation Act, supra note 22, at 1782 (citing Item 63(C.1) in both acts).


26See supra note 2.

27See supra note 3.

OP. NO. 04-014

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

Authority for county to include variance procedure in its subdivision ordinance.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
MAY 6, 2004

ISSUE PRESENTED

You ask whether a county that has not enacted a zoning ordinance may include a variance provision in its subdivision ordinance.

RESPONSE

It is my opinion that a county may include a variance provision in its subdivision ordinance, regardless of whether the county has enacted a zoning ordinance.
APPLICABLE LAW AND DISCUSSION

Opinions of the Attorney General rendered in 1976 and 1982 determine that a county may not include a variance procedure in its subdivision ordinance. These determinations, however, were based on Articles 7 and 8, Chapter 11 of Title 15.1, as they were enacted at the time of the opinions. At the time of these prior opinions, § 15.1-495 authorized a board of zoning appeals to grant variances; however, Article 7, which governed subdivision regulations, did not authorize a variance procedure. The opinions conclude that because a variance procedure was specifically authorized in the zoning context and no mention of such procedure was included in the subdivision enabling legislation, a variance procedure could not be included in a subdivision ordinance.

In 1983, however, the General Assembly amended Article 7 by adding the following language to § 15.1-466:

B. A subdivision ordinance may include provisions for variations in or exceptions to the general regulations of the subdivision ordinance in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.

Section 15.2-2242, the successor statute to § 15.1-466, includes this identical language. It is my opinion, therefore, that, subsequent to the 1976 and 1982 opinions, the General Assembly specifically authorized localities to include variance provisions in their subdivision ordinances. This position is supported by the fact that subsequent to enactment of the relevant statutory language, both the Supreme Court of Virginia and a circuit court decided cases involving the standards for granting variances under subdivision ordinances.

Nothing in § 15.2-2242 indicates that a locality’s failure to enact a zoning ordinance impacts the locality’s authority to include a variance procedure in its subdivision ordinance. “When the language of a statute is unambiguous, we are bound by the plain meaning of that language and may not assign the words a construction that amounts to holding that the General Assembly did not mean what it actually stated.” Based on the plain language of § 15.2-2242, a locality may include a variance procedure in its subdivision ordinance.

CONCLUSION

Accordingly, it is my opinion that a county may include a variance procedure in its subdivision ordinance, regardless of whether the county has enacted a zoning ordinance.


2Articles 7 and 8, Chapter 11 of Title 15.1 governed land subdivision and development and zoning in counties, cities and towns, respectively.
Stepchild that has not been adopted by stepparent is not 'offspring' or 'member of immediate family' for purposes of family subdivision exception.

MR. DONALD D. LITTEN
COUNTY ATTORNEY FOR SHENANDOAH COUNTY
MARCH 23, 2004

ISSUE PRESENTED

You ask whether the term “offspring,” as used in the family subdivision exception in § 15.2-2244(A), includes stepchildren.

RESPONSE

It is my opinion that a stepchild that has not been adopted by the stepparent is not the “offspring” of a stepparent and, therefore, is not included in the legal definition of “member of the immediate family” for purposes of § 15.2-2244(A).

APPLICABLE LAW AND DISCUSSION

Section 15.2-2244(A) provides counties shall provide in their local subdivision ordinances “for reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner.” Section 15.2-2244(A) further states that “[f]or the purpose of this subsection, a member of the immediate family is defined as any person who is a natural or legally defined offspring … of the owner.”

Section 15.2-2244 does not define the term “offspring,” nor is the term defined elsewhere in the Virginia Code. In the absence of a statutory definition, nontechnical words in statutes are to be given their ordinary meaning. In ordinary usage, “offspring” refers to a person’s children or “descendants.” “Offspring” also means “[c]hildren; issue; progeny.”
“The synonyms ‘descendant,’ ‘issue’ and ‘offspring’ are ordinarily used to refer to those who have issued from an individual and include his children, grandchildren and their children to the remotest degree.” 5 “Since the infancy of the legal system in this Commonwealth the word ‘issue’ has meant ‘heirs of the body’ and has been distinguished from seemingly similar words such as ‘children.’” 6 Under common law, “[i]ssue is ordinarily defined as descendants of a common ancestor.” 7 In other words, under the common law, one individual is the “issue” of another person only if the individual is the biological result, immediately or remotely, of that person. Similarly, one is the “offspring” of another person only if the individual is the biological result, immediately or remotely, of that person.

A stepchild is not the offspring of his or her stepparent, because the stepchild has not issued from the stepparent. “Step,” “[w]hen used as [a] prefix in conjunction with a degree of kinship … is indicative of a relationship by affinity.” 8 Under common law, a stepchild is not the issue/offspring of the stepparent, because the stepchild is not the biological result, immediately or remotely, of the stepparent. 9

The definitions of the words “stepmother” and “stepfather” reflect the fact that a stepchild is not the offspring of his or her stepparent. A “stepmother” is “[t]he wife of one’s father by virtue of a marriage subsequent to that of which the person spoken of is the offspring.” 10 Similarly, a “stepfather” is “[t]he husband of one’s mother by virtue of a marriage subsequent to that of which the person spoken of is the offspring.” 11 These definitions clearly imply that a person continues to be the offspring or issue of his or her biological parents even if their marriage dissolves and one or both parents later remarry. Further, by stating that the person spoken of is the offspring of a prior marriage, the definitions of “stepmother” and “stepfather” clearly imply that a stepchild is not the offspring of the subsequent marriage or of the stepparent.

Finally, I am aware of no Virginia statute or case decision that provides a legal definition of a stepchild as the offspring or issue of his or her stepparent. 12

CONCLUSION

Accordingly, it is my opinion that a stepchild that has not been adopted by the stepparent is not the “offspring” of a stepparent and, therefore, is not included in the legal definition of “member of the immediate family” for purposes of § 15.2-2244(A).

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1 Section 15.2-2244(A) also applies to the city of Suffolk.
4 BLACK’S LAW DICTIONARY 1085 (7th ed. 1999).
7 Id. at 143, 348 S.E.2d at 271 (quoting Munday v. Munday’s Ex’rs, 164 Va. 145, 148, 178 S.E. 917, 918 (1935)).
Under common law, not even an adopted child is considered the issue or offspring of his or her adoptive parents because the child has not issued from them. See Hyman, 232 Va. at 143, 348 S.E.2d at 271 ("As a matter of common law then, it is plain that in Virginia the word ‘issue’ does not include adopted children.").

BLACK'S LAW DICTIONARY, supra note 8, at 1414 (emphasis added).


1Sections 55-49.1 and 64.1-71.1 provide that an adopted person is included in the word "issue," even though a biological connection is lacking. "In determining the intent of a grantor" and "a testator or settlor, adopted persons are presumptively included in such terms as ‘children,’ ‘issue,’ ‘kindred,’ ‘heirs,’ ‘relatives,’ ‘descendants’ or similar words of classification ...." VA. CODE Ann. § 55-49.1 (LexisNexis Repl. Vol. 2003) (relating to construction of deeds); id. § 64.1-71.1 (LexisNexis Repl. Vol. 2002) (relating to construction of wills). Sections 55-49.1 and 64.1-71.1 also both provide, however, that adopted person "are presumptively excluded by such terms as ‘natural children,’ ‘issue of the body,’ ‘blood kindred,’ ‘heirs of the body,’ ‘blood relatives,’ ‘descendants of the body’ or similar words of classification." Unlike the exception that has been made for adopted persons, neither § 55-49.1 or § 64.1-71.1, nor any other statute or case decision, provides that a stepchild is presumptively included in such terms as "children," "issue," "kindred," "heirs," "relatives," "descendants," or other similar words.
of the property owner’s immediate family. These “family subdivisions” generally are exempt from the requirements of the locality’s subdivision ordinance. A locality may, however, impose particular access standards on a lot created pursuant to the family subdivision provisions if the newly created lot is “less than five acres.” Specifically, a locality may require such lots to “have reasonable right-of-way of not less than ten feet or more than twenty feet providing ingress and egress to a dedicated recorded public street or thoroughfare.”

The issues relevant to your inquiries are (1) whether the remainder parcel is exempt from the requirements of the locality’s subdivision ordinance by operation of the family subdivision exception, and (2) if so, whether the locality may impose the family subdivision access standards on the remainder parcel.

Section 15.2-2244(A) provides:

In any county … a subdivision ordinance shall provide for reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner, subject only to any express requirement contained in the Code of Virginia and to any requirement imposed by the local governing body that all lots of less than five acres have reasonable right-of-way of not less than ten feet or more than twenty feet providing ingress and egress to a dedicated recorded public street or thoroughfare.

It is first necessary to determine whether § 15.2-2244(A) exempts the remainder parcel from the otherwise applicable requirements of the locality’s subdivision ordinance, including access requirements. Section 15.2-2244(A) makes no explicit distinction between the newly created lot and the remainder parcel. “When the language of a statute is unambiguous, we are bound by the plain meaning of that language and may not assign the words a construction that amounts to holding that the General Assembly did not mean what it actually stated.” In addition, “the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.” A careful reading of § 15.2-2244(A) indicates that the General Assembly did not make a distinction between the newly created lot and the remainder parcel.

It is true that, as an exception to otherwise applicable subdivision requirements, § 15.2-2244(A) must be narrowly construed consistent with the purpose underlying the exception. It is, however, also true that “the primary objective of statutory construction is to ascertain and give effect to legislative intent.” An examination of the legislative purposes underlying § 15.2-2244(A) supports this reading of the statute.

With respect to § 15.2-2244(A), a 1989 opinion of the Attorney General notes:

The manifest intent of the General Assembly in enacting [§ 15.2-2244(A)] was to permit property owners in counties … to divide existing par-
cels by a single transfer by a property owner to a family member without being subject to the formalities and expenses attendant to compliance with otherwise applicable provisions of the subdivision ordinance.

A 1986 opinion of the Attorney General notes that § 15.2-2244(A) is “intended to promote the values society places upon the inter vivos disposition of family estates with a minimum of government regulation. By permitting family divisions without compliance with otherwise applicable requirements, such divisions promote the cohesiveness of the family.” The exception in § 15.2-2244(A) is rooted in the objective of enhancing such family values, including keeping the family estate within the immediate family and passing real property interests from one family generation to another.

The underlying purposes of § 15.2-2244(A) support exclusion of the remainder parcel from compliance with otherwise applicable requirements of the subdivision ordinance. In fact, limiting the application of the exclusion only to the newly created lot would restrict the ability of property owners to enjoy the opportunity that the General Assembly intended to create with the exception. These points, in combination with the plain language of the statute, lead me to conclude that the remainder parcel is not subject to the otherwise applicable requirements of the subdivision ordinance.

Because localities are prohibited from subjecting the remainder parcel to the otherwise applicable requirements of the subdivision ordinance, it is necessary to determine whether a locality may impose the right-of-way requirements specified in § 15.2-2244(A) on the remainder parcel. If the right-of-way requirements specified in § 15.2-2244(A) are inapplicable, the remainder parcel would be subject to no access standards through the subdivision ordinance. This, however, does not appear to be the case. Because § 15.2-2244(A) makes no distinction between the remainder parcel and the newly created lot, the right-of-way requirements specified therein apply to both the remainder parcel and the newly created lot.

**CONCLUSION**

Accordingly, it is my opinion that a locality may not require that a remainder parcel meet the access standards imposed on nonfamily subdivisions. A locality may, however, impose a requirement that a remainder parcel of less than five acres have reasonable right-of-way providing access to a public roadway as prescribed in § 15.2-2244(A).

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1Botetourt County appears to have enacted its ordinance pursuant to § 15.2-2244(A).

2See also VA. CODE ANN. § 15.2-2241(10) (LexisNexis Repl. Vol. 2003).


4Section 15.2-2244(A) (LexisNexis Repl. Vol. 2003).

5Id.
If the remainder parcel is not exempt, the requirements of the subdivision ordinance, including those addressing frontage and access, govern the parcel. See tit. 15.2, ch. 22, art. 6, §§ 15.2-2240 to 15.2-2279 (LexisNexis Repl. Vol. 2003) ("Land Subdivision and Development"). But see, e.g., 1992 Op. Va. Att’y Gen. 53, 57 n.3, and accompanying text (noting that street improvement requirements may not be imposed on landowners creating family subdivision, as permitted by predecessor statute to § 15.2-2244(A)). If the remainder parcel is exempt, the provisions of the locality’s subdivision ordinance, including those addressing frontage and access, do not apply. See Crestar Bank, 238 Va. at 236, 383 S.E.2d at 716; Op. Va. Att’y Gen.: 1989, supra note 3, at 101; 1986-1987 at 121 (interpreting predecessor statute to § 15.2-2244(A)).

For purposes of § 15.2-2244(A), “member of the immediate family” means “any person who is a natural or legally defined offspring, spouse, sibling, grandchild, grandparent, or parent of the owner [and] may include aunts, uncles, nieces and nephews.” Section 15.2-2244(A).

I note that Botetourt County’s subdivision ordinance specifies area requirements similar to lots created under § 15.2-2244(A). See BOTETOURT COUNTY, VA., CODE § 21-70(4) (Jan. 1, 2002) available at http://www.co.botetourt.va.us/code/ch021.htm. I have not reviewed Botetourt County’s zoning ordinance. If such zoning ordinance requires lot sizes different from those provided in its subdivision ordinance, the specification of lot sizes in § 21-70(4) is improper. Crestar Bank, 238 Va. at 235-36, 383 S.E.2d at 716 (noting that lots created pursuant to family subdivision exception are subject to land-use controls of zoning ordinance); Mason v. Bd. of Zoning Appeals; 25 Va. Cir. 198, 199 (1991) (noting that family gift lots are subject to zoning ordinance); Op. Va. Att’y Gen.: 1989, supra note 3, at 102 (determining that lots created by family subdivision are subject to zoning and other land use regulations); 1985-1986 at 83 (determining that, under predecessor statute to § 15.2-2244(A), family subdivisions are not exempt from local zoning ordinances).


1989 Op. Va. Att’y Gen. supra note 3, at 101, quoted in 2000 Op. Va. Att’y Gen. 73, 74. “The principal focus of the exception in [§ 15.2-2244(A)] is to promote the values society places upon the disposition of family estates during the lifetime of the owner with a minimum of government regulation and to promote the cohesiveness of the family.” Id.

“Inter vivos” means “[o]f or relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor’s lifetime.” BLACK’S LAW DICTIONARY 826-27 (7th ed. 1999).


ISSUES PRESENTED

You ask whether a county may collect reimbursement pursuant to § 15.2-1716 where a law-enforcement officer makes a routine traffic stop and arrest that results in a conviction of driving while intoxicated ("DUI"). You also ask must fire, rescue, or extra law-enforcement personnel respond to a DUI event for it to be compensable.

RESPONSE

It is my opinion that a county may not seek reimbursement pursuant to § 15.2-1716 for expenses incurred by a law-enforcement officer performing routine duties that result in a DUI conviction. It is also my opinion that a county may be compensated, in limited circumstances, for reasonable expenses incurred in providing an appropriate emergency response to an accident or incident related to the DUI conviction, even when fire, rescue, or extra law-enforcement personnel do not participate.

BACKGROUND

You provide a copy of the Amherst County Code, which tracks the language of § 15.2-1716 prior to its 2003 and 2004 revisions. You suggest that an "incident" is distinct from an "accident" and encompasses any event, however minor. Thus, you believe every DUI case triggers civil liability, because a DUI offense is an "emergency" that requires a law-enforcement officer to respond. You further suggest that such an event is compensable even if fire, rescue, or extra law-enforcement personnel are not involved.

APPLICABLE LAW AND DISCUSSION

You ask whether a county may collect reimbursement pursuant to § 15.2-1716 where a law-enforcement officer makes a routine traffic stop and arrest that results in a conviction of driving while intoxicated. Section 15.2-1716(A) provides that a locality may adopt an ordinance providing that a person convicted of certain offenses, including DUI, "shall be liable in a separate civil action for reasonable expenses incurred by the locality ... when providing an appropriate emergency response to any accident or incident related to such violation." Section 15.2-1716(B) allows the locality to "bill a flat fee of $250 or a minute-by-minute accounting of the actual costs incurred." Section 15.2-1716(B) further states that the phrase "appropriate emergency response," as used in § 15.2-1716, "includes all costs of providing law-enforcement, fire-fighting, rescue, and emergency medical services." Moreover, § 15.2-1716(B) allows court-ordered restitution for "reasonable expenses incurred by the locality for fire-fighting, rescue and emergency medical services."

Statutes, as well as ordinances, should be construed so as to reflect legislative intent. Analyzing legislative intent includes appraisal of the subject matter and purpose of the statute, as well as its express terms. "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction." "[A] statute should never be construed so that it leads to absurd results."

Section 15.2-1716 evidences the General Assembly’s intent not to allow a locality to be reimbursed for costs associated with a law-enforcement officer performing routine
duties. Section 15.2-1716(A) speaks of “an appropriate emergency response to any accident or incident” related to certain offenses. An “emergency” typically means “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” An “accident” is a “sudden event … occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result.” An “incident” denotes a “subordinate” occurrence. The words “accident” and “incident” are used together, and sometimes interchangeably, in other statutes. The Code of Virginia is one body of law, and a statute should be interpreted so that it harmonizes with other statutes. Additionally, “the maxim noscitur a sociis, which translates ‘it is known from its associates,’ provides that the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context.” Thus, the intent of § 15.2-1716(A) may not be construed to mean that a mere traffic stop, which leads to a DUI conviction, is an event necessitating an emergency response. Requiring an emergency response to an accident or incident signifies the legislature’s intent to preclude reimbursement for ordinary responses in the performance of routine patrol duties. If the General Assembly had intended to allow reimbursement for routine duties that resulted in convictions, it simply could have permitted reimbursement whenever an officer made any response to any event.

Moreover, even though § 15.2-1716(B) defines an “appropriate emergency response” to include “all costs of providing law-enforcement, fire-fighting, rescue, and emergency medical services,” the 2004 amendment allows court-ordered restitution only for “the reasonable expenses incurred by the locality for fire-fighting, rescue and emergency medical services.” Court-ordered restitution for law-enforcement services, however, is not included. When the General Assembly amends a statute, a presumption arises that the legislature intended to change existing law. Thus, the statute does not allow reimbursement for the performance of routine law-enforcement duties.

You also ask must fire, rescue, or extra law-enforcement personnel respond to a DUI event for it to be compensable. It is my opinion civil liability may arise in limited circumstances even if fire, rescue and extra law enforcement personnel are not involved in the event. For example, there may be instances where a law-enforcement officer responds to a minor single vehicle accident involving only the defendant and no fire, rescue, or extra law-enforcement officers are involved. To the extent such an event is an accident or incident as contemplated by the statute and not a routine traffic stop, a locality may bill the defendant for reasonable costs under § 15.2-1716(B). Such expenses associated with the single law-enforcement officer, however, could not be part of any court ordered restitution under § 15.2-1716(B) since the statute specifically omits such expenses in that situation.

CONCLUSION

Accordingly, it is my opinion that a county may not seek reimbursement pursuant to § 15.2-1716 for expenses incurred by a law-enforcement officer performing routine
duties that result in a DUI conviction. It is also my opinion that a county may be compensated, in limited circumstances, for reasonable expenses incurred in providing an appropriate emergency response to an accident or incident related to the DUI conviction, even when fire, rescue, or extra law-enforcement personnel do not participate.

1Amherst County, Va., Code § 9-3 (2003). In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the governing body has control. See, e.g., 2002 Op. Va. Att’y Gen. 85, 86, and opinions cited at 90 n.3. I, therefore, confine my comments to the interpretation of § 15.2-1716.


3Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”


5The 2004 Session of the General Assembly increased the flat fee in § 15.2-1716(B) from $100 to $250. See 2004 Va. Acts, supra note 2.


9“Id.” at 11.

10“Id.” at 1142.


12Branch, 14 Va. App. at 839, 419 S.E.2d at 425.


14See 2003 Op. Va. Att’y Gen. 60, 61; id. at 65, 71 n.32, and opinions cited therein (noting that when General Assembly intends statute to impose requirements, it knows how to express its intention).

152004 Va. Acts, supra note 2 (quoting § 15.2-1716(B)). As originally drafted, the proposed amendment raised the flat fee to "$500," and provided that “[t]he court costs in criminal or traffic court proceedings,” without providing for restitution. 2004 H.B. 303 (quoting § 15.2-1716(B)), available at http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HB303.


17See 2000 Op. Va. Att’y Gen. 125 (concluding that, because county has discretion to provide fire-fighting and rescue services, county also has discretion to seek reimbursement for actual cost of emergency equip-
ment used by fire and rescue organizations in responding to emergency calls). Compare State v. Storlie, 647 N.W.2d 926, 927 (Wis. Ct. App. 2002) (holding that police are not entitled to restitution for replacing “stop sticks” used to halt defendant’s vehicle, because replacement expense was cost of normal law-enforcement procedure).

OP. NO. 04-068
COUNTIES, CITIES AND TOWNS: POWERS OF CITIES AND TOWNS.
Section 2-1240(b) of Richmond City Code may not be enforced regarding persons in classified or unclassified service until it is administratively precleared by Department of Justice or approved by declaratory judgment of United States District Court for District of Columbia. No authority for City of Richmond to define council members as unclassified employees subject to City’s personnel system. Prohibition requiring forfeiture of position with city government when standing as candidate for election for certain offices is not applicable to city council members. Regardless of application of § 2-1240(b) to city council members, statute must be submitted for preclearance prior to enforcement with respect to classified and unclassified city employees.

MR. JOHN A. RUPP
CITY ATTORNEY FOR THE CITY OF RICHMOND
OCTOBER 8, 2004

ISSUE PRESENTED
You ask whether the City of Richmond may enforce a provision added to § 2-1240(b) of the city code, relating to “unclassified” employees or officers who are prohibited from continuing in service after becoming a candidate for elective office, when the United States Department of Justice has not precleared the provision and the city charter sets two-year term limits for city council members.

BRIEF RESPONSE
It is my opinion that § 2-1240(b) of the city code may not be enforced with regard to those persons in the classified or unclassified service of the City of Richmond unless and until that section is administratively precleared by the Department of Justice or approved by a declaratory judgment in the United States District Court for the District of Columbia.

It is further my opinion that the City of Richmond did not have authority to define unclassified employees, for the purpose of its personnel system, to include council members thereby subjecting council members to the City’s personnel system. Consequently, the prohibition contained in § 2-1240(b) requiring the forfeiture of one’s position with city government when standing as a candidate for election for certain city offices does not apply to members of city council.

Such determination, however, does not negate the need for preclearance by the United States Department of Justice of § 2-1240(b) as it relates to those persons who hold classified and unclassified positions in city government. It is my opinion that § 2-1240(b) must be submitted to the Department of Justice, regardless of its application to city council members, prior to its enforcement with respect to classified and unclassified employees of the City of Richmond.
APPLICABLE LAW AND DISCUSSION

A. THE FEDERAL VOTING RIGHTS ACT

Section 5 of the Voting Rights Act of 1965, as amended, which applies to the City of Richmond, requires that any change in state or local election laws, voting practices or procedures be submitted either to the “United States District Court for the District of Columbia for a declaratory judgment” or to the Department of Justice for a determination as to whether the proposed change has the purpose or effect of abridging certain constitutional rights. Specifically, the submitting jurisdiction must demonstrate that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” or because a citizen “is a member of a language minority group.” The Department of Justice has adopted regulatory procedures for the administrative review of § 5, commonly referred to as “§ 5 preclearance.”

A qualification, prerequisite, standard, practice, or procedure affecting voting, and thereby requiring § 5 preclearance, may not be implemented until preclearance is obtained. The regulatory procedures include among the examples of changes that must be submitted to the Department, “[a]ny change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.” Under accepted rules of statutory construction, interpretations by the agency charged with administering a statute are entitled to great weight.

The Department’s regulations authorize the United States Attorney General to bring civil actions for appropriate relief against violations of § 5 and allow private parties to enforce § 5. A voting change that is implemented without § 5 preclearance is subject to “an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order.”

B. APPLICATION OF THE FEDERAL VOTING RIGHTS ACT

TO § 2-1240(B) OF THE CITY CODE

You indicate that city council adopted an ordinance on May 10, 1999, which has become a part of the city code. You note that recently certain provisions of the city code were recodified. On July 26, 2004, §§ 2-134 and 2-131 of the city code became §§ 2-1240 and 2-1237, respectively, of the city code. Section 2-1240(b) of the city code provides:

No officer or employee in either the classified or unclassified service of the city shall continue in such position after becoming a candidate for nomination or election to an office elected by voters of an election district which includes all or a part of the city or by the voters at large of the city for a constitutional office serving only the city.

The prohibitions in § 2-1240(b) apply to both classified and unclassified employees. Section 2-1236 provides that “[t]he classified service shall comprise all positions,
including those in the police and fire departments, not specifically included in the unclassified service. Section 2-1237(1) provides that the city’s “unclassified” personnel shall consist of “[o]fficers elected by the people and persons appointed to fill vacancies in elective offices.” It is the inclusion of the phrase “[o]fficers elected by the people” in the definition of “unclassified” employees that subjects city council members to the prohibitions in § 2-1240(b).

Section 2-1240(b) prohibits employees defined as classified and unclassified from continuing in their positions with the city government when they choose to run for certain elected offices within the City of Richmond. It appears the provision was intended to prevent employees of city government from running for council or other elected office within the city while associated with city government. Section 2-1240(b) impacts who within the city is eligible to run for an elected office of city government. Consequently, it is my opinion that § 2-1240(b) is subject to § 5 preclearance.

Section 5 of the Voting Rights Act requires “changes” in voting practices or procedures to be approved by the Department of Justice or the District of Columbia federal district court. In your opinion request you indicate that the “change” about which you are inquiring is the addition of “unclassified” employees, particularly “officers elected by the people,” to the group of those prohibited by § 2-1240(b) from continuing in office after becoming a candidate for elective office.

I note that the “change” in question is not just the language pertaining to “unclassified” employees, but to § 2-1240(b) in its entirety. The language pertaining only to classified employees appeared in § 9.13 of the charter for the City of Richmond prior to July 1, 1998:

No officer or employee in the classified service of the city shall continue in such position after becoming a candidate for nomination or election to any public an office elected by voters of an election district which includes all or a part of the City of Richmond, or by the voters at large of the city for a constitutional office serving only the City of Richmond.

Notably absent from § 9.13 of the city charter is the inclusion of “unclassified” employees. The 1998 Session of the General Assembly repealed this provision, as well as § 9.07, which defined “unclassified service” as consisting of “officers elected by the people.” You indicate that the repeal of the city personnel provisions from the charter was in order to have such provisions moved entirely to the city code.

The repeal of these provisions was effective July 1, 1998. Based on the facts presented, it appears that from July 1, 1998, until May 10, 1999, there was no provision addressing whether a classified employee must forfeit his position if he ran for city office. The adoption of the ordinance on May 10, 1999, inserted into the city code the language from former § 9.13 of the city charter with additional language pertaining to “unclassified service.”
Adoption by city council of the language applying to both classified and unclassified employees constituted a “change” affecting voting. It does not matter that the language applying only to classified employees previously appeared in the city charter. Such language was repealed. Upon its adoption on May 10, 1999, the pertinent provisions of the ordinance should have been submitted for § 5 preclearance. Consequently, § 2-1240(b), as it applies to those persons defined as classified and unclassified employees, may not be implemented until it is precleared.23

The 1987 and 1998 Sessions of the General Assembly amended the city charter. The 1987 change affected § 9.13 of the charter which required classified employees to forfeit their city positions in order to run for an office elected by the city voters. The 1998 change repealed §§ 9.07, defining “unclassified service,” and § 9.13 of the charter. Given the conclusion that the enactment § 2-1240(b) of the city code should have been precleared, it is apparent that the 1987 and 1998 charter changes should also have been submitted for preclearance. You do not indicate whether the Department of Justice precleared either change. Consequently, I offer no opinion on what effect the failure to preclear either or both changes has on the validity or enforcement of § 2-1240(b) of the city code.

C. EFFECT OF § 5 PRECLEARANCE OF MAYOR AT-LARGE PROVISIONS ON CITY CODE § 2-1240(B)

You note that some have argued that the Department of Justice may have precleared the city code provision when it recently precleared Chapters 514, 877, and 898 of the 2004 Acts of Assembly.24 These chapters institute certain election changes to the city charter, including the term of office for council members and election of a mayor citywide. Chapter 514 extends the terms of council members from two to four years, subject to approval by voter referendum.25 It also provides that “[n]o primary election shall be held for the nomination of candidates for the office of councilman, and candidates shall be nominated only by petition.”26 Chapters 877 and 898 provide for the direct election of the mayor, beginning in November 2004.27 The chapters also provide for certain procedures and requirements for determining who is elected mayor, term of office, and powers of the position.28 In addition, the chapters outline the powers of a newly created position of chief administrative officer.29 No portion of these changes affects the city code. The changes in Chapters 514, 877 and 898 are confined to the city charter.

It is clear that the preclearance of Chapters 514, 877, and 898 does not constitute a preclearance of city code § 2-1240(b). The Department of Justice regulatory procedures define “submission” as a “written presentation to the Attorney General by an appropriate official of any change affecting voting.”30 The submission should contain “[a] copy of any ordinance, enactment, order, or regulation embodying a change affecting voting.”31 The Attorney General has 60 days to “notify the submitting authority of a decision to interpose no objection to a submitted change affecting voting.”32

The regulations are clear that the material before the Department of Justice is the proposed change and not all manner of peripheral laws that may have some effect on
the proposed change. While the Department may review other provisions of law as they interact with the proposed change as part of its § 5 analysis, such review cannot be said to constitute preclearance of nonsubmitted provisions.

Interpreting the prior versions of the Department’s regulations, the Supreme Court of the United States noted that “[t]he regulations indicate that the focus of the Attorney General’s scrutiny of a statute was, understandably, limited to the specific changes submitted for consideration.” The Court determined that

[w]hen a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to § 5 preclearance.... A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices.\[34\]

Consequently, the submission of Chapters 514, 877, and 898, and their subsequent preclearance, does not constitute preclearance of § 2-1240(b) of the city code.

D. AUTHORITY TO SUBJECT OFFICERS ELECTED BY THE PEOPLE TO § 2-1240(B) OF THE CITY CODE

You next ask whether the City of Richmond had authority to enact § 2-1240(b) of the city code. You assert that if § 2-1240(b) were enforced, each member of city council that declared himself a candidate for reelection or for another office representing all or part of the city (i) would not serve a full two-year term and (ii) would not remain in office until a successor has qualified. You believe that the prohibition in § 2-1240(b) on “officers elected by the people” continuing in office after becoming a candidate for reelection or another office in the city not only exceeds the authority granted to the city by the General Assembly but also violates state election law.

Essentially, you assert that the effect of § 2-1240(b), when applied to city council members, impermissibly “shortens” the term of office for such members. Section 2-1240(b) does not “shorten” the terms of city council members in the sense that it sets a term less than two years for service. Instead, it imposes essentially a “resign-to-run” condition on such members and city employees. Under the city code, a councilman or city employee who chooses to run for a local office elected by the voters of the city would forfeit his or her current position with the city.

The question remains whether the City of Richmond had authority to enact § 2-1240(b), regardless of how it operates. This Office historically has followed a policy of responding to official opinion requests only when such requests concern an interpretation
of federal or state law, rule or regulation. In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control. Any ambiguity that exists in a local ordinance is a problem to be rectified by the local governing body rather than by an interpretation by this Office. In addition, Virginia Attorneys General traditionally have declined to render such opinions when the request involves a matter of purely local concern or procedure. Consequently, my comments are limited to the authority of the City of Richmond to adopt § 2-2140(b) and to define “unclassified service” within the city to include officers elected by the voters.

In 1997, the General Assembly granted certain cities the authority to establish personnel for certain officers and employees. Pursuant to § 15.2-1131, the City of Richmond established “a human resources system for the city’s administrative officers and employees.” Section 15.2-1131 provides:

Notwithstanding any contrary provisions of law, general or special, in any city with a population over 200,000 ..., the city council ... may establish a personnel system for the city administrative officials and employees. Such system shall be based on merit and professional ability and shall not discriminate on the basis of race, national origin, religion, sex, age, disabilities, political affiliation or marital status. The personnel system shall consist of rules and regulations which provide for the general administration of personnel matters, a classification plan for employees, a uniform pay plan and a procedure for resolving grievances of employees as provided by general law for either local government or state government employees. [Emphasis added.]

Section 15.2-1131 generally authorizes certain cities to enact a personnel system for the orderly management of local government officials and employees. Section 15.2-1131 does not define the phrase “administrative officials and employees.” Generally, when a statute does not define a particular word, the word must be given its ordinary meaning.

The word “administrative” generally means “concerning or relating to the management of affairs.” The word is the adjective form of the noun “administration,” which means “the practical management and direction of the executive department and its agencies.” Use of the adjective “administrative” before “officials” indicates that the General Assembly intended such personnel policies to apply to persons involved in the practical day-to-day management of city government and not to elected officials. The term “official” means “[o]ne who holds or is invested with a public office.” A “public office” may be appointed or elected. When modified by the adjective “administrative,” it is clear that § 15.2-1131 is intended to capture only nonelected public officials.
Such an interpretation is further supported by reading the provisions of § 15.2-1131 as a whole. “[A] fundamental rule of statutory construction requires that courts view the entire body of legislation and the statutory scheme to determine the ‘true intention of each part.’ In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.” The personnel system authorized by § 15.2-1131 must be “based on merit and professional ability,” be nondiscriminatory, and “consist of rules and regulations which provide for the general administration of personnel matters, a classification plan for employees, a uniform pay plan and a procedure for resolving grievances.” All of these things are typical of personnel plans for administrative officials and employees and not officers elected by the people.

Section 15.2-1131 does not define the word “employee.” Title 15.2 addresses aspects of the employer/employee relationship in local government. Specifically, § 15.2-1500(A) provides that “[e]very locality shall provide for all the governmental functions of the locality, including, without limitation, … the employment of … employees needed to carry out the functions of government.” Because § 15.2-1131 does not define the term “employee,” the term must be given its “ordinary and obvious meaning.” Generally, there are four elements to determine whether an employer/employee relationship exists: (1) the employer’s selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer’s retention of the power of dismissal; and (4) the employer’s retention of the power of control. Finally, public officers are distinguished from public employees. An officer is distinguished from an employee in the greater importance and independence of the position, and by the authority to direct and supervise. Thus, when a public employee enters an elected office, he becomes a public officer and is no longer considered to be a public employee.

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.” The Dillon Rule recognizes that localities are political subdivisions of the Commonwealth, which, in turn, rests on the foundation of Article I, § 14 of the Constitution of Virginia.

Section 15.2-1131 is a grant of authority to certain cities to enact a personnel policy. That grant of authority is specific to personnel policies that are established for “administrative officials and employees.” 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. Since public “officers elected by the people” are not administrative officials or employees, the City of Richmond is without authority under § 15.2-1131 to subject elected officers to the city’s personnel policies. Therefore, it is my opinion that the city council had no authority to adopt an ordinance placing council members in the city’s personnel system. Consequently, the City of Richmond does not have authority to define unclassified employees, for the
purpose of its personnel system, to include council members. Therefore, the prohibitions contained in § 2-1240(b) do not apply to members of city council.

Please note, however, that this determination does not negate the need for preclearance of § 2-1240(b) as it relates to those persons who hold classified and unclassified positions in city government. For the reasons stated in part B of this opinion, it is my opinion that § 2-1240(b) in its entirety must be submitted to the Department of Justice, regardless of its application to city council members, prior to its enforcement with respect to classified and unclassified employees of the City of Richmond.

CONCLUSION

It is my opinion that § 2-1240(b) of the city code may not be enforced with regard to those persons in the classified or unclassified service of the City of Richmond unless and until that section is administratively precleared by the Department of Justice or approved by a declaratory judgment in the United States District Court for the District of Columbia.

It is further my opinion that the City of Richmond did not have authority to define unclassified employees, for the purpose of its personnel system, to include council members thereby subjecting council members to the City’s personnel system. Consequently, the prohibition contained in § 2-1240(b) requiring the forfeiture of one’s position with city government when standing as a candidate for election for certain city offices does not apply to members of city council.

Such determination, however, does not negate the need for preclearance by the United States Department of Justice of § 2-1240(b) as it relates to those persons who hold classified and unclassified positions in city government. It is my opinion that § 2-1240(b) must be submitted to the Department of Justice, regardless of its application to city council members, prior to its enforcement with respect to classified and unclassified employees of the City of Richmond.

2Id.
728 C.F.R. § 51.13(g).
8United States v. Bd. of Comm’rs, 435 U.S. 110, 131-35 (1978) (noting Congress’ adoption of United States Attorney General’s long-standing administrative interpretation of § 5, which is binding on Supreme Court).
928 C.F.R. § 51.62(a).
1028 C.F.R. § 51.63.

13RICHMOND CITY CODE, supra note 12, § 2-1236.

14RICHMOND CITY CODE, supra note 12, § 2-1237.

15See Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 47 (1978) (holding that county board of education’s personnel rule, requiring employees to take unpaid leaves of absence while campaigning for elective political office, is “standard, practice, or procedure with respect to voting” that is subject to preclearance requirements of Voting Rights Act); see also 28 C.F.R. § 51.13(g) (providing that “change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices” must be precleared under the Voting Rights Act prior to implementation).


17RICHMOND CITY CODE, supra note 12, § 2-1237(1).


191948 Va. Acts, supra note 19, at 226 (quoting § 9.07(a)).

20As previously stated, those positions identified as “unclassified” by the city charter were not subject to the prohibition in § 9.13 of the charter.

21Your opinion request cites Morse v. Republican Party of Virginia, 517 U.S. 186, 225 (1996), for the proposition that the change involving unclassified employees is void and legally unenforceable. In Morse, the Supreme Court of the United States explained that “the fundamental purpose of the preclearance system was to 'shift the advantage of time and inertia from the perpetrators of the evil to its victims,' by declaring all changes in voting rules void until they are cleared by the Attorney General or by the District Court for the District of Columbia.” Id. at 225 (citation omitted). I agree that a change that is not precleared is unenforceable. I caution against misinterpreting the use of the word “void” by the Supreme Court. The legal definition of “void” means having “no legal effect;” “an absolute nullity.” BLACK’S LAW DICTIONARY 1568 (7th ed. 1999). In this instance, the ordinance eventually may be enforced, rather than be declared void, upon preclearance. In that sense, the city code section at issue may be “saved” upon preclearance and consequently does not meet the strict legal definition of “void.”

22Any request by a city 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).


24Id. (quoting § 3.01(B)).


26Id. (citing §§ 3.01.1, 4.16(b)-(c), 5.01, 5.01.1, 5.05, 5.06, 5.07, 6.02, 6.03, 6.04, 6.06, 6.07, 6.08, 6.11, 6.13, 6.14, 6.16, 6.19).

27Id. (citing §§ 4.16(b)-(c), 5.01.1, 5.02, 5.04, 5.05.1, 5.07, 17.02, 18.03).

2828 C.F.R. § 51.2 (emphasis added).

2928 C.F.R. § 51.27(a) (emphasis added).

3028 C.F.R. § 51.41(a) (emphasis added).

expressio unius est exclusio alterius,


See Richmond City Code, supra note 12, § 2-1206.


Id. at 1114; see, e.g., Va. Code Ann. § 42.1-77 (LexisNexis Repl. Vol. 2002) (defining “public official,” as that term is used in Virginia Public Records Act, to include “all persons holding office created by the Constitution of Virginia”).

See 2004 Op. Va. Att’y Gen. 6, and opinions cited therein (noting that public office must be created by Constitution or statutes, and that it is position filled by election or appointment, with designation or title, and duties concerning public, assigned by law).


See, e.g., 1985-1986 Op. Va. Att’y Gen., supra note 50, at 29 (concluding that when employee of commissioner of revenue was appointed commissioner, he became public officer and was no longer employee).


Richmond City Code, supra note 12, § 2-1237(1).
You do not provide a copy of the ordinance(s) adopting the predecessor to §§ 2-1237(1) and 2-1240(b). I do not know whether such ordinance(s) contained a severability clause. Consequently, I cannot opine on the status or validity of the remaining provisions contained in the ordinance(s).

**OP. NO. 04-080**

**COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT — JOINT ACTION BY LOCALITIES — JOINT EXERCISE OF POWERS.**

Virginia Water and Waste Authorities Act authorizes town of Independence to create Virginia water authority in conjunction with Grayson County, Virginia, town of Sparta, North Carolina, and Alleghany County, North Carolina.

MR. ROGER D. BROOKS
ATTORNEY FOR TOWN OF INDEPENDENCE
DECEMBER 22, 2004

**ISSUE PRESENTED**

You ask whether the town of Independence is authorized by the Virginia Water and Waste Authorities Act, §§ 15.2-5100 through 15.2-5158, to create a water authority under the Act with Grayson County, Virginia, the town of Sparta, North Carolina, and Alleghany County, North Carolina.

**RESPONSE**

It is my opinion that the town of Independence is authorized by the Virginia Water and Waste Authorities Act, §§ 15.2-5100 through 15.2-5158, to create a Virginia water authority in conjunction with Grayson County, Virginia, the town of Sparta, North Carolina, and Alleghany County, North Carolina.

**BACKGROUND**

You advise that a preliminary engineering study of the long-term water supply needs of the towns of Independence and Sparta, North Carolina, and the land areas adjacent to each locality, including Grayson County, Virginia, and Alleghany County, North Carolina, indicates that demand will outstrip supply. The study also indicates that construction of a new water treatment plant is the best solution to this matter. You relate that representatives of the four localities have discussed approaching the project on a regional basis. Under consideration is the creation of a Virginia regional water authority under the Virginia Water and Waste Authorities Act, §§ 15.2-5100 through 15.2-5158. It is proposed that such an authority would contract with all four localities in order to construct the treatment plant and supply the water.

You further advise that the Virginia Water and Waste Authorities Act authorizes the town of Independence and Grayson County ("Virginia localities") to create a water authority. You ask that I assume the town of Sparta and Alleghany County ("North Carolina localities") have similar powers or authority under North Carolina law. Furthermore, you ask that I assume there is nothing in any charter or special act applicable to the Virginia localities that would prevent them from forming an authority under the Act with the North Carolina localities.
In your request,¹ you note that the Virginia Water and Waste Authorities Act authorizes the creation of public service authorities for the purpose of owning and operating water systems. Under the provisions of the Act, two or more localities may create such an authority. It is your opinion that because the definition of locality used in Title 15.2 is not expressly limited to Virginia localities, the North Carolina localities will meet the definition of “locality” for purposes of the Act. Should that conclusion not have merit, you relate that § 15.2-1300 will permit the Virginia localities and the North Carolina localities to form a Virginia water authority under the Act.

APPLICABLE LAW AND DISCUSSION

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.”² “[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.”³ The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.⁴ Therefore, any doubt as to the existence of power must be resolved against the locality.⁵

The Virginia Water and Waste Authorities Act is set forth in Chapter 51 of Title 15.2, §§ 15.2-5100 through 15.2-5158. The Act “shall constitute full and complete authority, without regard to the provisions of any other law for the doing of the acts herein authorized.”⁶ Furthermore, the General Assembly requires the Act to be “liberally construed to effect the purposes of [Chapter 51].”⁷ Section 15.2-5102(A) provides:

The governing body of a locality may by ordinance or resolution, or the governing bodies of two or more localities may by concurrent ordinances or resolutions or by agreement, create a water authority .... The name of the authority shall contain the word “authority.” The authority shall be a public body politic and corporate. The ordinance, resolution or agreement creating the authority shall not be adopted or approved until a public hearing has been held on the question of its adoption or approval, and after approval at a referendum if one has been ordered pursuant to this chapter.

It is your opinion that because the definition of locality used in Title 15.2 is not expressly limited to Virginia localities, the North Carolina localities will meet the definition of “locality” for purposes of the Act. The General Assembly sets forth the definitions of the terms used in Title 15.2 in § 15.2-102. The definitions apply “unless such construction would be inconsistent with the context or manifest intent of the statute.”⁸ For purposes of Title 15.2, § 15.2-102 defines the term “locality” “to mean a county, city, or town as the context may require.” The provision does not expressly require that such county, city or town be located within the Commonwealth. The jurisdiction of the legislature of any state, however, generally is limited to the geographical area governed by that state. Therefore, “legislative enactments apply only to persons or
things within the territory over which the enacting legislature exercises jurisdiction."\(^8\) Furthermore, as a general rule, the statutory law of a state can have no effect outside the territorial limits of that state, unless it is given effect in a foreign jurisdiction by courtesy or comity. The Supreme Court of Virginia notes that “[s]tatutes derive their force from the authority of the Legislature, and as a necessary consequence their effect will be limited to the boundaries of the State.”\(^10\)

This general rule must be considered universal because

"[T]he general rule is that no state or nation can by its laws directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. A statute may thus be valid insofar as it relates to persons or things within the jurisdiction although it is invalid insofar as it relates to persons and things outside the jurisdiction. However, a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries."\(^11\)

To the extent that a statute may have any extraterritorial effect, the rule of statutory construction is that

unless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it. Thus, an extraterritorial effect is not to be given statutes by implication."\(^12\)

"The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."\(^13\) The applicable provisions of the Virginia Water and Waste Authorities Act and the provisions of §§ 15.2-102 and 15.2-1300 govern the formation of a water authority within the Commonwealth. Section 15.2-1300(G) indicates that power exists for political subdivisions of the Commonwealth to form a water authority with political subdivisions of other states. The agreement must comply with § 15.2-1300.\(^14\) You advise that none of the applicable Virginia statutory provisions are to be exercised outside the geographic area of the Commonwealth. In addition, you advise that the North Carolina localities desire to join with the Virginia localities within the Commonwealth to form a Virginia water authority pursuant to the laws of the Commonwealth. Furthermore, you request that I assume for the purposes of this opinion that the North Carolina localities are permitted under the law of the State of North Carolina to enter into an agreement to form a Virginia authority under the provisions of the Act. You also request that I assume nothing in the charter or any special act applicable to the Virginia localities would prohibit them from participating with the North Carolina localities."
CONCLUSION

Accordingly, it is my opinion that the town of Independence is authorized by the Virginia Water and Waste Authorities Act, §§ 15.2-5100 through 15.2-5158, to create a Virginia water authority in conjunction with Grayson County, Virginia, the town of Sparta, North Carolina, and Alleghany County, North Carolina.

1Section 2.2-505(B) requires that 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.”


4See Bd. of Suprs. v. Countryside Invest. Co., 258 Va. 497, 522 S.E.2d 610 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, and may include optional provisions contained in Act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.


7Id.


9See 1 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 2:2, at 32 (6th ed. 2002).


12Id. at 431.


14Section 15.2-1300 provides: “A. Any power, privilege or authority exercised or capable of exercise by any political subdivision of this Commonwealth may be exercised and enjoyed jointly with any other political subdivision of this Commonwealth having a similar power, privilege or authority except where an express statutory procedure is otherwise provided for the joint exercise.

   “B. Any two or more political subdivisions may enter into agreements with one another for joint action pursuant to the provisions of this section. The participating political subdivisions shall approve such agreement before the agreement may enter into force. Localities shall approve such agreements by ordinance. Other political subdivisions shall approve such agreements by resolution.

   “C. The agreement shall specify the following:

     “1. Its duration.

     “2. Its purpose or purposes.

     “3. The manner of financing the joint undertaking and of establishing and maintaining a budget therefor.

     “4. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.

     “5. All other necessary and proper matters.

   “D. The agreement, in addition to the items enumerated in subsection C hereof, may contain the following:

     “1. Provision for an administrator or a joint board responsible for administering the undertaking. The precise organization, composition, term, powers and duties of any administrator or joint board shall be specified.

     “2. The manner of acquiring, holding (including how title to such property shall be held) and disposing of real and personal property used in the undertaking.
“3. How issues of liability will be dealt with and the types, amounts and coverages of insurance.
“E. No agreement made pursuant to this section shall relieve any political subdivision of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by an administrator or joint board created by an agreement made hereunder, such performance may be offered in satisfaction of the obligation or responsibility.
“F. Any political subdivision entering into an agreement pursuant to this section may appropriate funds and may sell, lease, give, or otherwise supply the administrator or joint board created to operate the undertaking with such property, personnel or services therefor as may be within its legal power to furnish.
“G. Any power, privilege or authority exercised or capable of exercise by any political subdivision of this Commonwealth may be exercised and enjoyed jointly with any political subdivision of any other state or the District of Columbia subject to the provisions of subsections A, B, C, D, E and F above, which shall apply mutatis mutandis.”

OP. NO. 04-012
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS – DISPOSITION.
Authority for juvenile court to order local board of social services to accept noncustodial entrustment of child found to be in need of services.

THE HONORABLE FRANK D. HARGROVE, SR.
MEMBER, HOUSE OF DELEGATES
MARCH 22, 2004

ISSUE PRESENTED
You inquire regarding the authority of a juvenile and domestic relations district court ("juvenile court") judge to order a local social services board to accept a noncustodial entrustment of a child found to be in need of services.

RESPONSE
It is my opinion that a juvenile court judge has the authority to order a local board of social services to accept noncustodial entrustment of a child found to be in need of services.

BACKGROUND
You relate that § 16.1-278.4 permits a local social services board to enter into noncustodial entrustment agreements for the placement of children in appropriate residential facilities while legal custody remains with the parents. You further relate that § 16.1-278 authorizes a judge, after notice and an opportunity to be heard, to order any governmental agency or institution to render only such services as are provided for by law.

APPLICABLE LAW AND DISCUSSION
“The jurisdiction, practice, and procedure of the juvenile . . . courts are entirely statutory,” and are set forth in Chapter 11 of Title 16.1, §§ 16.1-226 through 16.1-361. Section 16.1-278(A) provides that a juvenile court judge
may order, after notice and opportunity to be heard, any state, county or municipal officer or employee or any governmental agency or other governmental institution to render only such information, assistance, services and cooperation as may be provided for by state or federal law or an ordinance of any city, county or town. [Emphasis added.]

The use of the word “only” in § 16.1-278(A) clearly limits a juvenile court judge’s authority to order only those services to be rendered as are provided by law or ordinance. ²

Section 16.1-278.4 provides that, where a child is found to be in need of services, ³ the juvenile court may enter an order pursuant to § 16.1-278 ⁴ and may also permit the local board of social services to place the child in an appropriate facility while legal custody remains with the parents. ⁵ Because the local board of social services is authorized by law to enter into noncustodial entrustment agreements, the juvenile court judge may also order that governmental agency to render that service. In 1995, the Court of Appeals of Virginia held that the juvenile court judge may, pursuant to § 16.1-278(A), order a local governmental entity to provide necessary services. ⁶

CONCLUSION

Accordingly, it is my opinion that a juvenile court judge has the authority to order a local board of social services to accept noncustodial entrustment of a child found to be in need of services.

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3. “Child in need of services” means that (1) a child’s behavior, conduct or condition presents a clear and substantial danger to the life or health of the child or another person; (2) the child or his family needs, but is not receiving, treatment, rehabilitation or services; and (3) the court’s intervention is essential to provide the child or his family with necessary treatment, rehabilitation or services. VA. CODE ANN. § 16.1-228 (LexisNexis Repl. Vol. 2003).
4. Section 16.1-278.4(1).
5. Section 16.1-278.4(5) authorizes a juvenile or circuit court to enter an order permitting the local board of social services to place a child in need of services, subject to a foster care plan, in a suitable family home, child-care institution, residential facility, or independent living arrangement while legal custody remains with the parents or guardians. Any order allowing a local board to place a child whose legal custody is with the parents or guardians “shall be entered only upon a finding by the court that reasonable efforts have been made to prevent placement out of the home and that continued placement in the home would be contrary to the welfare of the child, and the order shall so state.” Id.
6. See Fauquier County Dep’t of Social Servs. v. Robinson, 20 Va. App. 142, 455 S.E.2d 734 (1995) (holding that court had authority to compel Family Assessment and Planning Team and Community Policy and Management Team to provide necessary residential treatment services for child).
OP. NO. 03-101
COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS – FEES.
ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Circuit court clerk is not required to produce records from electronic database in tangible medium that is not used in regular course of business. If clerk has ability to produce requested information in proper medium and format, charge for reproduction must be reasonable and should not exceed actual costs incurred.

THE HONORABLE CHARLES V. MASON
CLERK, CIRCUIT COURT OF KING GEORGE COUNTY
FEBRUARY 2, 2004

ISSUES PRESENTED

You ask two questions related to The Virginia Freedom of Information Act. First, you ask whether a clerk of the circuit court must reproduce digital images contained in an electronic database on a compact disc, if so requested, when the clerk does not regularly use such format and has no capacity to make such copies. Second, you ask what amount the circuit court clerk must charge for the requested material.

RESPONSE

It is my opinion that a clerk of the circuit court is not required to produce records from an electronic database in a tangible medium that is not used in the regular course of business. If a circuit court clerk has no capacity to reproduce requested records onto the requested medium, the clerk may not be considered to regularly use such medium in the course of business. It is further my opinion that if the clerk has the ability to produce the requested information in the proper medium and format, the charge for such reproduction must be reasonable and should not exceed the actual costs pursuant to § 2.2-3704(F) and (G).

BACKGROUND

You relate that the clerk of the King George County Circuit Court stores land records and certain other public information on computers in digital format. Such records in the clerk’s office are accessible by the public on computer terminals at fifty cents per printed page. The computer terminals are not capable of producing copies in any digital format.

Further, the clerk does not store records in any other digital format or database. The clerk’s office does not regularly use, create or maintain compact discs for its public databases. You have received a request under The Virginia Freedom of Information Act requesting copies of all land records in digital format. You relate that the clerk’s office has no staff or capacity to copy the records or produce them on compact discs, and that there is no funding to hire an outside computer technician to produce the requested information.

APPLICABLE LAW AND DISCUSSION

Sections 2.2-3700 through 2.2-3714 comprise The Virginia Freedom of Information Act. Section 2.2-3704(A) provides that “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." A 2002 opinion of the Attorney General concludes that there is a presumption of openness of court records that has its origins in the common law, and that Virginia statutory law creates a presumption of openness with regard to requests for court records in digital format. The 2002 opinion further concludes that The Virginia Freedom of Information Act and § 17.1-208 impose a duty on circuit court clerks to furnish copies of records requested by a citizen, without distinction between paper and digital formats, provided that the records are not sealed by court order or otherwise exempt from disclosure by law.

Section 2.2-3704(G) provides that “[p]ublic records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F.” Section 2.2-3704(G) further provides, in part:

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Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. [Emphasis added.]
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You first ask whether a clerk of the circuit court must produce a digital format that is not regularly used by the clerk’s office or that is not within the capacity of that office to produce. Specifically, you have been asked to produce a copy of a digital database on a compact disc. You indicate that you do not have the capacity to create compact discs in your office.

The clerk of the circuit court is a “public body” subject to The Virginia Freedom of Information Act. Records of the clerk’s office include those electronic records “prepared or owned by, or in the possession of … its officers, employees or agents in the transaction of public business.” Section 2.2-3704(G) requires public bodies to produce records from an electronic database “in any tangible medium identified by the requester, … if that medium is used by the public body in the regular course of business.” A compact disc is a tangible medium that stores information. You state that your office does not have the capability to copy information onto a compact disc. Therefore, if such medium is not used by your office in the regular course of business, you are not required to produce the requested information on that medium.
To the extent a public body is asked to reformat the data in a database, the plain language of § 2.2-3704(G) states that a public body is not required “to produce records ... in a format not regularly used by the public body.” The public body, however, is required to “make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs.” Consequently, a clerk is required to make a reasonable effort to accommodate a request for a format it does not regularly use. The payment of “reasonable costs” by the requester may include the procurement of a computer technician to make the requested copy if the clerk does not have the capability of producing the requested format and the requester is willing to pay for the services of such technician.

You next inquire concerning the amount the circuit court clerk must charge for copies if he is able to produce the requested records in the proper medium or format. Section 2.2-3704(F) allows “[a] public body [to] make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.” Moreover, “[a]ny duplicating fee charged by a public body shall not exceed the actual cost of duplication.”

Section 17.1-275(A), however, specifically provides:

A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees:

7. For making out a copy of any paper or record to go out of the office, which is not otherwise specifically provided for, a fee of fifty cents for each page.

Section 2.2-3704(G) provides that a public body may charge “a reasonable cost” to make a copy of a computer database, “not to exceed the actual cost in accordance with subsection F.” Section 2.2-3704(F) generally authorizes “reasonable charges” for duplicating an electronic database and limits such charge to the “actual cost” of duplication. As such, § 2.2-3704(F) specifically authorizes a charge to produce this particular record. Therefore, the fifty-cents-per-page charge authorized by § 17.1-275(A)(8) is inapplicable by its express terms.

“A digital database is not identified by the number of pages it contains; instead, a digital database is a set of data that may be copied and transferred from one computer to a computer disk or other storage medium.” In this instance, the electronic database contains digital images of paper records. Those images are stored as files in the database. Consequently, if the clerk has the ability to produce the requested information in the proper medium and format, the charge for such reproduction must be reasonable and should not exceed the actual costs pursuant to § 2.2-3704(F) and (G).

I note, that § 2.2-3704(G) allows the requester and public body to agree on a charge for the requested information to be manipulated into a format usable to the requester.
Although such a procedure is entirely different from actually producing the copy of the information requested, it is a charge that is nonetheless authorized under § 2.2-3704(G), provided that the requester agrees to payment for the reformatting.

CONCLUSION

Accordingly, it is my opinion that a clerk of the circuit court is not required to produce records from an electronic database in a tangible medium that is not used in the regular course of business. If a circuit court clerk has no capacity to reproduce requested records onto the requested medium, the clerk may not be considered to regularly use such medium in the course of business. It is further my opinion that if the clerk has the ability to produce the requested information in the proper medium and format, the charge for such reproduction must be reasonable and should not exceed the actual costs pursuant to § 2.2-3704(F) and (G).

2 Id. at 12.
3 Va. Code Ann. § 2.2-3701 (LexisNexis Supp. 2003) (providing in definition of “public body” that “constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records”).
4 Id. (defining “public records”).
5 The word “medium” is defined as “something through or by which something is accomplished, conveyed, or carried on.” Webster’s Third New International Dictionary of the English Language Unabridged 1403 (1993). Examples of computer storage mediums include compact discs, floppy disks, hard discs, and magnetic tapes.
6 I note, however, that § 2.2-3704(G) also requires public bodies to produce “records maintained in an electronic database” by “posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business.” Therefore, if you are requested to provide such information via the Internet by uploading a file and e-mailing it to the requestor, and you use e-mail in the regular course of your business, then § 2.2-3704(G) requires you to provide such information in this manner. Given the size of certain computer files and restrictions of your Internet service provider, however, it may be impossible to comply with a request in this manner.
7 The word “format” is defined as a “general plan of physical organization or arrangement.” Webster’s Third New International Dictionary of the English Language Unabridged, supra note 5, at 893. “Format” is also defined in the computing context as “a defined structure for holding data, etc., in a record for processing or storage.” The Oxford American Dictionary and Language Guide 380 (1999). Examples of file formats include rich text, plain text, pdf, gif, or jpeg.
8 Section 2.2-3704(G) (LexisNexis Supp. 2003).
9 Section 2.2-3704(G) attempts to weigh the interests of the public in having access to electronic records against the responsibility of a public body to use its limited resources for the common benefit of all citizens. This language imposes an obligation to make reasonable accommodation in providing reformatted records. Accordingly, a public body must make a determination whether the effort in providing the information requested in a format not regularly used by the public body is “reasonable.” “In ordinary use and common acceptation, the word ‘reasonable’ means ‘fair; just; ordinary or usual; not immoderate or excessive; not capricious or arbitrary.’ It means what is ‘just, fair and suitable under the circumstances.’” Sydnor Pump & Well Co. v. Taylor, 201 Va. 311, 317-18, 110 S.E.2d 525, 530 (1959) (citations omitted). This requires the application of the reasonableness standard to the particular circumstances of the public body in the context of the request and available technology. Accordingly, § 2.2-3704(G)
places a burden on the public body to establish that the refusal to provide reformatted records is reasonable under the circumstances.

\footnote{Section 2.2-3704(F) (LexisNexis Supp. 2003).}


OP. NO. 04-017

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PEACE AND ORDER – PLACES OF AMUSEMENT AND DANCE HALLS.

Exemption from regulation as public dance hall only applies to restaurants in cities; no exemption for restaurants located in counties or towns regardless of size of dance floor. Restaurant that provides musical entertainment and meaningfully enforces prohibition against dancing is not subject to regulation as public dance hall. Attorney General declines to render opinion regarding local dance floor ordinance.

MR. J. THOMPSON SHRADER
COUNTY ATTORNEY FOR AMHERST COUNTY
MAY 6, 2004

ISSUE PRESENTED

You seek guidance concerning the regulation of public dance halls. Specifically, you ask whether § 18.2-433 prohibits Amherst County from regulating a restaurant having a dance floor with an area not exceeding ten percent of its total floor area. You further inquire whether, under your local ordinance, dancing that occurs outside an area designated as a dance floor and exceeding ten percent of the total floor space subjects a restaurant to regulation. Finally, you ask whether a restaurant providing musical entertainment, but no dancing, remains subject to regulation.

RESPONSE

It is my opinion that a county may regulate, as a public dance hall, a restaurant located in the county, or in a town within the county, having a dance floor of any size. The exception to regulation in § 18.2-433 is applicable only to restaurants in cities and not to those in counties or towns. Attorneys General long have followed a policy of declining to interpret matters of local concern, and therefore, I decline to render an opinion regarding your local dance floor ordinance. Finally, it is my opinion that a restaurant that provides musical entertainment and meaningfully enforces prohibition against dancing is not subject to regulation as a public dance hall.

BACKGROUND

You relate that an applicant for a dance hall permit withdrew the application because the applicant believes the dance floor is less than ten percent of the total floor area of the restaurant. You further relate that the applicant states this area is the only area in which patrons may dance. Additionally, you note that the applicant limits the dance floor area by Designating the area with masking tape.

You state that Amherst County has adopted an ordinance excluding from the definition of “public dance hall,” a restaurant located in the county that is licensed under § 4.1-210
to serve food and beverages and has a dance floor not exceeding ten percent of the total floor area. Finally, you state that the county has concern that establishments, such as the one described, should be regulated as public dance halls, and the county has proposed to change its ordinance to eliminate the ten percent exception.

**APPLICABLE LAW AND DISCUSSION**

Section 18.2-433 states that “[t]he governing body of any county, city or town may, by ordinance, regulate public dance halls … and prescribe punishment for violation of such ordinance not to exceed that prescribed for a Class 3 misdemeanor.” Section 18.2-433 defines “public dance hall” as “any place open to the general public where dancing is permitted.” Section 18.2-433, however, also states that “a restaurant located in any city licensed under § 4.1-210 to serve food and beverages having a dance floor with an area not exceeding ten per centum of the total floor area of the establishment shall not be considered a public dance hall.”

You ask whether § 18.2-433 prohibits Amherst County from regulating as a public dance hall an establishment with a dance floor that does not exceed ten percent of its total floor area. Section 18.2-433 expressly limits the dance floor exception to “a restaurant located in any city.” (Emphasis added.) The General Assembly could also have included towns and counties within the exception’s coverage, but did not do so. The legislature’s use of the narrower term “city” “must be interpreted in the context of the exemption provision in which it appears.” “When the General Assembly uses two different terms in the same act, it is presumed to mean two different things.” Thus, § 18.2-433 does not prohibit Amherst County from regulating such a restaurant, regardless of the size of its dance floor.

You further ask whether the restaurant is subject to regulation and prosecution, when dancing occurs outside an area designated as a dance floor, which exceeds ten percent of the total area. As noted previously, because § 18.2-433 applies the “ten per centum” exception only to cities, a public restaurant that permits dancing and is located in a town or county qualifies as a public dance hall. Thus, such an establishment may be subject to regulation regardless of the size of its dance floor.

You indicate that the Amherst County ordinance exempts a restaurant from regulation when an establishment’s dance floor does not exceed ten percent of its total floor area. This Office historically has followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation. In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control. Any ambiguity that exists in a local ordinance is a problem to be rectified by the local governing body rather than by an interpretation by this Office. In addition, a 1987 opinion of the Attorney General concludes that the Attorney General has declined to render official opinions when the request involves, among others, a matter of purely local concern or procedure. Accordingly, I have limited my comments to the scope of authority to regulate a public dance hall pursuant to § 18.2-433.
You also inquire whether a restaurant that provides musical entertainment and excludes dancing would be subject to regulation as a public dance hall. Section 18.2-433 defines a "public dance hall" as a "place open to the general public where dancing is permitted." (Emphasis added.) Thus, a facility that prohibits dancing and meaningfully enforces such a prohibition is not subject to regulation as a public dance hall.

CONCLUSION

It is my opinion that a county may regulate, as a public dance hall, a restaurant located in the county, or in a town within the county, having a dance floor of any size. The exception to regulation in § 18.2-433 is applicable only to restaurants in cities and not to those in counties or towns. Attorneys General long have followed a policy of declining to interpret matters of local concern, and therefore, I decline to render an opinion regarding your local dance floor ordinance. Finally, it is my opinion that a restaurant that provides musical entertainment and meaningfully enforces prohibition against dancing is not subject to regulation as a public dance hall.

Amherst County Bd. of Supvrs. Mins. (July 15, 2003), (adopting proposed amendments to § 7-245 of Amherst County Code).


Id.

Cf. Stork Diaper Serv., Inc. v. City of Richmond, 210 Va. 705, 707-08, 173 S.E.2d 859, 861 (1970) (noting that statutory exception expressly limited to businesses with offices in city and other localities cannot be said to include company with facilities in city alone). The court “cannot supply a provision that was not enacted by the General Assembly.” Id. at 708.

Pursuant to § 18.2-433, a county may regulate a public dance hall.


See id.


Person who conspires to make threatening or obscene telephone calls is not subject to misdemeanor punishment for using telephone unlawfully.

THE HONORABLE J. BRANDON BELL, II
MEMBER, SENATE OF VIRGINIA
APRIL 16, 2004

ISSUE PRESENTED
You ask whether a conspiracy to make obscene or threatening phone calls may be considered a violation of § 18.2-427.

RESPONSE
It is my opinion that conspiracy is not a criminal act punishable under § 18.2-427. Therefore, a person who conspires to make threatening or obscene telephone calls is not subject to the misdemeanor punishment prescribed in § 18.2-427 for the unlawful use of a telephone.

BACKGROUND
You relate that you are concerned that a person may potentially avoid prosecution under § 18.2-427 by asking another person to make obscene or threatening telephone calls.

APPLICABLE LAW AND DISCUSSION
Section 18.2-427 provides:

If any person shall use obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act with the intent to coerce, intimidate, or harass any person, over any telephone or citizens band radio, in this Commonwealth, he shall be guilty of a Class 1 misdemeanor.

Section 18.2-22(a) provides that “[i]f any person shall conspire, confederate or combine with another … to commit a felony …, he shall be guilty of a felony.” Generally, under this statute, “a person cannot conspire to commit a misdemeanor.”

Section § 18.2-22 does not apply to any person who conspires to commit a drug-related offense as defined in the Drug Control Act or in Article 1, Chapter 7 of Title 18.2. Section 18.2-256 specifically applies to persons who conspire to commit the drug-related offenses defined in Article 1, Chapter 7 of Title 18.2 or in the Drug Control Act. The Supreme Court of Virginia has recognized that the prohibition in § 18.2-256 applies to conspiracies to commit particular drug-related crimes, regardless of their classification as a felony or misdemeanor, while § 18.2-22 applies only to conspiracies to commit crimes that are classified as felonies.

In other circumstances, the General Assembly has expressly criminalized conspiracy to engage in particular acts despite their felony or misdemeanor classification. No similar provision, however, applies to the criminal acts proscribed under § 18.2-427, which are punishable as a Class 1 misdemeanor.
CONCLUSION

Accordingly, it is my opinion that conspiracy is not a criminal act punishable under § 18.2-427. Therefore, a person who conspires to make threatening or obscene telephone calls is not subject to the misdemeanor punishment prescribed in § 18.2-427 for the unlawful use of a telephone.

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1The authorized punishment for conviction of a Class 1 misdemeanor is “confine[ment] 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).


5See, e.g., § 18.2-23(A)-(B) (LexisNexis Supp. 2003) (conspiring to commit trespass is punishable as Class 3 misdemeanor; larceny as felony); § 18.2-195(4) (Michie Repl. Vol. 1996) (conspiring to commit credit card fraud is punishable as Class 6 felony); § 18.2-367 (Michie Repl. Vol. 1996) (conspiring to cause spouse to commit adultery is punishable as Class 6 felony); § 18.2-408 (Michie Repl. Vol. 1996) (conspiring to incite riot is punishable as Class 5 felony).

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OP. NO. 04-066
CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON – ASSAULTS AND BODILY WOUNDINGS – CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS.

Deferred finding of guilt related to first-offense assault and battery is considered 'conviction' for purposes of applying § 18.2-57.3 in subsequent proceedings and for purposes of concealed weapons statute during defendant's term of probation. Such 'conviction' terminates once person completes probation and deferred finding proceedings against him are dismissed, except for purposes of applying § 18.2-57.3 in any future proceeding under that statute.

THE HONORABLE GARY A. MILLS
JUDGE, SEVENTH JUDICIAL DISTRICT
SEPTEMBER 27, 2004

ISSUE PRESENTED

You ask whether a deferred finding of guilt under § 18.2-57.3 constitutes a conviction of assault and battery against a family or household member.

RESPONSE

It is my opinion that while a deferred finding of guilt related to first-offense assault and battery under § 18.2-57.3 is not a “conviction” in the legal sense of the word, such a deferred finding is considered a “conviction” for purposes of applying § 18.2-57.3 in subsequent proceedings and for purposes of § 18.2-308 during a defendant’s term of probation. It is also my opinion that the person’s “conviction” terminates once the person completes probation and the deferred finding proceedings against him are dismissed, except for purposes of applying § 18.2-57.3 in any future proceeding under that statute.
APPLICABLE LAW AND DISCUSSION

The General Assembly has afforded trial courts the authority to enter deferred findings of guilt as a tool to foster rehabilitation of defendants. Section 18.2-57.3 authorizes trial courts to enter a deferred finding of guilt when first-time offenders are charged with assault and battery against a family or household member under § 18.2-57.2. Such a deferred finding constitutes a “conviction” only for the purpose of applying § 18.2-57.3 in subsequent proceedings. Additionally, the deferred finding is “treated as a conviction” for purposes of § 18.2-308 during a defendant’s term of probation.

Under basic principles of statutory construction, the General Assembly’s intent must be determined from the words contained in a statute. “When the language of a statute is unambiguous, [one is] bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated.” Further, “[w]hen the General Assembly enacts a statute in language with a long history of definition by [the Supreme] Court [of Virginia,]” the presumption is that the General Assembly intended “that the words carry their historical construction.” “Words in a statute are read according to their common meaning … unless it is apparent that the legislature intended otherwise.”

In Virginia, the term “conviction” has a well-understood meaning. A “conviction” generally includes a determination of guilt and the entry of a final judgment by a court. In the context of a not guilty plea, a conviction does not exist until the court has entered judgment. In instances where an individual has pled guilty, however, a conviction exists once the guilty plea is accepted, because a guilty plea is “‘a self-supplied conviction,’” authorizing imposition of a sentence. A deferred finding has none of the characteristics of a “conviction” and, therefore, is not a conviction. When a court enters a deferred finding, such as that contemplated by § 18.2-57.3, no final judgment is entered and sentence may not be imposed, even where a defendant enters a guilty plea. While a deferred finding is not a conviction, it also is not a finding of innocence, even where the defendant successfully completes the term of probation and the charge is dismissed.

Although the Supreme Court of Virginia has not yet construed § 18.2-57.3, it has addressed a similar statute that applies a deferred finding of guilt for drug offenses. Section 18.2-251 provides that, in a proceeding involving a first offense for the illegal possession of drugs, “if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, [the court] may defer further proceedings and place [the accused] on probation upon terms and conditions.” Section 18.2-251 further provides that “[u]pon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him.” Such a dismissal under § 18.2-251 “shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings.” While the dismissal of the charge obviously concludes the proceeding without a conviction, a 1982 opinion of the Attorney General has determined that such dismissals may not be expunged. Nevertheless, the General Assembly
has inserted specific language in § 18.2-251 that a prior dismissal under that statute is considered a "conviction" in limited circumstances. This language is repeated in other deferred finding statutes enacted by the General Assembly and clearly indicates that the General Assembly intended that a person is to be afforded one chance only to avoid a conviction.

Section 18.2-57.3 contains language identical to that used in § 18.2-251. Section 18.2-57.3 provides that "if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, [the court] may defer further proceedings and place [the accused] on probation upon terms and conditions." Section 18.2-57.3 further provides that "[u]pon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him." Such a dismissal under § 18.2-57.3 "shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings." Section 18.2-57.3 differs from § 18.2-251 in that it explicitly bars the expungement of court records pertaining to assault and battery charges dismissed pursuant to § 18.2-57.3.

The General Assembly, however, was concerned about individuals who have shown a tendency for violent behavior and included a second situation where a deferred finding of guilt is deemed a conviction. Section 18.2-57.3 provides that, "[n]otwithstanding any other provision of this section, whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of § 18.2-308," and the concealed weapons prohibitions of that statute shall be imposed. This language evinces a clear intent to ensure that individuals who receive the benefit of a deferred finding of guilt, which is predicated upon a finding that they have committed an act of violence, do not have the same access to weapons as other citizens of the Commonwealth.

In keeping with the rehabilitative intent of the statute, the General Assembly established that such a deferred finding would be considered a conviction only for applying § 18.2-57.3 while the defendant is on probation. The plain language of the statute establishes that the deferred finding is a "conviction" only while the defendant is on probation. Once the matter is dismissed, there is no probation, and the deferred finding ceases to be a "conviction" for purposes of § 18.2-308. At this point, the dismissal is considered a conviction only for the purpose of applying the statute in future proceedings under § 18.2-57.3. The General Assembly did not attach any other collateral consequences to such a dismissal.

CONCLUSION

Accordingly, it is my opinion that while a deferred finding of guilt relating to first-offense assault and battery under § 18.2-57.3 is not a "conviction" in the legal sense of the word, such a deferred finding is considered a "conviction" for purposes of applying § 18.2-57.3 in subsequent proceedings and for purposes of § 18.2-308 during a defendant’s term of probation. It is also my opinion that the person’s "conviction"
terminates once the person completes probation and the deferred finding proceedings against him are dismissed, except for purposes of applying § 18.2-57.3 in any future proceeding under that statute.


3Id.


6See BLACK'S LAW DICTIONARY 335 (7th ed. 1999) (defining “conviction” as “[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty”; “[t]he judgment ... that a person is guilty of a crime”); see also Jewel v. Commonwealth, 260 Va. 430, 536 S.E.2d 905 (2000) (interpreting word “conviction” for purposes of impeachment of witness under § 19.2-269).

7See Jewel, 260 Va. at 432, 536 S.E.2d at 906 (noting that guilty verdict returned by jury remains subject to being set aside by trial court for error committed during trial or for insufficient evidence); see also VA. SUP. CT. R. 3A:15(b) (allowing court to set aside guilty verdict for error committed during trial or if evidence is insufficient to sustain conviction).

8Id. (quoting Peyton v. King, 210 Va. 194, 196, 169 S.E.2d 569, 571 (1969)).

9See 1981-1982 Op. Va. Att’y Gen. 143, 143 (noting that record of dismissals under § 18.2-251 should be maintained, “since they may operate as convictions for the purpose of determining first offender status in subsequent drug prosecution cases”).

10See cites supra note 1.

11Section 18.2-57.3 provides that “no charges dismissed pursuant to this section shall be eligible for expungement under § 19.2-392.2.” Compare Commonwealth v. Jackson, 255 Va. 552, 499 S.E.2d 276 (1998) (reversing order of trial court directing expungement of police and court records related to charge of misdemeanor concealment of merchandise, contending that expungement was not available to defendant who was not innocent as required by § 19.2-392.2) and Gregg v. Commonwealth, 227 Va. 504, 316 S.E.2d 741 (1984) (affirming trial court’s dismissal of petition to expunge police and court records under § 19.2-392.2, where drug charge against defendant was dismissed under first-offender statute, § 18.2-251, stating that § 19.2-392.2 applies only to innocent persons).

12Section 18.2-308 regulates the carrying of concealed weapons in the Commonwealth.

OP. NO. 04-040

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS.

Applicant for concealed handgun permit who is denied permit based on submission of incomplete application should not have his application dismissed with prejudice; may reapply by submitting complete application.
ISSUES PRESENTED
You ask whether an applicant, who is denied a concealed handgun permit because he fails to comply with the procedural requirements of § 18.2-308, should have his subsequent application dismissed with prejudice when the applicant failed to request an ore tenus hearing or appeal the denial of his initial application. If the application is not dismissed with prejudice, you further inquire on what basis the court may hear reapplication.

RESPONSE
It is my opinion that an applicant for a concealed handgun permit who is denied a permit based on submission of an incomplete application should not have his application dismissed with prejudice and may reapply by submitting a complete application pursuant to § 18.2-308(D).

BACKGROUND
You submit a hypothetical situation wherein a circuit court denies an application for a concealed handgun permit due to the applicant’s failure to submit to fingerprinting. The applicant did not avail himself of either an ore tenus hearing pursuant to § 18.2-308(I) or an appeal pursuant to § 18.2-308(L). Should the applicant subsequently submit to fingerprinting, you ask whether the court should rehear the application or whether the applicant is barred from obtaining a concealed handgun permit.

APPLICABLE LAW AND DISCUSSION
Section 18.2-308(D) provides, in part:

Any person 21 years of age or older may apply in writing to the clerk of the circuit court of the county or city in which he resides ... for a five-year permit to carry a concealed handgun.... As a condition for issuance of a concealed handgun permit, the applicant shall submit to fingerprinting if required by local ordinance in the county or city where the applicant resides’” .... The court shall issue the permit within forty-five days of receipt of the completed application unless it is determined that the applicant is disqualified.... An application is deemed complete when all information required to be furnished by the applicant is delivered to and received by the clerk of court before or concomitant with the conduct of a state or national criminal history records check.

When an applicant does not comply with the procedural requirements of § 18.2-308(D), the applicant fails to provide an application to the circuit court clerk that is “deemed complete.” For example, in the hypothetical situation wherein the applicant did not submit to fingerprinting, his application was not complete pursuant to § 18.2-308(D). According to § 18.2-308(D), it is incumbent on the applicant to furnish the required information to the circuit court clerk in order for his application to be “deemed complete.” An application that is incomplete lacks ripeness for adjudication by a circuit court, as it is still within the purview of the clerk of court.
Further, § 18.2-308(D) limits the role of a circuit court. The court either issues the permit within forty-five days of the completed application or determines that an applicant is disqualified. Under your hypothetical situation, the court did not determine that the applicant was disqualified from obtaining a concealed handgun permit. Section 18.2-308(E) details the persons who "shall be deemed disqualified from obtaining a permit." Therefore, an incomplete application would not constitute disqualification under § 18.2-308(E).

Finally, due to the lack of ripeness for adjudication, principles of res judicata would not be applicable and, therefore, would not bar the applicant’s resubmission of his application.

CONCLUSION

Accordingly, it is my opinion that an applicant for a concealed handgun permit who is denied a permit based on submission of an incomplete application should not have his application dismissed with prejudice and may reapply by submitting a complete application pursuant to § 18.2-308(D).

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1The City of Newport News has enacted an ordinance that requires an applicant to submit to fingerprinting. See Newport News, Va., Code of Ordinances § 43-2(d) (1989).


3Section 18.2-308(E) describes twenty categories of individuals who "shall be deemed disqualified from obtaining a permit," such as fugitives from justice (§ 18.2-308(E)(12)), and individuals subject to restraining or protective orders (§ 18.2-308(E)(5)). The applicant in the hypothetical situation was not denied a permit on the basis that he was disqualified pursuant to § 18.2-308(E).


OP. NO. 04-065
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – UNIFORM MACHINE GUN ACT.

No violation of Uniform Machine Gun Act for individual to display historic machine guns at Virginia War Memorial, provided such guns are properly registered and are not used offensively or aggressively.

THE HONORABLE FRANK D. HARGROVE SR.
MEMBER, HOUSE OF DELEGATES
OCTOBER 7, 2004

ISSUE PRESENTED

You ask whether it is a violation of § 18.2-291, which pertains to the possession of a machine gun, for an individual to bring historic weapons, including historically significant machine guns, to the Virginia War Memorial for the purpose of displaying them on special occasions for education purposes.
RESPONSE

It is my opinion that an individual may display historic machine guns at the Virginia War Memorial without violating the Uniform Machine Gun Act, provided that the machine guns are registered pursuant to the Act and federal law and are not used for offensive or aggressive purposes.

APPLICABLE LAW AND DISCUSSION

You express concern that an individual requested to display historic weapons, including historically significant machine guns, at the Virginia War Memorial may be in violation of the Uniform Machine Gun Act. The display of such weapons would be on special occasions and solely for education purposes. Article 5, Chapter 7 of Title 18.2, §§ 18.2-288 through 18.2-298, comprises the Uniform Machine Gun Act. The Act sets out definitions, establishes offenses and presumptions, and creates a mechanism for the registration of a specified class of firearms. No person shall lawfully possess a machine gun unless it is registered pursuant to the Act and federal law. The Act makes the “[p]ossession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence ... a Class 2 felony.” Additionally, § 18.2-290 makes the “[u]nlawful possession or use of a machine gun for an offensive or aggressive purpose ... a Class 4 felony.” Finally, § 18.2-291 provides that Possession or use of a machine gun shall be presumed to be for an offensive or aggressive purpose:

(1) When the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found.

Section 18.2-293.1(2), however, provides that the Uniform Machine Gun Act does not apply to “[t]he possession of a machine gun for a purpose manifestly not aggressive or offensive.” Section 18.2-293.1 provides that such possession is subject to the registration provisions of the Act.

A primary principle of statutory construction dictates that statutes are to be read in accordance with their plain meaning and intent. Resort to the rules of statutory construction is necessary only when there is ambiguity; otherwise, the clear and unambiguous words of the statute must be accorded their plain meaning. When a statute is penal in nature, it “must be strictly construed against the Commonwealth and in favor of an accused.”

A 2002 opinion of this Office determined that the Uniform Machine Gun Act did not prevent the transportation of a machine gun away from a person’s registered bona fide permanent residence or business address. The 2002 opinion, however, cautioned that the transportation of the machine gun on premises not owned or rented by him for his residence or business could create a presumption that the transportation of the machine gun is for an aggressive purpose. In addition to the 2002 opinion, a 1982 opinion of the Attorney General concludes that § 18.2-291 creates a rebuttable presumption. Consistent with these earlier opinions, it is my opinion that transporting machine guns
to the war memorial could create a rebuttable presumption that the transportation is for an aggressive purpose pursuant to § 18.2-291(1).

Although transportation of the machine guns to the war memorial may create a rebuttable presumption pursuant to § 18.2-291(1), the presumption may be rebutted by a showing that the possession of the machine guns is not for an aggressive or offensive purpose as permitted by § 18.2-293.1(2). A 1977 opinion of the Attorney General analyzed the terms “aggressive” and “offensive” with regard to the Uniform Machine Gun Act.\(^\text{18}\) In the 1977 opinion, the issue was whether security personal at a nuclear facility armed with machine guns would be found in violation of the Act.\(^\text{17}\) The 1977 opinion concluded that the purpose for possessing the machine guns was for a defensive, rather than an aggressive or offensive, purpose.\(^\text{18}\) Based on this earlier opinion, I reach a similar conclusion because there appears to be no aggressive or offensive purpose. I believe that transporting machine guns to the war memorial under the scenario outlined above is for an educational, rather than an aggressive or offensive, purpose. Therefore, it is my opinion that the transportation of machine guns to the war memorial for the purpose of an historical display satisfies § 18.2-293.1(2), which rebuts the presumption in § 18.2-291(1).

**CONCLUSION**

Accordingly, it is my opinion that an individual may display historic machine guns at the Virginia War Memorial without violating the Uniform Machine Gun Act, provided that the machine guns are registered pursuant to the Act and federal law and are not used for offensive or aggressive purposes.

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2. See § 18.2-288 (defining “machine gun,” “crime of violence,” and “person”).
3. See §§ 18.2-289, 18.2-290.
4. See § 18.2-291.
5. See §§ 18.2-294, 18.2-295.
6. See § 18.2-295. Failure to produce a certificate of registration or to provide notification of the transfer of a machine gun constitutes a Class 3 misdemeanor. Id.
8. Section 18.2-289.
14. Id. at 143.
15. 1981-1982 Op. Va. Att’y Gen. 120, 121 (concluding that § 18.2-291(2) is constitutionally valid rebuttable presumption); 2002 Op. Va. Att’y Gen. supra note 13, at 143 (concluding that person electing to discharge or fire machine gun must rebut presumption contained in § 18.2-291(4)).
OP. NO. 04-015
CRIMINAL PROCEDURE: ARREST — MAGISTRATES.

No requirement that law-enforcement officer bring arrestee to nearest magistrate's office.

THE HONORABLE DANNY R. FOX
SHERIFF FOR MECKLENBURG COUNTY
APRIL 13, 2004

ISSUE PRESENTED
You ask whether § 19.2-80 requires a law-enforcement officer to transport an arrested person to the closest magistrate's office located in your county.

RESPONSE
It is my opinion that, under the circumstances described, a law-enforcement officer is not required to bring an arrested person to the nearest magistrate's office.

BACKGROUND
You state that Mecklenburg County has four magistrates' offices. Although the offices are not open twenty-four hours a day, you relate that each office has an “on-call” magistrate who is available as needed. You further note that one of the offices is located at the county jail.

You relate that your office requires the arresting officer to bring each arrestee to the county jail for fingerprinting. You further state that the jail has installed a “Live Scan” fingerprint system that is not available at the other magistrate locations. Finally, since all arrestees are transported to the jail, you note that it is more convenient to access the magistrate's office at the jail rather than the office closest to the arrest location.

APPLICABLE LAW AND DISCUSSION
Section 19.2-80 requires “a law-enforcement officer making an arrest under a warrant or capias [to] bring the arrested person without unnecessary delay before a judicial officer” for a bail hearing. (Emphasis added.) Other statutory and constitutional issues, however, are relevant to your inquiry. When a person is arrested without a warrant, § 19.2-82 requires that the arresting officer bring the individual forthwith before a magistrate or other [judicial officer] for a probable cause determination. (Emphasis added.) Should the judicial officer determine there is probable cause, he issues an arrest warrant or a summons.

The terms “forthwith” and “without unnecessary delay,” as used in §§ 19.2-80 and 19.2-82, are synonymous. Such terms are broad enough to allow for the realities
of law enforcement, including issues related to transportation and processing, as well as the availability of a magistrate. Assuming that the “on-call” magistrate at the jail is able to respond promptly, it is my opinion that a law-enforcement officer may transport an arrestee to such magistrate without violating the statutory or constitutional provisions applicable to arrest. Generally speaking, Article I, § 10 of the Constitution of Virginia provides protections similar to those under the Constitution of the United States. Nonetheless, I caution that any “unreasonable” delay in bringing an individual before a magistrate or other judicial officer would comprise a constitutional and statutory violation.

Finally, for the purposes of this opinion, I have confined my comments and analysis to the statutory and constitutional issues regarding an arrest. Other factors, beyond the scope of the facts and the question you present may affect the ability to use a particular magistrate’s office. For example, a standing court order, which requires individuals arrested in certain areas to appear before the magistrate in that location, would require compliance with that order. Section 19.2-35 provides that the chief judge of the circuit court has “supervisory authority” over the magistrate system in that circuit. Thus, the judge has the inherent authority to manage the logistics of the operations of the magistrates’ offices.

CONCLUSION

Accordingly, it is my opinion that, under the circumstances described, a law-enforcement officer is not required to bring an arrested person to the nearest magistrate’s office.

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1 Mecklenburg County is responsible for providing quarters for the magistrates. See Va. Code Ann. § 19.2-48.1(A) (Michie Repl. Vol. 2000). A county may maintain multiple offices within the county whenever it is necessary for “the efficient administration of justice.” Section 19.2-48.1(B).

2 See § 19.2-82 (LexisNexis Supp. 2003). Once a warrant or a summons is issued, a magistrate may address the issue of bail. See § 19.2-45(3) (Michie Repl. Vol. 2000).


7 See Mullins v. Sanders, 189 Va. 624, 629, 54 S.E.2d 116, 119 (1949) (interpreting former § 5070n, which is similar to §§ 19.2-80 and 19.2-82, requiring person arrested without warrant to be taken before judicial officer “with all practicable speed” (quoting § 5070n)). “It is uniformly held that unreasonable delay in failing to comply with such statutory mandate constitutes false imprisonment.” Id. at 630, 54 S.E.2d at 120. Accord Pearson v. Commonwealth, 221 Va. 936, 942 n.1, 275 S.E.2d 893, 897 n.1 (1981) (noting that purpose of § 19.2-80 “is to safeguard a defendant’s constitutional rights by proscribing unnecessary delay between arrest and arraignment”).
You ask whether there is a specified time within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

It is my opinion that there is no statutory time limit within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

APPLICATION LAW AND DISCUSSION

A 1983 opinion of the Attorney General addresses your question. The opinion notes that the justification for detaining a person accused of driving under the influence or public intoxication is that the accused represents a threat to his own safety or the safety of others. The determination as to when to release such a person must be based on a subjective evaluation of the person’s condition at that time.

This standard defies fixed time limits. Instead, the magistrate must hold the intoxicated person until he may be released without “unreasonable danger to himself or the public.” This release must occur in a manner that protects the accused from being unreasonably held long after his condition has changed. The 1983 opinion concludes that, “[b]ecause of the limited justification for this detention, the confinement should last only until the accused can be released to the supervision of a responsible third person or the condition which presents a danger to the accused and others changes.”

Bail decisions generally are committed to the sound discretion of the appropriate judicial officer. Of course, this discretion may not be exercised arbitrarily. Even if the person is still intoxicated, the magistrate must release him to a third party only, if one is available and is deemed by the magistrate to be responsible.
The determination as to whether a third party is “responsible” rests with the sound discretion of the magistrate. Factors such as the age, physical characteristics, and demeanor of both the detainee and the other adult may enter into this decision. For example, a magistrate could determine, in his discretion, that release of a belligerent, intoxicated, 250-pound detainee to a meek 100-pound family member, who clearly cannot control him, is not appropriate. Similarly, a magistrate might find that a sober passenger in the vehicle at the time the defendant was driving under the influence is not “responsible.”

I am unable to find any statute requiring a magistrate to release an individual charged with driving under the influence or public intoxication to a family member or other third party while the arrestee is still intoxicated. The magistrate must release such individual only if, in his sound discretion, he deems the third party to be responsible. Otherwise, the magistrate may order the individual held until his physical condition no longer constitutes a threat to himself or others.

CONCLUSION

Accordingly, it is my opinion that there is no statutory time limit within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

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4See 1983-1984 Op. Va. Att’y Gen., supra note 1, at 229; see also § 19.2-120(A) (providing for pretrial detention of person held in custody when there is probable cause to believe accused will flee or will pose danger to safety of community).
7Id. (emphasis added); see also Pulliam v. Allen, 466 U.S. 522, 526 n.2 (1984) (noting lower court’s directive that any pretrial detention of persons arrested for nonjailable offenses and deemed to be danger to themselves or others must cease when condition that created danger changes or abates, or arrestee is released into third-party custody under circumstances that abate danger).
8Judd, No. 2 v. Commonwealth, 146 Va. 276, 277-78, 135 S.E. 713, 713-14 (1926) (per curiam) (granting of bail after conviction of felony). This discretion may be curtailed by other provisions of law. For example, effective July 1, 2004, a presumption against bail exists for any individual charged with a fourth or subsequent offense of driving under the influence committed within five years. Section 19.2-120(B)(9).
9“There is a presumption that public officials will discharge their duties honestly and in accordance with law, and will not arbitrarily exercise the discretion placed in their hands.” Nat’l Mar. Union v. City of Norfolk, 202 Va. 672, 680, 119 S.E.2d 307, 313 (1961).
"See, e.g., State v. Haas, 505 S.E.2d 311, 314 (N.C. Ct. App. 1998) (noting that under North Carolina statute, impaired driver has right to pretrial release only when magistrate determines that sober, responsible adult will assume responsibility for impaired individual).

As other states have recognized, the consequences of premature release of drunk drivers can be tragic. For example, in New Jersey, a drunk driver who was released while still intoxicated drove within an hour of his release, killing himself and a recent Naval Academy graduate with whom he collided. Joseph A. Gambardello, DWI law lets towns keep hold of drivers, PHILADELPHIA INQUIRER, Aug. 28, 2003, at B01, available at LEXIS, News Library, Major Newspapers File; see also N.J. STAT. § 40:48-1.3(a) (LEXIS through June 7, 2004) (permitting municipalities to adopt ordinances to hold DUI arrestees in protective custody until blood-alcohol concentration is less than 0.05% or up to eight hours without hearing).

In the case of an arrestee charged with public intoxication, part of the magistrate's consideration must be whether the third party can arrange to transport the arrestee so that he does not subject himself to rearrest for again appearing in public while intoxicated.

OP. NO. 04-059
CRIMINAL PROCEDURE: CONSERVATORS OF THE PEACE AND SPECIAL POLICEMEN.

Definition of ‘private police officers.’ Private police officers, who constitute special conservators of peace and meet training standards established by Criminal Justice Services Board, are exempt from registration and bonding requirements.

THE HONORABLE EMMETT W. HANGER, JR.
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 7, 2004

ISSUES PRESENTED

You inquire as to the meaning and authority of a “private police officer.” You also ask whether special conservators of the peace, who are part of a nongovernmental or private police force, are exempt from the registration process established under § 19.2-13(B) and the bonding requirement described in § 19.2-13(C).

RESPONSE

It is my opinion that the term “private police officers” in § 19.2-13(D) refers to the category of officers appointed for the purposes described in § 19.2-13(A). It is, therefore, my opinion that private police officers, who constitute special conservators of the peace and meet the training standards established by the Criminal Justice Services Board, are exempt from the registration and bonding requirements imposed by § 19.2-13.

BACKGROUND

You relate that the Department of Criminal Justice Services, the agency charged with the regulation of special conservators of the peace in the Commonwealth, has advised a nongovernmental or private police force whose members are appointed as conservators of the peace that they are exempt from the registration and bonding requirements contained in § 19.2-13(B) and (C). Specifically, the Department has informed a Virginia nonstock corporation that employs police officers appointed as special conservators of the peace that its officers have met the compulsory training standards established by the Criminal Justice Services Board. The Department of
Criminal Justice Services considers these special conservators of the peace to be law-enforcement officers, and as such, they are not required to possess a registration or to be bonded, as required by § 19.2-13(B) and (C).

**APPLICABLE LAW AND DISCUSSION**

Section 19.2-13 authorizes the circuit court of any county or city to appoint special conservators of the peace upon application of the sheriff or chief of police of a locality “or any corporation authorized to do business in the Commonwealth ... and the showing of a necessity for the security of property or the peace.” Section 19.2-13(B) provides that effective September 15, 2004, persons seeking appointment as special conservators of the peace must register with the Department of Criminal Justice Services prior to being appointed by the circuit court. Special conservators also must satisfy the bonding requirement contained in § 19.2-13(C). Among the individuals designated by § 19.2-13(D) as “exempt from the requirements in subsections A through C,” are those “individuals employed as law-enforcement officers or private police officers as defined in § 9.1-101[18] who have met the minimum qualifications set forth in § 15.2-1705.”

A “law-enforcement officer,” for purposes of § 19.2-13, is a full- or part-time employee of a local police department or sheriff’s office who is responsible for performing normal police functions, and includes certain state agencies with police powers. While not expressly defined by statute, private police officers long have been recognized in the Commonwealth by common law. Section 19.2-13(A) recognizes that police may be appointed, by order and at the discretion of the circuit court, upon application of the sheriff or police chief of a locality, any corporation authorized to conduct business in the Commonwealth, or owner or proprietor of any place in the Commonwealth, for the security of property or the peace. In particular, those appointed upon application of any corporation, or owner or proprietor of any place, in the Commonwealth, are commonly referred to as private police officers. Thus, the term “private police officers” in § 19.2-13(D) refers to the description of such officers appointed for the purposes described in § 19.2-13(A).

While such a factual determination is to be based on the manner and purpose of the particular appointment order at issue, the private police officers authorized to provide police services on the property of the Virginia nonstock corporation referenced in your inquiry appear to constitute special conservators of the peace as provided in § 19.2-13. Thus, it is my opinion that “private police officers” exempted pursuant to § 19.2-13(D) include those officers at issue. The determination whether such officers have met the training requirements imposed pursuant to § 15.2-1705, however is within the statutory purview of the Department of Criminal Justice Services.

**CONCLUSION**

Accordingly, it is my opinion that the term “private police officers” in § 19.2-13(D) refers to the category of officers appointed for the purposes described in § 19.2-13(A). It is, therefore, my opinion that private police officers, who constitute special conservators
of the peace and meet the training standards established by the Criminal Justice Services Board, are exempt from the registration and bonding requirements imposed by § 19.2-13.

1Conservators of the police appointed or elected pursuant to § 19.2-12 are not the subject of this inquiry.

2Special conservators of the peace who are not exempt under § 19.2-13(D) are governed by §§ 9.1-150.1 through 9.1-150.4.


4See McClannan v. Chaplain, 136 Va. 1, 12, 116 S.E. 495, 497-98 (1923) ("The office of conservators of the peace is a very ancient one, and their common law authority ... extends throughout the territory for which they are elected or appointed, ... in private as well as in public places, and upon private as well as public property ... "); see also VA. CODE ANN. § 15.2-1737 (LexisNexis Repl. Vol. 2003) (authorizing circuit courts to appoint special police officers).

OP. NO. 04-034

CRIMINAL PROCEDURE: EVIDENCE AND WITNESSES.

Witness who testifies or produces evidence pursuant to special grand jury subpoena is granted use/derivative use immunity; is not granted transactional immunity or immunity from future prosecution based on prior testimony.

THE HONORABLE DAVID M. HICKS
COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND
JULY 6, 2004

ISSUE PRESENTED

You inquire concerning the kind of immunity that § 19.2-208 affords a witness who is subpoenaed to testify before a special grand jury.

RESPONSE

It is my opinion that a witness who testifies or produces evidence pursuant to a special grand jury subpoena under § 19.2-208 is afforded use immunity and derivative use immunity. Such a witness, however, is not granted transactional immunity, as he is not absolutely immune from future prosecution based on the mere fact of his prior testimony.

APPLICABLE LAW AND DISCUSSION

Article 3, Chapter 13 of Title 19.2, §§ 19.2-206 through 19.2-215, establishes the procedure for impaneling special grand juries. Section 19.2-208 authorizes a special grand jury to subpoena persons to testify before it and to produce specified records and documents. Prior to testifying, a witness “shall be warned by the [special grand jury] foreman that he need not answer any questions or produce any evidence that would tend to incriminate him.” Further, the foreman must warn the witness that he “may later be called” to testify in any subsequent case that might arise out of the special grand jury’s investigation and report.

Section 19.2-208 provides that a witness who is called to testify before a special grand jury and refuses to do so by expressly invoking his right against self-incrimination
may nevertheless be compelled to testify or produce specified records. Further, a witness may be held in contempt if he refuses to testify after being ordered to do so by the presiding judge. Section 19.2-208 also provides that, if a witness expressly invokes his right not to incriminate himself and the presiding judge determines that such right

is bona fide, the compelled testimony, or any information directly or indirectly derived from such testimony or other information, shall not be used against the witness in any criminal proceeding except a prosecution for perjury.

Notwithstanding the provisions of this section, all provisions of this Code relative to immunity granted to witnesses who testify before a grand jury shall remain applicable.

In order to determine the kind of immunity that is available to a witness under § 19.2-208 and the impact of the above-quoted “notwithstanding” provision, it is necessary to assess the three levels of immunity that exist in Virginia: use immunity, derivative use immunity, and transactional immunity. Use immunity protects the witness only from “the use of the specific testimony compelled from him under the grant of immunity,” but not from evidence obtained as a result of such testimony.4

Thus, witnesses protected only by use immunity may be prosecuted, based on evidence indirectly obtained from the witness’s compelled testimony.5 Because immunity must be “coextensive” with a witness’s privilege against self-incrimination, in order for the witness to be constitutionally compelled to testify after invoking his Fifth Amendment right, use immunity has been deemed a “limited protection” that is “inadequate to overcome an assertion of the privilege.”6

Derivative use immunity and transactional immunity afford a witness sufficiently greater safeguards. “[T]he protection against self-incrimination provided by each has been found consonant and coextensive with constitutional safeguards and, thus, sufficient to supplant the privilege.”7 Derivative use immunity bars the use of evidence obtained “even indirectly” from a witness’s compelled testimony, while transactional immunity prevents a witness from being prosecuted “for the offense related to compelled testimony.”8

As stated in § 19.2-208, if a witness testifies or produces certain records pursuant to a special grand jury subpoena, his “compelled testimony, or any information directly or indirectly derived from such testimony or other information, shall not be used against the witness in any criminal proceeding except a prosecution for perjury.”9 It is my opinion, therefore, that § 19.2-208 affords a witness both use immunity and derivative use immunity.

Significantly, the Court of Appeals of Virginia has held that § 19.2-215.7, which governs compelled testimony before multijurisdiction grand juries, affords witnesses
“use immunity and derivative use immunity rather than transactional immunity.”

The fact that §§ 19.2-208 and 19.2-215.7(C) contain identical language barring the use of “compelled testimony, or any information directly or indirectly derived from such testimony or other information,” reinforces the conclusion that § 19.2-208 likewise affords a witness use immunity and derivative use immunity.

It is true that, in contrast to § 19.2-215.7(C), § 19.2-208 states that, “[n]otwithstanding the provisions of this section, all provisions of this Code relative to immunity granted to witnesses who testify before a grand jury shall remain applicable.” This language, however, does not alter the conclusion that a witness who gives compelled testimony before a special grand jury has use immunity or derivative use immunity.

A review of other witness immunity statutes in the Virginia Code discloses no particular framework of protections. For example, the Court of Appeals of Virginia has held that § 18.2-262, which requires a witness to testify as to alleged drug offenses, establishes both use and transactional immunity. Specifically, the Court of Appeals has ruled that, insofar as § 18.2-262 provides that a witness’s compelled testimony “‘shall be in no case used against him,’” it affords him use immunity. The Court of Appeals further held that the provision in § 18.2-262, mandating that a witness “shall [not] be prosecuted as to the offense as to which he testifies,” affords him transactional immunity. Further, § 19.2-270, which governs a witness’s immunity at trial in connection with his prior statements “as a witness upon a legal examination, in a criminal or civil action,” “confers only use immunity.”

Several other statutes in Title 18.2 provide a witness with transactional immunity. Moreover, § 24.2-1018 provides transactional immunity for a witness who testifies concerning election offenses. Other Code provisions, however, provide lesser levels of protection for witnesses. For example, § 4.1-350 establishes use immunity for witnesses testifying with respect to Alcoholic Beverage Control Act offenses. Further, § 52-8.2(B) affords use immunity and derivative use immunity regarding testimony involving elected officials.

Given the varying levels of immunity established in other Code sections for witnesses testifying in criminal proceedings, it is my opinion that the phrase in § 19.2-208, “[n]otwithstanding the provisions of this section,” indicates the intent of the legislature that, in the event of conflict between the immunity established in § 19.2-208 and immunity created in another statute, the latter statute controls. In this regard, it is fundamental that where two statutes “‘are closely interrelated [they] must be read and construed together and effect given to all of their provisions. They should be construed, if possible, so as to harmonize, and force and effect should be given the provisions of each.’” In addition, “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.”

Thus, for example, if a witness were compelled under § 18.2-337 to give testimony before a “grand jury” concerning a gambling matter, he would receive transactional
immunity, because, under the statute, he "shall [n]ever be prosecuted for the offense" about which he testifies. A witness in such a case would not have mere use immunity or derivative use immunity under § 19.2-208, because § 18.2-337, the more specific statute, would control, and § 19.2-208 commands that the other statute’s immunity provisions “shall remain applicable.”

CONCLUSION

Accordingly, it is my opinion that a witness who testifies or produces evidence pursuant to a special grand jury subpoena under § 19.2-208 is afforded use immunity and derivative use immunity. Such a witness, however, is not granted transactional immunity, as he is not absolutely immune from future prosecution based on the mere fact of his prior testimony.

2Id.
5Gosling, 14 Va. App. at 164, 415 S.E.2d at 873.
6Id. at 164-65, 415 S.E.2d at 873.
7Id. at 164, 415 S.E.2d at 873.
9For purposes of this opinion, I assume that the witness has expressly invoked his right against self-incrimination before a special grand jury and that the presiding judge has determined that the assertion of the witness’s privilege is bona fide.
10Tharpe, 18 Va. App. at 44, 441 S.E.2d at 233.
12Id. at 88, 379 S.E.2d at 370.
13Id.
15See VA. CODE ANN. § 18.2-337 (Michie Repl. Vol. 1996) (providing that witness who gives compelled testimony in gambling case “shall [n]ever be prosecuted for the offense being prosecuted concerning which he testifies”); § 18.2-437 (Michie Repl. Vol. 1996) (providing transactional immunity for witness who testifies in perjury prosecution); § 18.2-445 (Michie Repl. Vol. 1996) (providing that witness who gives compelled testimony in bribery case shall not be prosecuted “for any offense of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution”); § 18.2-450 (Michie Repl. Vol. 1996) (providing that witness who gives compelled testimony in prosecution for bribery of public servant or party official is afforded transactional immunity); § 18.2-501(a) (Michie Repl. Vol. 1996) (providing transactional immunity for witness who gives testimony in case involving conspiracy to injure business).
16Tharpe, 18 Va. App. at 43, 441 S.E.2d at 232 (citation omitted).
Issues Presented

You ask whether, pursuant to § 19.2-62(B. 1), employees of a wire or electronic communications service who have intercepted telephone conversations in the course of investigating a complaint of fraudulent telephone service may disclose the contents of those intercepted conversations during testimony at a criminal trial for the offense of fraudulently obtaining or using telephone service. You also ask whether such employees may disclose to law-enforcement officers the contents of the intercepted telephone conversations.

Response

It is my opinion that the subject telephone company employees may disclose the contents of the intercepted telephone conversations both to law-enforcement officers and in testimony at a criminal trial for the offense of fraudulently obtaining or using telephone service.

Background

You state that a consumer received a bill from a telephone company for a telephone he did not own, order or use. The consumer complained to the telephone company, and the company began an investigation. During the investigation, telephone company employees intercepted telephone calls from the subject telephone, in order to determine who was committing the fraud.

Telephone company employees recorded conversations that established crimes of fraudulently obtaining telephone service. They also recorded conversations that evidenced identity theft and credit card fraud. The employees disclosed the recorded conversations to the police. No party to the recorded conversations consented to the interception or recording of the conversations, nor were the conversations intercepted pursuant to court order.

For purposes of this opinion, you assume that the telephone company employees stopped intercepting telephone conversations once they determined who was fraudulently obtaining the telephone service. You also assume that the phone company intercepts telephone conversations as a normal investigative technique used in fraud investigations.
Chapter 6 of Title 19.2, §§ 19.2-61 through 19.2-70.3, contains the provisions governing the interception of wire, electronic or oral communications. Section 19.2-62(A) provides that any person who intentionally intercepts wire, electronic or oral communications "shall be guilty of a Class 6 felony."[1] Section 19.2-62(B. 1), however, provides:

It shall not be unlawful under this chapter for … an officer, employee or agent of a provider of wire or electronic communications service, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service.[2]

Federal law provides an exception to the general prohibition against interception in a manner similar to § 19.2-62(B. 1).[3]

While there are no Virginia case decisions on the subject, some federal courts have addressed the interception of telephone conversations by a telephone company.[4] In a federal district court case involving interception of telephone conversations by a telephone company, the court considered three issues in determining whether the telephone company's actions violated federal wiretap law: (1) whether the provider of electronic communications service had reasonable cause to suspect that its property rights were being abused by a specific subscriber; (2) whether the interception activities were conducted upon a permissible telephone; and (3) whether the interception activities were reasonable.[5] The court noted that there must be some substantial nexus between the use of the telephone instrument to be monitored and the specific fraudulent activity being investigated.[6]

In the situation you describe, each of the questions posed in the federal district court case may be answered in the affirmative. Certainly, there was a substantial nexus between the suspected fraud and the subject telephone. Every use of the suspect telephone potentially was illegal since the billed customer had complained that he did not own or order the telephone. The interception of the telephone conversations, conducted in the ordinary course of the telephone company's investigation of a complaint of fraud, squarely falls within the exception to interception contemplated by § 19.2-62(B. 1).

Disclosure to law enforcement also falls within the permissible actions contemplated by the statute. Certainly, a report to the police of discovered criminal activity, ascertained in the ordinary course of investigating fraud and protecting the property of the telephone company, is proper under the statute.[7]

Testimony in court regarding the conversations intercepted by the telephone company employees also would be permissible under § 19.2-62. Under § 19.2-62(B. 1),
the provider of wire or electronic communications service may “disclose or use” the intercepted wire communications “in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service.” You conclude in your letter that, if it is the normal policy for the phone company to prosecute criminally those who commit telephone fraud, testimony at a criminal trial would be a necessary incident to the protection of the rights and property of the provider. A criminal prosecution, indeed, may be a necessary incident to protect the rights and property of the telephone company. It may be the only way to stop fraud.

Section 19.2-65 provides that no part of an intercepted conversation or evidence derived therefrom may be received in any trial if the disclosure would violate Chapter 6. The disclosures referenced in your request would not violate Chapter 6. Section 19.2-67(C) provides that testimony about communications or derivative evidence obtained from authorized interceptions is limited to criminal proceedings for the offenses listed in § 19.2-66, which is not applicable to the interceptions by employees of the phone company.

CONCLUSION

Accordingly, it is my opinion that the subject telephone company employees may disclose the contents of the intercepted telephone conversations both to law-enforcement officers and in testimony at a criminal trial for the offense of fraudulently obtaining or using telephone service.

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2 "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection, including the use of such connection in a switching station, furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications." Section 19.2-61 (LexisNexis Supp. 2003). Thus, the term “wire communication” includes communication made over cellular telephones.
3 Section 19.2-62(B. 1) prohibits random monitoring by a provider of wire communication service to the public “except for mechanical or service quality control checks.”
4 "It shall not be unlawful under this chapter for … an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks." 18 U.S.C.A. § 2511(2)(a)(i) (West Supp. 2004).
6 See generally United States v. Villanueva, 32 F. Supp. 2d 635, 639 (S.D.N.Y. 1998) (holding that defendant's argument that AT&T Wireless was not authorized to disclose tapes of intercepted telephone calls to law-
enforcement officials ignores plain language of Common Carrier exception authorizing disclosure and disregards purpose of § 2511(a)(a)(i)).

A request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

"Section 19.2-67(C) applies to interceptions authorized under Chapter 6, pursuant to the requirements surrounding the request by the Attorney General, judicial approval, and other requirements.

OP. NO. 04-074

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS.

CONSTITUTION OF VIRGINIA: EDUCATION (SCHOOL BOARDS).

No express authority for school board to loan money to board of supervisors. School boards are subject to Dillon Rule and have only those powers that are expressly given and those that necessarily or fairly are implied from expressly granted powers.

MR. FRANKLIN P. SLAVIN, JR.
COUNTY ATTORNEY FOR BLAND COUNTY
OCTOBER 19, 2004

ISSUE PRESENTED

You ask whether the Board of Supervisors of Bland County may borrow funds from the Bland County School Board.

RESPONSE

It is my opinion that the Bland County School Board has no authority to loan money to the Bland County Board of Supervisors. School boards are subject to the Dillon Rule; thus, they have only those powers that are expressly given and those that necessarily or fairly are implied from expressly granted powers. There is no express grant of authority for a local school board to make loans to the Board of Supervisors nor can any such authority be reasonably or fairly implied.

APPLICABLE LAW AND DISCUSSION

You ask whether the Bland County Board of Supervisors ("board of supervisors") is authorized to secure a loan from the Bland County School Board ("school board"). Article VIII, § 7 of the Constitution of Virginia provides that "[t]he supervision of schools in each school division shall be vested in a school board." Constitutional provisions are either self-executing or mandatory.¹ A self-executing provision does not require enabling legislation for its enforcement.² A mandatory provision declares or imposes a duty or requirement that must be followed.³ A directory provision sets forth procedures or "confer[s] discretion on the legislature" for its implementation.⁴ The Supreme Court of Virginia's decisions concerning Article VIII, § 7, however, leave no room to doubt that the provision is mandatory rather than self-executing.⁵ Thus, the General Assembly has specified the supervisory powers and duties of the local school boards.⁶ School boards are "public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other."⁷
Virginia adheres to the Dillon Rule of strict construction, which provides that “[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.” Any doubt as to the existence of a power must be resolved against the locality. The Dillon Rule applies to school boards as well as to localities.

The first issue, then, is to determine whether there is an express grant of authority for the school board to make loans. In your written opinion, you conclude that no authority explicitly permitting school boards to make loans exists. I concur.

This alone, however, does not end the inquiry. The next question is whether the authority given to school boards necessarily or fairly implies the power to make loans. For a power to be necessarily or fairly implied, it must be consistent with, and directly related to, a stated power or function of a school board. There is no specific test to determine what powers are necessarily implied from particular expressed powers. To determine whether a school board has an implied power, one must first identify a stated power from which the unexpressed authority necessarily or fairly is implied. When the express power necessarily or fairly embraces the implied power, the school board will be deemed to have the implied authority. When a conclusion that a governing body does not have the implied power would frustrate the legislative intent, the implied power will be found to exist. An implied power will not be found where its exercise implicates a power not expressly given, or where statutory construction suggests legislative intent to the contrary.

The overriding duty of a school board is the supervision of schools in each school division. It is my opinion that, under the circumstances you present, such authority does not include the power to make loans to the locality. Section 22.1-88, which lists sources of school funds, describes them as “funds available to the school board of a school division for the establishment, support and maintenance of the public schools in the school division.” This language suggests that the school board must use its funds for the “establishment, support and maintenance” of the schools. The facts you relate do not suggest that a loan by the school board to the board of supervisors meets these objectives.

CONCLUSION

Accordingly, it is my opinion that the Bland County School Board has no authority to loan money to the Bland County Board of Supervisors. School boards are subject to the Dillon Rule; thus, they have only those powers that are expressly given and those that are necessarily or fairly implied from expressly granted powers. There is no express grant of authority for a local school board to make loans to the Board of Supervisors nor can any such authority be reasonably or fairly implied.

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The Virginia Constitution, however, establishes three levels of oversight of public education in the Commonwealth. First, the General Assembly is directed to “provide for a system of free public elementary
and secondary schools for all children of school age throughout the Commonwealth.” VA. CONST. art. VIII, § 1. Second, “general supervision of the public school system shall be vested in a Board of Education” appointed by the Governor and confirmed by the General Assembly. VA. CONST. art. VIII, § 4. Third, school boards have the duty of “supervision of schools.” VA. CONST. art. VIII, § 7.


A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.” City of Newport News v. Woodward, 104 Va. 58, 61-62, 51 S.E. 193, 194 (1905) (citation omitted).

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

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


Any request by a county attorney for an opinion from the Attorney General “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.” Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).


For example, a 1983 opinion of the Attorney General concludes that § 22.1-78, which requires a school board to ensure the “proper discipline of students, including their conduct going to and returning from school,” includes the authority to punish a student by directing the student to perform work for the school. 1982-1983 Op. Va. Att’y Gen. 448, 449. Also, this Office has concluded that the authority of school boards to determine who will use their property, and in what manner, included the power to grant exclusive broadcast rights to sporting events. 1978-1979 Op. Va. Att’y Gen. 224, 225 (interpreting § 22-164.1, predecessor to § 22.1-131).

Gordon, 207 Va. at 832-33, 153 S.E.2d at 274-75.

See 1978-1979 Op. Att’y Gen. 228 (concluding that §§ 22-161 and 15.1-262, which authorize “sale” or “exchange” of school property, do not include power for school board to make gift of school property that does not benefit school district); see also 1978-1979 Op. Va. Att’y Gen., supra note 13, at 216 (concluding that power of local school board to supervise education does not include authority to operate day care center, which is custodial in nature and not essentially related to education).

See, e.g., 2002 Op. Va. Att’y Gen. 105, 106-07 (concluding that school board may not add sexual orientation as category in its nondiscrimination policy, as such authority is not necessarily or fairly implied from express authority to prohibit discrimination on basis of sex); see also 1976-1977 Op. Va. Att’y Gen. 240, 240 (concluding that authority of school board to care for, manage, and control school property does not include authority to offer reward for identification of vandals).
OP. NO. 04-009

EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATION AND SALARIES OF MEMBERS – POPULAR ELECTION OF SCHOOL BOARD.

COUNTRIES, CITIES AND TOWNS: COUNTY BOARD FORM OF GOVERNMENT.

Authority for county board of supervisors to appoint tie breaker for county school board.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
MARCH 22, 2004

ISSUE PRESENTED

You ask whether the Russell County Board of Supervisors has the authority to appoint the tie breaker for the Russell County School Board, an elected school board.

RESPONSE

It is my opinion that § 15.2-410(D) authorizes the Russell County Board of Supervisors to appoint the tie breaker for the Russell County School Board.

BACKGROUND

You enclose with your request a letter from the attorney for the Russell County School Board (“School Board attorney”), which provides an explanation and information about your request. The School Board attorney relates that Russell County uses the county board form of government.1 At its organizational meeting on January 5, 2004, the Russell County Board of Supervisors appointed a resident of Russell County to serve as the tie breaker for the Russell County School Board. The School Board consists of six members elected by the qualified voters of Russell County.

The School Board attorney advises that, pursuant to § 22.1-57.2,2 the county held a referendum, which the voters of Russell County approved. The referendum changed the selection of School Board members to a direct election by the voters. Additionally, the School Board attorney relates that § 22.1-57.3 governs school board member elections in counties that have adopted the county board form of government.3 The School Board attorney notes that § 22.1-57.3 does not provide a method for appointing a tie breaker for school boards. The School Board attorney, however, notes that § 15.2-531 provides for the appointment of a tie breaker under the county executive form of government.4 Section 15.2-531 permits a school board to appoint a county resident as the tie breaker to exercise the duties prescribed in § 22.1-75. The School Board attorney also notes that § 15.2-410(D), providing for the appointment of a tie breaker for a school board under the county board form of government, predates the statutes permitting popular elections of school boards.5 The School Board attorney concludes that, prior to the popular election of school boards, the General Assembly clearly authorized a county board of supervisors to appoint school board members as well as a tie breaker for the school board.

APPLICABLE LAW AND DISCUSSION

Section 22.1-57.3 establishes the procedure for the election of school board members following the approval of the required referendum. Section 22.1-57.3(A) provides...
that, upon voter approval of the referendum, “the members of the school board shall be elected by popular vote.”

Section 22.1-75 generally provides for the appointment of a special tie breaker:

In any case in which there is a tie vote of the school board of any school division in a county when all the members are not present, the question shall be passed by until the next meeting when it shall again be voted upon even though all members are not present. In any case in which there is a tie vote on any question after complying with this procedure or in any case in which there is a tie vote when all the members of the school board are present, the proceedings thereon shall be in conformity with the proceedings prescribed below, except that the tie breaker, if any, appointed pursuant to §§ 15.2-410, 15.2-531, 15.2-627, 15.2-837, 22.1-40, 22.1-44, or § 22.1-47, whichever is applicable, shall cast the deciding vote.

The tie breaker must be a qualified voter and resident of the county.

Section 15.2-410(D) governs school board appointments under the county board form of government:

The board of county supervisors may also appoint a resident of the county to cast the deciding vote in case of a tie vote of the school board as provided in § 22.1-75. The tie breaker, if any, shall be appointed for a four-year term whether appointed to fill a vacancy caused by expiration of a term or otherwise.

Section 15.2-410(F) also provides that “[n]otwithstanding any contrary provisions of this section, a county which has an elected school board shall comply with the applicable provisions of Article 7 of Title 22.1.” The phrase, “[n]otwithstanding any contrary provisions of this section,” clearly indicates a legislative intent to override any potential conflicts with the other subsections of § 15.2-410 and with Article 7. The phrase is limited to conflicts arising from the express language used in § 15.2-410. Use of such phrase in this limited manner contrasts with a statute containing the phrase, “[n]otwithstanding any other provision of law.” The latter phrase indicates a clear legislative intent to override potential conflicts with all earlier legislation.

In analyzing § 15.2-410(D), which permits the board of supervisors in the county board form of government to appoint a tie breaker, and § 22.1-57.3, several rules of statutory construction apply. First, a statute should not be construed to frustrate its purpose. Secondly, statutes related to the same subject should be considered in pari materia. Finally, statutes dealing with the same subject matter should be construed to achieve a harmonious result.

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

"In the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute, which are to be gathered by giving to all the words used their plain meaning, and construing all statutes *in pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation."[10]

As noted by the School Board attorney, Article 7, Chapter 5 of Title 22.1, specifically § 22.1-57.3, does not contain a provision for the appointment of a tie breaker for elected school boards. Indeed, Article 7 is silent regarding such an appointment. Consequently, § 15.2-410(D) is not *contrary* to Article 7 regarding a tie breaker for an elected school board. Since § 15.2-410(D) is not contrary to § 22.1-57.3, the appointment procedure expressly set forth therein will apply to the situation you present.

In this instance, it is clear that §§ 15.2-410 and 22.1-57.3 are both applicable to the fact situation presented by the School Board attorney. The General Assembly is presumed to be aware of the law existing at the time it adopts a statute,[18] as well as its own previous enactments.[17] The 1980 Session of the General Assembly added § 15.1-708(d), the predecessor statute to § 15.2-410(D).[19] Next, in 1992, the General Assembly enacted § 22.1-57.3.[18] Finally, the 1997 Session of the General Assembly added § 15.2-410(F).[28] It is, therefore, reasonable to conclude that the 1997 Session of the General Assembly was aware of the provisions of §§ 15.2-410(D) and 22.1-57.3 when it added § 15.2-410(F).

CONCLUSION

Accordingly, it is my opinion that § 15.2-410(D) authorizes the Russell County Board of Supervisors to appoint the tie breaker for the Russell County School Board.

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1See VA. CODE ANN. §§ 15.2-200 to 15.2-418 (LexisNexis Repl. Vol. 2003).

2Section 22.1-57.2 provides that "[t]he registered voters of any ... county ... may, by petition ..., ask that a referendum be held on the question of whether the members of the school board of the county ... shall be elected directly by the voters."


5See infra notes 6, 18, 19 and accompanying text.


7 Article 7, Chapter 5 of Title 22.1, §§ 22.1-57.1 through 22.1-57.5, governs popular elections of school boards.


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

9 See Prillaman, 199 Va. at 405, 100 S.E.2d at 7; 1996 Op. Va. Att’y Gen. 19, 21 (interpreting statute beginning with phrase, “[n]otwithstanding any other provision of this chapter”).


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


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


20 See 1980 Va. Acts ch. 559, supra note 6, at 759 (adding § 15.1-708(d)). The original language of § 15.1-708(d) directed that the “supervisors shall also appoint” a tie breaker. Id. In 1981, the General Assembly amended § 15.1-708(d) to provide that “supervisors . . . may also appoint” a tie breaker. 1981 Va. Acts ch. 246, at 269, 270. The 1997 Session of the General Assembly recodified Title 15.1 at Title 15.2. See 1997 Va. Acts ch. 587, cls. 2, 4, 5, at 976, 1400-01. Section 15.1-708(d) was recodified at § 15.2-410(D). Id. at 984.


OP. NO. 03-120

EDUCATION: SCHOOL PROPERTY — GENERAL POWERS AND DUTIES OF SCHOOL BOARDS.

Authority for Loudoun County School Board to lease 1883 schoolhouse and adjacent brick building to Loudoun Museum Inc., if leased property is used for benefit of school district and nominal lease is consistent with good business judgment and sound business principles. Question of whether nominal lease benefits school district and is consistent with good business judgment and sound business principles is question of fact to be resolved by School Board.

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EDUCATION: SCHOOL PROPERTY — GENERAL POWERS AND DUTIES OF SCHOOL BOARDS.

Authority for Loudoun County School Board to lease 1883 schoolhouse and adjacent brick building to Loudoun Museum Inc., if leased property is used for benefit of school district and nominal lease is consistent with good business judgment and sound business principles. Question of whether nominal lease benefits school district and is consistent with good business judgment and sound business principles is question of fact to be resolved by School Board.
ISSUE PRESENTED

You ask whether the Loudoun County School Board has the authority to lease to the Loudoun Museum, Inc., real property owned by the School Board.

RESPONSE

It is my opinion that the Loudoun County School Board may lease the 1883 schoolhouse and adjacent brick building to the Loudoun Museum Inc., if the leased property is used for the benefit of the school district and the nominal lease is consistent with good business judgment and sound business principles. It is further my opinion that the question of whether the nominal lease benefits the school district and is consistent with good business judgment and sound business principles is a question of fact to be resolved by the Loudoun County School Board.

BACKGROUND

The Loudoun Museum, Inc., is a federal tax-exempt corporation. The Museum’s mission is to (1) collect and care for materials that illustrate the history of Loudoun County and its residents; (2) interpret the history of Loudoun County through permanent and changing exhibitions; (3) educate the public concerning the county’s history through programs, resource materials, and events; and (4) foster heritage tourism. The Museum has a history of supporting the county’s public school system.

The Loudoun County School Board owns a deteriorating frame structure that was first used as a public school in 1883 and is now being used for storage (“1883 schoolhouse”). The School Board also owns an adjoining brick building. The Loudoun Museum has proposed to lease the property owned by the School Board on a long-term basis and for a nominal amount. The Museum intends to (1) maintain both buildings; (2) invest approximately $500,000 of its own money for renovation of the buildings; (3) restore and operate the 1883 schoolhouse as a historic site and offer educational programs related to its historical importance; (4) create additional classroom and meeting space, conserve and store its collections, and house its administrative offices in the adjoining brick building; and (5) waive the fees of Loudoun County visiting student classes.

APPLICABLE LAW AND DISCUSSION

Section 22.1-129(B) authorizes a school board to lease property it owns. Although no statute limits a school board’s authority as to the term of a lease, prior opinions of this Office have concluded that a school board has authority to enter into a long-term lease.

A 1979 opinion has determined that a transfer for nominal consideration is tantamount to a gift, unless it is for the benefit of the school district and consistent with good business judgment and sound business principles. You relate that, because the leased property will be used for educational programs, a benefit to the school district may be inferred. Further, you relate that (1) the facilities will be used for educational
purposes; (2) the lessee will expend substantial funds to renovate the frame building; (3) no public funding is contemplated; and (4) the county public schools will have continued enjoyment of the facilities, at no cost, and in a useable condition when the lease expires. Such facts would indicate that the proposed nominal lease arrangement meets the "good business judgment and sound principles" test. Whether the proposed nominal lease is for the benefit of the school district and consistent with good business judgment and sound business principles, however, is a question of fact. 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. In this instance, the question of fact must be resolved by the Loudoun County School Board.

CONCLUSION

Accordingly, it is my opinion that the Loudoun County School Board may lease the 1883 schoolhouse and adjacent brick building to the Loudoun Museum Inc., if the leased property is used for the benefit of the school district and the nominal lease is consistent with good business judgment and sound business principles. It is further my opinion that the question of whether the nominal lease benefits the school district and is consistent with good business judgment and sound business principles is a question of fact to be resolved by the Loudoun County School Board.

1See I.R.C. § 501(c)(3) (West 2002) (exempting from taxation "[c]orporations ... organized and operated exclusively for ... educational purposes").
2"A school board shall have the power ... to lease real and personal property either as lessor or lessee ...." VA. CODE ANN. § 22.1-129(B) (LexisNexis Repl. Vol. 2003).

OP. NO. 04-081
EDUCATIONAL INSTITUTIONS: INSTITUTE FOR ADVANCED LEARNING AND RESEARCH.
ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES — GENERAL PROVISIONS.

Local elected officials are not 'nonelected citizens' for purposes of Board of Trustees of Institute for Advanced Learning and Research. Exemption for current Board members appointed prior to July 1, 2004; upon expiration of terms of current Board members, future appointments limited to 'nonelected citizens.' After July 1, 2004, common law doctrine of incompatibility of offices applies resulting in vacation of Board membership when 'nonelected citizen' is elected to public office.
ISSUES PRESENTED

You inquire concerning application of the amendments to § 23-231.20(A), which establishes requirements for appointment to the Board of Trustees of the Institute for Advanced Learning and Research ("Board"), enacted by the 2004 Session of the General Assembly\(^1\) ("2004 amendments").

First, you ask whether local elected officials, i.e. school board members, city council members, and mayors, would be "nonelected citizens" pursuant to § 23-231.20(A). Next, if local elected officials are not "nonelected citizens," you seek guidance regarding the procedure to remove Board members that were appointed prior to the 2004 amendments, but who hold elected positions that now disqualify them from serving on the Board.

Additionally, you ask whether the 2004 amendments require that the city council member and the mayor currently serving as Board members resign their positions; and, if so, what effect would the resignation have on any actions taken by the Board during the period of their membership. Finally, you ask what procedure must be followed when a "nonelected citizen" is appointed to the Board and subsequently becomes an "elected citizen."

RESPONSE

It is my opinion that local elected officials, i.e. school board members, city council members, and mayors, are not "nonelected citizens" as that term is used in § 23-231.20(A). The 2004 amendments provide an exemption from the restricted appointment provision for members appointed prior to July 1, 2004, whose terms have not expired.\(^2\) It is further my opinion that upon the expiration of the terms of the members of the current Board, all future appointments must be made in accordance with § 23-231.20(A). Finally, is my opinion that after July 1, 2004, application of the common law doctrine of incompatibility of offices results in the vacation of membership on the Board when a "nonelected citizen" is elected to public office.

BACKGROUND

You advise that questions have arisen regarding the eligibility requirements for continued service on the Board. Prior to the 2004 amendments, you relate that § 23-231.20 did not provide specific qualifications or conditions for service on the Board. Further, you advise that a city council member and the mayor of a local town currently serve as members of the Board. Both of these members served on the Board and held their local elected positions prior to the 2004 amendments, which added the requirement that members of the Board be "nonelected citizens."

APPLICABLE LAW AND DISCUSSION

Effective July 1, 2004,\(^3\) the 2004 amendments to § 23-231.20(A) provide:
The Institute shall be governed by a nine 15-member Board of Trustees consisting of the presidents or their designees of Averett University, Danville Community College, and Virginia Polytechnic Institute and State University; the chairman or his designee of the Board of the Future of the Piedmont Foundation; a one resident of the City of Danville to be appointed by the Danville City Council; a one resident of Pittsylvania County to be appointed by the Pittsylvania County Board of Supervisors; and three nine citizens representing business and industry and residing in Southside Virginia, one three to be appointed by the Governor, one three to be appointed by the Senate Committee on Privileges and Elections Rules, and one three to be appointed by the Speaker of the House of Delegates. All members appointed shall be nonelected citizens of the Commonwealth.6

When new provisions are added to existing legislation by amendment, a presumption arises that, in making such amendment, the General Assembly “acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts.”5 It is further presumed that the General Assembly acted purposefully with the intent to change existing law.6 The 2004 amendments clearly change the eligibility requirements for appointment to the Board by adding the last sentence to § 23-231.20(A) restricting membership to the Board to “nonelected citizens of the Commonwealth.”

The General Assembly has not, however, defined the term “nonelected” as used in § 23-231.20(A). Ordinarily, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning.7 In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling.8 The term “non” means “not: reverse of: absence of.”9 The ordinary meaning of “elect[ed]” is “to choose (a person) for an office, position, or membership” especially “to select (a person) for political office by vote.”10 The General Assembly, therefore, clearly intends that members of the Board be citizens of the Commonwealth who are not elected by the people to any office.

Elected members of school boards, boards of supervisors, and mayors clearly are public officers.11 “[A] public office is a public agency or trust created in the interest and for the benefit of the people.”12 Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people.13 As elected officers, it is presumed that public officials will discharge their duties in accordance with law.14 Consequently, local elected officials, who are elected to such offices by the citizens, may not be considered “nonelected” citizens. Pursuant to § 23-231.20(A), such public officials may not be appointed to serve on the Board.

In amending § 23-231.20(A), the General Assembly is presumed to have acted with full knowledge of and in reference to the existing law.15 It is readily apparent that the
General Assembly did, in fact, act with full knowledge of the existing law and with the apparent knowledge that elected citizens currently served on the Board. The fifth enactment clause to the 2004 amendments provides:

That this act shall not be construed to affect existing appointments for which the terms have not expired. However, any new appointments or appointments to fill vacancies made after the effective date of this act shall be made in accordance with the provisions of this act.18

"""The manifest intention of the legislature, clearly disclosed by its language, must be applied.""" Thus, it follows that the members of the Board about whom you inquire are not affected by the 2004 amendments.

Therefore, since I conclude that the members about whom you inquire are not affected, it is unnecessary to respond to your question regarding a procedure for current Board members holding local elected positions to resign their positions. Additionally, it is not necessary to address the effect of such resignation on any actions taken by the Board during the period of their membership.

Your final question concerns the procedure to be followed when a "nonelected citizen" is appointed to the Board and later becomes an "elected citizen." It is necessary to determine whether the common law doctrine of incompatibility of offices19 applies to this fact situation. The cases from the Virginia Supreme Court and prior opinions of the Attorney General all speak of incompatibility of office and officers.20 Therefore, a determination must be made whether the person would be a public officer in his capacity as a member of the Board as well as in his capacity as an "elected citizen." In making such a determination, several criteria must be considered. One important consideration is that to constitute a public office, the position must be created by the Constitution of Virginia or by statute.21 It is a position filled by election or appointment, with a designation or title, and duties concerning the public assigned by law. A frequent characteristic of such a post is a fixed term of office.22

As previously noted, persons holding elected offices generally are public officers because: (a) elected offices are created by the Constitution or statute; (b) they have duties concerning the public assigned by law; (c) the offices generally are filled by election; and (d) the offices are for a fixed term. It is equally clear that membership on the Board is a public office. Because § 23-231.20(A) creates positions on the Board and prohibits membership by an "elected citizen," it is clear that one person may not simultaneously serve as a member of the Board and as an "elected citizen." Therefore, the acceptance of and qualification for an elected office by a previously "nonelected citizen" vacates his membership on the Board, and a successor must be appointed to fill the unexpired term.23

CONCLUSION

Accordingly, it is my opinion that local elected officials, i.e. school board members, city council members, and mayors, are not "nonelected citizens" as that term is used
in § 23-231.20(A). The 2004 amendments provide an exemption from the restricted appointment provision for members appointed prior to July 1, 2004, whose terms have not expired.\(^2\) It is further my opinion that upon the expiration of the terms of the members of the current Board, all future appointments must be made in accordance with § 23-231.20(A). Finally, it is my opinion that after July 1, 2004, application of the common law doctrine of incompatibility of offices results in the vacation of membership on the Board when a “nonelected citizen” is elected to public office.


\(^3\)You ask related questions regarding a procedure for removing current Board members whose service is disqualified by the 2004 amendments, and the effect their removal would have on actions by the Board during their membership. Since I conclude that there is an exemption for members appointed to the Board prior to the 2004 amendments, it is unnecessary to respond to these inquiries.

\(^4\)See VA. CODE ANN. § 1-12(A) (LexisNexis Repl. Vol. 2001) (requiring laws enacted at regular session of General Assembly to take effect on July 1 following adjournment of session).


\(^6\)City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).


\(^11\)See supra note 5, and accompanying text.


\(^14\)Ours Props., Inc. v. Ley, 198 Va. 848, 850-51, 96 S.E.2d 754, 756 (1957).

\(^15\)See supra note 5, and accompanying text.


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[Text continues as per the original document]
terminated its agreement with the Department and entered into an agreement with the Department of General Services. Under the new agreement, the General Services’ Bureau of Capital Outlay Management is the building official for the Authority’s capital projects. You note that the Authority asserts that the Fire Marshal must now perform the preoccupancy inspections at no cost, as it does for “other” state buildings.

You advise that the former agreement between the Virginia Commonwealth University Health System Authority and the Department of Housing and Community Development stated that Virginia Commonwealth University leased certain of its buildings to the Authority. Further, you relate that the Authority presumably would pay for the renovation of these buildings. You also note that the agreement provides that the Authority may construct new buildings and renovate others on and off the MCV campus. The wording of the agreement suggests that the University may not own these other buildings or the land on which the proposed buildings will be situated.

**APPLICABLE LAW AND DISCUSSION**

In 1996, the General Assembly established the Virginia Commonwealth University Health System Authority Act. Section 23-50.16:3(A) of the Act identifies the Virginia Commonwealth University Health System Authority “as a public body corporate and as a political subdivision of the Commonwealth.” Section 23-50.16:17(A) grants Virginia Commonwealth University the authority to lease, convey or otherwise transfer to the Authority any or all assets and liabilities appearing on the balance sheet of the Medical College of Virginia Hospitals and any or all of the hospital facilities, except real estate which may be leased to the Authority for a term not to exceed ninety-nine years, upon such terms as may be approved by the University.

Section 36-139.4 authorizes the Department of Housing and Community Development “to enter into agreements with federal agencies, other state agencies and political subdivisions for services directly related to enforcement and administration of laws, rules, or regulations, or ordinances of such agencies affecting fire safety in public buildings.” Section 23-50.16:18(C) requires the Virginia Commonwealth University Health System Authority to ensure that the State Fire Marshal or his designee inspect all its capital projects “prior to certification for building occupancy.” Section 23-50.16:18 is silent regarding the payment or nonpayment of fees to the Fire Marshal for preoccupancy inspection services.

The Virginia Commonwealth University Health System Authority, by the terms of its organic statute, is a “public body corporate and ... a political subdivision.” Section 23-50.16:5(E) authorizes the Authority to employ “a director, officers, employees and agents ..., including engineers, consultants, lawyers and accountants as the Board [of Directors of the Authority] deems appropriate.” It has the power to sue and be sued in its own name; to locate and maintain offices; to accept, hold, and enjoy any gift, devise, or bequest; to borrow money and issue bonds; and to seek financing from and enter...
into contractual commitments with the Virginia Public Building Authority, the Virginia College Building Authority, and the Commonwealth. Until July 1, 2001, employees of the Authority shall be considered employees of the Commonwealth. Further, it is my understanding that the Authority does not directly receive any appropriations from the Commonwealth.

A 2002 opinion of the Attorney General concludes:

A political subdivision is created by the legislature to exercise some portion of the state’s sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred upon it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.

The general obligation of the State Fire Marshal to inspect capital projects without payment of a fee is subject to the project being a “state-owned building.” As a “public body corporate” and a “political subdivision of the Commonwealth,” the Virginia Commonwealth University Health System Authority is neither a state agency nor a state institution for the purpose of answering the question you pose. Therefore, its buildings are not “state-owned buildings.” Since consideration is given solely to ownership of the building, ownership of the land is not relevant. Consequently, the Authority must compensate the Fire Marshal for inspections of Authority-owned buildings.

A building owned by Virginia Commonwealth University and leased to the Virginia Commonwealth University Health System Authority remains a state-owned building. This situation, however, would require that the lease be a conventional lease, and not (1) a financing lease pursuant to which title will change hands at the end of the term for nominal or no consideration, or (2) a lease of such duration, or other good cause, that it is construed to create a freehold estate. You do not suggest that any special leases exist, and therefore, I do not express an opinion with respect to such leases.

As previously noted, the State Fire Marshal’s obligation to provide services at no cost to the building owner applies only to state-owned buildings. Section 23-50.16:18(C), which requires that the Authority use the services of the Fire Marshal to conduct inspections, does not address the compensation issue. Therefore, it does not affect the outcome expressed in this opinion. The determination regarding which capital projects, if any, the Fire Marshal must inspect without compensation is subject to the principles outlined above.

CONCLUSION

Accordingly, it is my opinion that the State Fire Marshal or his designee is not required to perform, without compensation, preoccupancy inspections of capital projects owned by the Virginia Commonwealth University Health System Authority. The Fire Marshal
or his designee is required to perform, without compensation, preoccupancy inspections of capital projects owned by Virginia Commonwealth University and leased under conventional lease to the Authority.\footnote{A capital project leased by Virginia Commonwealth University to the Virginia Commonwealth University Health System Authority is subject, however, to the requirement that the University pay some or all inspection costs when any part of the funding derives from private or foundation sources. See infra note 11. The outcome may also be different should the University and the Authority enter into a nonconventional lease that provides that ownership of the project be conveyed to the Authority at the end of its term, or any other lease that gives a freehold estate to the Authority. See id.}

\footnote{The Director of the Department of Housing and Community Development administers the State-wide Fire Prevention Code and appoints the State Fire Marshal. See VA. CODE ANN. § 36-139(13) (LexisNexis Supp. 2004); § 36-139.2 (Michie Repl. Vol. 1996).}

\footnote{I do not have a copy of the agreement between the Authority and Department of General Services. Such agreement is not directly relevant to the issues presented in this opinion. Therefore, I am unable to review this agreement or comment on the authority to enter into such agreement.}


\footnote{All capital projects must be approved by the Board of Directors of the Virginia Commonwealth University Health System Authority. VA. CODE ANN. § 23-50.16:18(A) (LexisNexis Repl. Vol. 2003). Any capital project exceeding $5 million must be approved by the House Appropriations and Senate Finance Committees prior to being undertaken by the Authority. Section 23-50.16:18(A)-(B).}

\footnote{Section 23-50.16:3(A) (LexisNexis Repl. Vol. 2003).}

\footnote{Section 23-50.16:6(1), (4), (8)-(11) (LexisNexis Repl. Vol. 2003); see also § 23-50.16:25 (LexisNexis Repl. Vol. 2003) ("[B]onds may be issued ... without obtaining the consent of any commission, board, bureau or agency of the Commonwealth," subject to determination by State Treasurer that such bonds do not constitute tax-supported debt, and will not adversely affect debt capacity, of Commonwealth), § 23-50.16:26 (LexisNexis Repl. Vol. 2003) ("Bonds of the Authority shall not be a debt of the Commonwealth or any political subdivision thereof other than the Authority....").}

\footnote{The General Assembly has not assigned the Authority a three-digit agency code in the Appropriation Act, and it does not receive direct appropriations from the Commonwealth.}


\footnote{See § 36-98.1 (Michie Repl. Vol. 1996) (authorizing Department of General Services, which functions as state-owned buildings official, to delegate inspection of state-owned buildings to Fire Marshal, other appropriate state agencies, and local building departments, and requiring state agencies and institutions to pay local building departments for inspections requested by Department).}

\footnote{Prior opinions of the Attorney General have established that a "political subdivision" is not necessarily a state agency. See, e.g., 1999 Op. Va. Att'y Gen. 39, 41, and opinions cited at 43 n.8.}

\footnote{See § 36-98.1 (providing that Uniform Statewide Building Code "shall be applicable to all state-owned buildings"), VA. CODE ANN. § 27-99 (Michie Repl. Vol. 2001) (providing that Statewide Fire Prevention Code "shall be applicable to all state-owned buildings"). If a building is owned by an entity other than a state agency or institution, such building may not be classified as a "state-owned building."}

\footnote{See supra note 1.}
State-owned vehicular tunnels and other transportation-related structures, regardless of age, are subject to Statewide Fire Prevention Code provisions applicable to structures.

MR. WILLIAM C. SHELTON
DIRECTOR, DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
FEBRUARY 18, 2004

ISSUES PRESENTED
You ask whether the Statewide Fire Prevention Code applies to structures such as tunnels that are constructed and maintained by the Department of Transportation. You also ask if the response would be different for any such structure that originally was not constructed in accordance with the Code or its fire prevention regulations.¹

RESPONSE
It is my opinion that state-owned vehicular tunnels and other transportation-related structures, regardless of their age, are subject to the provisions of the Statewide Fire Prevention Code applicable to structures.

BACKGROUND
You relate that the State Fire Marshal is aware of problems with respect to the maintenance of fire protection systems in the Department of Transportation’s vehicular tunnels connecting the cities of Norfolk and Portsmouth. The Fire Marshal is concerned that the Department has not performed the necessary maintenance work on the tunnels’ older systems to assure adequate fire protection in the event of an emergency.

You state that when the State Fire Marshal and local fire officials raised this matter, a representative of the Department of General Services responded that, except as to buildings, the Statewide Fire Prevention Code does not apply to work performed within a Department of Transportation right-of-way.

APPLICABLE LAW AND DISCUSSION
Both the Uniform Statewide Building Code and the Statewide Fire Prevention Code are applicable to state buildings and structures.¹ Section 36-997 of the Building Code defines “structure” as

an assembly of materials forming a construction for occupancy or use including stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, water tanks, storage tanks (underground and aboveground), trestles, piers, wharves, swimming pools, amusement devices, storage bins, and other structures of this general nature but excluding water wells.

Although it does not explicitly include the term “tunnels,” the Building Code’s definition of “structure” is broad enough to include vehicular tunnels. Other statutes
within the Virginia Code include vehicular tunnels as “structures.” Clearly, a tunnel is an assembly of materials forming a construction for use. Moreover, I am unable to locate any statutory authority suggesting that the term “structure,” as used in the Building Code and Fire Prevention Code, is not intended to include vehicular tunnels. Therefore, unless otherwise excepted by statute, vehicular tunnels should not be excluded as “structures” for purposes of the Statewide Building and Fire Prevention Codes.

The Commonwealth Transportation Commissioner is charged with doing “all acts necessary or convenient for constructing, improving and maintaining the systems of state highways.” This authorization does not, however, constitute a basis for exempting tunnels or other highway-related structures from the Fire Prevention Code. The Commissioner must follow and obey all state laws pertaining to the Transportation Department and state highway system. It appearing that there is no statute specifically exempting tunnels and other highway-related structures from the Fire Prevention Code, all such state-owned structures must of necessity be subject to the Code.

It makes no difference that a tunnel or other structure was constructed prior to the establishment of the Statewide Fire Prevention Code. Section 27-99 addresses the applicability of the Code to “state-owned buildings and structures,” and states that “[e]very agency ... shall permit ... a local fire official reasonable access to existing structures or a structure under construction or renovation, for the purposes of performing an informational and advisory fire safety inspection.” (Emphasis added.) Section 27-97 of the Code provides that “buildings constructed prior to 1973 be maintained in accordance with state fire and public building regulations in effect prior to March 31, 1986.” This requirement relates to buildings, not to structures. Therefore, state-owned tunnels and other transportation-related structures, regardless of when they were constructed, are subject to the Statewide Fire Prevention Code provisions applicable to structures.

CONCLUSION

Accordingly, it is my opinion that state-owned vehicular tunnels and other transportation-related structures, regardless of their age, are subject to the provisions of the Statewide Fire Prevention Code applicable to structures.

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1 Section 27-97 provides that “[t]he Fire Prevention Code shall prescribe regulations to be complied with for the protection of life and property from the hazards of fire.”
2 Section 36-139.2 requires that the Director of the Department of Housing and Community Development “appoint a State Fire Marshal ... to carry out the provisions of the Statewide Fire Prevention Code.”
3 You indicate that some of the fire protection systems have been in the tunnels over forty years.
4 Section 36-98.1 provides that, “[a]cting through the Division of Engineering and Buildings, the Department of General Services shall function as the building official for state-owned buildings.”
Section 27-97 authorizes the Board of Housing and Community Development "to adopt and promulgate a Statewide Fire Prevention Code."

By using the terms "buildings" and "structures" in the preceding statutes, the General Assembly is evidencing an intent that they are not one and the same, and that a "structure" clearly is something different from a building. See generally Gray v. Graves Mountain Lodge, Inc., 26 Va. App. 350, 494 S.E.2d 866 (1998).

See, e.g., VA. CODE ANN. § 46.2-881 (LexisNexis Repl. Vol. 2002) ("The Commonwealth Transportation Commissioner ... may conduct an investigation of any ... tunnel and ... may set the maximum speed of vehicles which such structure can withstand ....") VA. CODE ANN. § 15.2-3105 (LexisNexis Repl. Vol. 2003) ("The boundary of every locality ... shall embrace all wharves, piers, docks and other structures, except bridges and tunnels ....") (Emphasis added.)

The conclusion that such structures are subject to the Statewide Fire Prevention Code does not mean that there are fire protection issues with respect to all such structures. To the extent no such issues exist, no action is required of the Commonwealth Transportation Commissioner, nor is any action by fire officials authorized under the Fire Prevention Code. Clearly, however, there are fire protection issues with respect to vehicular tunnels.

If the agency does not make the corrective measures recommended by the local fire official, the State Fire Marshal is authorized to enforce the Fire Prevention Code in the manner prescribed in § 27-98. See also 2002 Op. Va. Att’y Gen. 176 (providing that municipalities may not enforce Fire Prevention Code absent appropriate delegation by State Fire Marshal or Director of Department of Housing and Community Development).

"See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) ("Thus, the maxim Expressio unius est exclusio alterius is applicable here. This maxim provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.").

OP. NO. 03-121
HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC.

You ask whether the language in Chapter 1012 of the 2003 Acts of Assembly is broad enough to encompass all Commonwealth transportation facilities constructed on the Metropolitan Washington Airports Authority’s property in or near Dulles Corridor.

It is my opinion that the question as to whether a particular transportation facility constructed on the Metropolitan Washington Airports Authority property is in or near Dulles Corridor.
the Dulles Corridor is a factual determination to be resolved by the Commonwealth Transportation Board.

APPLICABLE LAW AND DISCUSSION

The 2003 Session of the General Assembly enacted Chapter 1012, wherein the Commonwealth agrees to indemnify the Metropolitan Washington Airports Authority pursuant to agreements between the Authority and Department of Transportation regarding the use of transportation facilities constructed on the Authority’s property “in or near the Dulles Corridor.” Specifically, Chapter 1012 provides for

a limited waiver of sovereign immunity, not to exceed $5 million, so as to indemnify the Metropolitan Washington Airports Authority against claims, damages, losses, and expenses arising out of, resulting from, or attributable to the Commonwealth’s use of Authority property, in or near the Dulles Corridor, on which transportation facilities are constructed, to the extent required in any agreement between the Virginia Department of Transportation and the Authority. Chapter 1012 defines “Dulles Corridor” as “the transportation corridor with an eastern terminus of the East Falls Church Metrorail station and a western terminus of Route 772 in Loudoun County.” The definition of “Dulles Corridor” in Chapter 1012 establishes the eastern and western termini of the Dulles Corridor, but does not define “in or near the Dulles Corridor.”

A 1998 opinion of the Attorney General reviewed the role of the Commonwealth Transportation Board in determining the extent of the Dulles Corridor for purposes of funding a commuter parking lot to serve the Dulles Corridor, using surplus revenues from the Dulles Toll Road. The opinion concludes that the appropriate use of such funds is a determination to be made by the Commonwealth Transportation Board, and that such determination should be given deference. The term “corridor” had not been defined at the time the prior opinion was issued. The opinion notes that the applicable legislation addressing the use of surplus revenues did not specify the width and depth of the corridor and explains that the agency charged with the administration of the legislation authorizing the expenditure of surplus revenues should be given deference in determining such specifications.

While Chapter 1012 clearly establishes the termini of the Dulles Corridor, the Act does not address the depth, width or reach of the Dulles Corridor, except to use the phrase “in or near.” Therefore, deference is to be given to the Commonwealth Transportation Board as the appropriate body to determine which transportation facilities constructed on the Authority’s property are “in or near the Dulles Corridor.”

CONCLUSION

Accordingly, it is my opinion that the question as to whether a particular transportation facility constructed on the Metropolitan Washington Airports Authority property
is in or near the Dulles Corridor is a factual determination to be resolved by the Commonwealth Transportation Board.

12003 Va. Acts ch. 1012, at 1617 (quoting enacting clause 1, § 1).
2Id. (quoting enacting clause 1, § 1).
3Id. (quoting enacting clause 1, § 1).
4Id. (interpreting enacting clause 1, § 1).
6Id. at 93-94.
7Id. at 93 (using common, ordinary meaning of term “corridor”).
8Id. at 93-94.


OP. NO. 03-125
HOUSING: UNIFORM STATEWIDE BUILDING CODE.
ADMINISTRATION OF GOVERNMENT: VIRGINIA REGISTER ACT.
USBC regulations incorporating copyrighted model codes by reference represent enforceable law; are not unconstitutionally vague.

THE HONORABLE WILLIAM G. PETTY
COMMONWEALTH’S ATTORNEY FOR THE CITY OF LYNCHBURG
FEBRUARY 23, 2004

ISSUES PRESENTED
You ask whether the enforcement of building regulations adopted by the Board of Housing and Community Development must await resolution of whether copyrighted material incorporated into the regulations by reference have lost their protection under federal copyright laws. Further, you ask whether the regulations are unconstitutionally vague and thus violative of the due process provisions of the Constitution of the United States.

RESPONSE
It is my opinion that the Virginia Uniform Statewide Building Code regulations, which incorporate copyrighted model codes by reference, represent enforceable law. It is also my opinion that the Virginia Uniform Statewide Building Code regulations are not unconstitutionally vague.

BACKGROUND
You state that building regulations promulgated by the Board of Housing and Community Development incorporate by reference two model codes, which are copyrighted
and published by a private organization. You relate that, upon requesting a copy of one of the codes, the Board informed your office that you must purchase the document. You believe that several provisions of the code you requested and the building regulations are unconstitutionally vague, i.e., they contain vague standards or are susceptible to arbitrary enforcement.

APPLICABLE LAW AND DISCUSSION

The Board of Housing and Community Development has adopted regulations, known as the Virginia Uniform Statewide Building Code ("USBC regulations"), which are enforced pursuant to § 36-106. The USBC regulations include portions of two model codes—the 2000 editions of the International Building Code and the International Property Maintenance Code, which are copyrighted and published by a private organization.

The Virginia Register Act recognizes the authority of agencies to adopt regulations which incorporate textual matter by reference to other publications. When regulations are adopted in this manner, the Act requires that the agency state the places where copies of the publications may be procured and make such copies available for public inspection and copying. Since the model codes on file with the Board of Housing and Community Development are copyrighted, you question whether members of the public may copy the codes and, therefore, ask whether enforcement of the USBC regulations must await resolution of this issue.

I am of the opinion that the enforceability of the USBC regulations does not depend on resolution of any uncertainty regarding copyright protection. Section 2.2-4103 of the Virginia Register Act not only imposes access and copying obligations on the Board, but also prescribes a remedy for noncompliance with these requirements:

It shall be the duty of every agency to have on file with the Registrar [of Regulations] the full text of all of its currently operative regulations .... No regulation or amendment or repeal thereof shall be effective until filed with the Registrar.

Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.

Unless he finds that there are special circumstances requiring otherwise, the Governor, in addition to the exercise of his authority to see that the laws are faithfully executed, may, until compliance with [the Virginia Register Act] is achieved, withhold the payment
of compensation or expenses of any officer or employee of any agency in whole or part whenever the [Virginia Code] Commission certifies to him that the agency has failed to comply with [the Act] in stated respects, to respond promptly to the requests of the Registrar, or to comply with the regulations of the Commission. [Emphasis added.]

Section 2.2-4103 specifically provides that the failure of an agency to file regulations with the Registrar’s office makes them ineffective. Noncompliance with other provisions of § 2.2-4103 is remedied by the Governor, in some instances, by withholding compensation from agency personnel until compliance is achieved.

"[W]here a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." Accordingly, it is my opinion that the General Assembly did not intend the enforceability of the USBC regulations to be impaired by the failure of the Board of Housing and Community Development to enable the public to copy a model code incorporated in the regulations by reference.

Furthermore, it is my opinion that the notice requirements of the Due Process Clause do not imply that citizens be permitted to photocopy an entire model code. Due process requires that one must have "fair warning ... of what the law intends to do if a certain line is passed."

Due Process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.

According to the Department of Housing and Community Development, every locality and building code official is provided a copy of the Uniform Statewide Building Code. Further, it is also my understanding that the Board advises that it pays for each locality to be a member of the International Code Council, the organization that publishes “nationally recognized model building and fire codes.” Each locality should purchase its own copies of the model codes at a “membership price.” For example, the City of Lynchburg’s Inspection Division reports that it has copies of the USBC regulations and that each inspector has a copy of the model codes. Consequently, there is no doubt that the USBC regulations and the model codes incorporated by reference are available for inspection.

Given the availability of inspection locally of the model codes, any restriction on wholesale copying of the codes would not constitute a due process violation that would render the USBC regulations unenforceable.
You next inquire whether the USBC regulations violate the Due Process Clause of the Constitution of the United States.

“All legislation is presumed to be constitutional ....”15 “Any reasonable doubt whether a statute is constitutional shall be resolved in favor of its validity, and courts will declare a statute invalid only if it is plainly repugnant to some constitutional provision.”16

A penal statute is unconstitutionally void for vagueness if it does not “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”17 “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”18

This doctrine recognizes, however, that there are “practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.”19 “But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.”20 Consequently, penal statutes need only define crimes to “a reasonable degree of certainty.”21

You refer to various provisions of the International Property Maintenance Code22 that you believe are unconstitutionally vague. For example, you refer to subsection 303.1, which requires generally that “[t]he exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare.” You also refer to 302.1, which states that “[a]ll exterior property and premises shall be maintained in a clean, safe and sanitary condition. The occupant shall keep that part of the exterior property which such occupant occupies or controls in a clean and sanitary condition.” Subsection 303.2 provides for protective treatment of exterior surfaces:

All exterior surfaces, including but not limited to, doors, door and window frames, cornices, porches, trim, balconies, decks and fences shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. Peeling, flaking and chipped paint shall be eliminated and surfaces repainted.... All metal surfaces subject to rust or corrosion shall be coated to inhibit such rust and corrosion and all surfaces with rust or corrosion shall be stabilized and coated to inhibit future rust and corrosion. Oxidation stains shall be removed from exterior surfaces. Surfaces designed for stabilization by oxidation are exempt from this requirement.

These provisions, however, do not violate the void-for-vagueness test.
Subsection 303.1 requires that the exterior of the structure be maintained in “good repair.” While the term “good repair” may be a broad term, this fact does not render it unconstitutionally vague, as regulations may be broad in order to take into account a variety of situations. Further, the term “good repair” in 303.1 is modified by subsequent language stating that it must not “pose a threat to the public health, safety or welfare,” a phrase used extensively throughout the Virginia Code. Guided, therefore, by this conventional terminology, a person of ordinary intelligence could readily understand what is required to keep an exterior structure in “good repair.”

Moreover, the title of subsection 303.1 is “General,” and a review of the remainder of Section 303 of the International Property Maintenance Code reveals that subsequent provisions provide the necessary detail to determine what constitutes “good repair” of an exterior structure. There are sixteen other provisions in Section 303 delineating specific requirements, which if not complied with would render the exterior structure in disrepair. For example, subsection 303.4 states that “[a]ll structural members shall be maintained free from deterioration, and shall be capable of safely supporting the imposed dead and live loads,” and subsection 303.6 states that “[a]ll exterior walls shall be free from holes, breaks, and loose or rotting materials; and maintained weatherproof and properly surface coated where required to prevent deterioration.” Subsection 303.1 must be considered in the context of the more detailed provisions in Section 303 to determine its meaning. “Statutes which have the same general or common purpose or are parts of the same general plan are ... ordinarily considered as in pari materia.” Consequently, an owner or occupant of reasonable intelligence would understand what is required to properly maintain an exterior structure.

Section 131.0(4) of the USBC regulations deletes subsection 302.1 of the International Property Maintenance Code. Therefore, I do not offer an opinion on the constitutionality of this provision.

Subsection 303.2 of the International Property Maintenance Code, concerning wood and metal surfaces, provides detailed guidance as to necessary actions. It requires that peeling, flaking and chipped paint be eliminated and the surfaces repainted. Metal surfaces subject to rust or corrosion must be coated to inhibit such deterioration, and surfaces with rust or corrosion must be stabilized to inhibit future rust and corrosion. Oxidation stains must be removed. This language provides necessary detail and is not vague.

Furthermore, it is significant, when considering whether the provisions at issue are void for vagueness, that the USBC regulations provide first for notice of violation and then for initiation of legal proceedings. The issuance of a notice of violation is not a prosecution. Subsection 105.2 of the USBC regulations provides for notice of violation to the responsible party. If the responsible party does not comply with such notice, subsection 105.3 authorizes “the building official/building maintenance official [to] request, in writing, the legal counsel of the locality to institute the appropriate legal proceedings,” or, in the alternative, the “official may issue or obtain a summons or warrant where the locality so authorizes.”
You also express concern about the risk of arbitrary enforcement. You refer to § 36-99, which requires the Building Code to "prescribe procedures for the administration and enforcement of regulations, including procedures to be used by the local building department in the evaluation and granting of modifications for any provision of the Building Code." You view this provision as a delegation of authority to the locality arbitrarily to choose not to enforce the Building Code.

"It is ... presumed that public officials will discharge their duties honestly and in accordance with law." The Supreme Court of Virginia has explained that it is not improper to invest an administrative officer or bureau with the power to ascertain and determine the qualifications, facts or conditions required by general terms, as those officials possess the technical knowledge and experience necessary to make such decisions.

Section 36-99 and subsections 109.2 and 129.5 of the USBC regulations merely delegate power authorizing the building official or building maintenance official to ascertain the facts surrounding a request for modification and to apply those facts in determining whether such modification would endanger the public health, safety and welfare. "A delegation of the power to exercise a discretion based upon a finding of facts is not of itself an arbitrary or capricious delegation."

"[W]here protection is afforded by appeal and by review in the courts, ... the requirements of procedural due process are satisfied." Subsections 106.1 and 106.5 of the USBC regulations provide for appeal to the local Board of Building Code Appeals of the building official or building maintenance official's refusal to grant a modification. Further, subsection 106.9 provides that a final determination by the local Board may be appealed to the Technical Review Board. Judicial review of the Review Board's decisions is governed by the Administrative Process Act. These protections provided by the USBC regulations, therefore, eliminate the risk of arbitrary enforcement.

You find other standards of enforcement in the USBC regulations arbitrary. Specifically at issue are subsections 101.8, 109.1, and 109.2. Subsection 101.8 requires that the USBC regulations and model codes be applied and enforced as interpreted by the Technical Review Board. Subsection 109.1 requires that the building official enforce the USBC regulations as interpreted by the Technical Review Board. Section 36-108 provides that the membership of the State Building Code Technical Review Board shall include, among others, a professional engineer, a registered architect, a residential builder, a general contractor, and persons with experience in enforcement of building regulations. Clearly, the makeup of the Review Board provides for the technical knowledge and expertise necessary for interpretation of the USBC regulations. Thus, these provisions do not encourage arbitrary enforcement.

Subsection 109.2 of the USBC regulations provides that, upon application by an owner or his agent, a building official may grant a modification, provided that the spirit and intent of the regulations are observed and the health, welfare and safety of the public are assured. Furthermore, subsection 109.2.1 provides that a building
official may require that the application for modification “include architectural and engineering plans and specifications that include the seal of a professional engineer or architect.” Further, “[t]he building official may require and consider a statement from a professional engineer, architect or other competent person as to the equivalency of the proposed modification.” Subsection 109.2.2 provides that “[t]he application for modification and the final decision of the building official shall be in writing and shall be recorded with the certificate of occupancy in the permanent records of the local building department.” Subsection 129.5 of the USBC regulations, regarding modifications by a building maintenance official, is followed by subsections 129.5.1 and 129.5.2, which contain many of the additional safeguards set forth in subsections 109.2.1 and 109.2.2. These provisions regarding modification requests do not encourage arbitrary enforcement.

CONCLUSION

Accordingly, it is my opinion that the USBC regulations, which incorporate copyrighted model codes by reference, represent enforceable law. It is also my opinion that the USBC regulations are not unconstitutionally vague.


\[2\] It is my understanding that the Virginia Uniform Statewide Building Code is available for inspection.

\[3\] For purposes of this opinion, I assume that the document was available for purchase at a reasonable price.

\[4\] Section 36-98 directs and empowers the Board of Housing and Community Development “to adopt and promulgate a Uniform Statewide Building Code.”

\[5\] Section 36-106(A) provides that a violation of the Uniform Statewide Building is a misdemeanor punishable by a civil fine up to a specified amount.


\[8\] Section 2.2-4103 (LexisNexis Repl. Vol. 2001). The Act further requires that “each agency shall ... allow public copying [of its operative regulations] or make copies available either without charge, at cost, or on payment of a reasonable fee.” Id. (emphasis added).

\[9\] But see Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002) (en banc) (holding that model building codes enter public domain when adopted as law of jurisdiction; once adopted, model codes become “facts” that are not copyright-protected), cert. denied, 123 S. Ct. 2636, 156 L. Ed. 2d 674 (U.S. 2003). Compare Practice Mgmt. Info. Corp. v. AMA, 121 F.3d 516, 518-20 (9th Cir. 1997) (holding that incorporation of AMA's copyrighted medical procedure coding system in Medicare and Medicaid regulations does not render copyright invalid; however, if AMA limited publication, “fair use” would permit copying).

The First Circuit has noted that “judicial decisions and statutes are in the public domain. This straightforward general rule has proven difficult to apply when the material in question does not fall neatly into the categories of statutes or judicial opinions. A number of appellate courts have reached arguably inconsistent results in such cases.” John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 38 (1st Cir. 2003) (citations omitted).
I do not assume that such a failure has occurred in the situation presented; however, the remedial scheme in § 2.2-4103 makes it unnecessary to reach such an issue.


Bldg. Officials & Code Adm’rs Int’l, Inc. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980). In this case, the First Circuit vacated a preliminary injunction preventing Code Technology from publishing and selling its own edition of a state building code based in part on a model code which purportedly was copyrighted and licensed to the state by the plaintiff. The First Circuit noted that, “[w]ile the court leaned strongly toward a conclusion that the copyright was invalid, it emphasized just as strongly that it declined to reach a definitive conclusion.” Danielson, 322 F.3d at 39. Thus, the First Circuit did not resolve the issue and has not done so since. See id.


Id.

References you make to certain subsections do not correspond to the 2000 edition of the International Property Maintenance Code. The text you provide for subsections 303.1 and 304.1 corresponds to that of 302.1 and 303.1, respectively, of the 2000 Code. With regard to subsection 304.2, the text you quote does not correspond to 304.2 and does not appear in that precise form in the 2000 edition of the Code. These matters are included within subsection 303.2 of the 2000 Code.

See Colten, 407 U.S. at 110.


Section 36-99(A) (LexisNexis Supp. 2003).


See id. at 852, 96 S.E.2d at 757.
Id. at 852, 96 S.E.2d at 758.

Id. at 851, 96 S.E.2d at 756.

See § 36-114 (LexisNexis Supp. 2003) (authorizing State Building Code Technical Review Board “to hear all appeals from decisions arising under application of the Building Code ..., and to render its decision ..., which shall be final if no appeal is made therefrom”), see also USBC reg. subsec. 106.9.2, supra note 6.

In your letter, you refer to subsections 107.1 and 107.2. The text you cite, however, is in subsections 109.1 and 109.2 of the USBC regulations.

USBC reg., supra note 6, subsec. 109.2.1.

Section 105 of the International Property Maintenance Code provides detailed requirements regarding modifications, including recording of actions granting modifications and testing of the modifications to assure their compliance.

OP. NO. 04-067
LIBRARIES: STATE LIBRARY AND LIBRARY BOARD — STATE AND FEDERAL AID.

‘Librarian’ is synonymous with ‘library director’ or ‘library administrator.’ Librarian serving as director of local/regional library, and other persons holding full-time professional positions, must meet qualification standards established by Library Board. Branch librarian serving under direction of regional library board, in full-time position of librarian or other full-time professional librarian position, must be certified librarian. Board must seek legislative or regulatory authority to provide standards and guidance for alternative credentialing. Local and regional libraries may employ, and pay with public funding, library personnel who do not have American Library Association-accredited training or its equivalent, provided such individuals are not employed in full-time professional librarian positions. No authority for Library Board to ‘grandfather’ librarians serving before 1988 who do not meet current qualifications or to charge fee for considering applications of library systems requesting waivers of certain regulatory requirements for receiving state aid.

MR. PETER E. BROADBENT, JR.
CHAIRMAN, THE LIBRARY BOARD
NOVEMBER 4, 2004

ISSUES PRESENTED

You ask several questions regarding the meaning of “librarian” and “professional librarian position,” as those terms are used in § 42.1-15.1. You also inquire concerning certain responsibilities of the Library Board.

APPLICABLE LAW AND DISCUSSION

Section 42.1-15.1 sets forth the qualifications required to hold the position of professional librarian:

Public libraries serving a political subdivision or subdivisions having a population greater than 13,000 and libraries operated by the Commonwealth or under its authority, shall not use funds derived from any state aid to employ, in the position of librarian or in any other full-time professional librarian position, a person who does not meet the qualifications established by the State Library Board.

A professional librarian position as used in this section is one that requires a knowledge of books and of library technique equivalent
to that required for graduation from any accredited library school
or one that requires graduation from a school of library science
accredited by the American Library Association.

No funds derived from any state aid shall be paid to any person
whose employment does not comply with this section.

This section shall not apply to law libraries organized pursuant to
Chapter 4 (§ 42.1-60 et seq.) of [Title 42.1], libraries in colleges
and universities or to public school libraries.

Section 42.1-52 provides:

The [Library] Board shall establish standards under which library
systems and libraries shall be eligible for state aid and may require
reports on the operation of all libraries receiving state aid.

As long as funds are available, grants shall be made to the various
libraries, library systems or contracting libraries applying for state
aid in the order in which they meet the standards established
by the Board.

In the event that any library meets the standards of the State Library
Board but is unable to conform to § 42.1-15.1 relating to the
employment of qualified librarians, the Library Board may, under
a contractual agreement with such library, provide professional
supervision of its services and may grant state aid funds to it in
reduced amounts under a uniform plan to be adopted
by the State
Library Board.

Further, § 42.1-8 provides that “[t]he Board shall make rules and regulations, not
inconsistent with law, for the government and use of The Library of Virginia, and
may by general or special regulation determine what books and other possessions of
the Library may not be removed therefrom.” The Board has established regulations
for the certification of librarians.1

QUESTION ONE
You first inquire as to the meaning of “librarian,” as that term is used in
§ 42.1-15.1.

The term “librarian,” as used in § 42.1-15.1, contrasts with the term “professional
librarian position,” which suggests that more than one individual in a library system
may be covered. “When the [General Assembly] uses two different terms in the same
act, it is presumed to mean two different things.”2 I understand that, historically, the
Library Board and the library community have construed the term “librarian” syn-
onymously with “library director.” When the certification program began on July 1,
1937,3 there was one person on staff who possessed a master’s degree in library
science,4 who typically was the head of the State Library.5 Where a statutory term is
of doubtful meaning, the contemporaneous construction placed upon it by governmen-
tal officers charged with its enforcement is entitled to great weight, and should not
be disregarded or overthrown unless it is clear that such a construction is erroneous. The term “librarian” historically appears to be a term of art referring to what now is understood to be the “library director” or “library administrator.”

**QUESTION TWO**

You next ask whether §§ 42.1-15.1 and 42.1-52 require the Library Board to set standards for all persons who perform the function of a librarian, or only for persons who hold the title of director of a public library. You also ask, in the case of a large public library system with multiple branch libraries, whether § 42.1-15.1 requires standards only for the director of the entire system, or for the director of each branch library, or for each person performing a librarian function at any branch library.

Sections 42.1-15.1 and 42.1-52 require that librarians in local or regional libraries, in the position of director, and other persons holding full-time professional positions deemed by the local or regional library to require American Library Association-equivalent training, shall meet the qualification standards established by the Board. If a branch librarian is serving under the direction of the regional library board, in the full-time position of librarian or other full-time professional librarian position “that requires a knowledge of books and of library technique equivalent to that required for graduation from any accredited library school,” the branch librarian must be a certified librarian.

**QUESTION THREE**

You also ask whether the Library Board lawfully may adopt qualification standards for a professional librarian position that mandate graduation from a school approved by the American Library Association and that do not provide for the alternative test described in § 42.1-15.1. Section 42.1-15.1 stipulates that “[a] professional librarian position … requires a knowledge of books and of library technique equivalent to that required for graduation from any accredited library school or … graduation from a school of library science accredited by the American Library Association.” (Emphasis added.)

No Virginia statute requires the Library Board to offer a dual-track certification if the Library Board deems an American Library Association-based certification to be sufficient. If the Library Board elects to implement a certification process that is not approved by the American Library Association, however, legislation or regulations may be necessary to authorize the Library Board to provide standards and guidance for such alternative credentialing, including express authorization to “grandfather” librarians who obtained their Library of Virginia “certification for life” prior to the repeal of the State Board for the Certification of Librarians.

**QUESTION FOUR**

Further, you ask whether § 42.1-15.1 prohibits public libraries from employing librarians who do not meet Library Board qualifications; or whether the statute merely prohibits the use of state funds to pay such personnel. You advise that the first
paragraph of § 42.1-15.1 seems to prohibit employment, but the third paragraph suggests that such persons may be employed, provided they are not paid by certain public funds. A statute must be read as a whole, and all of its parts examined so as to make it harmonious, if possible. Section 42.1-15.1 sets forth the requirements that “[a] professional librarian position” must meet in order to receive funding “derived from state aid.” There is no conflict in the statute. Section 42.1-15.1 prohibits the use of state funds to pay personnel who do not meet Library Board qualifications for the positions specified in the statute.

Local and regional libraries may employ, and pay with monies not “derived from state aid,” library personnel who do not have American Library Association-accredited training or its equivalent. Such libraries may not, however, employ those individuals in the position of librarian or any other full-time professional positions requiring the knowledge and accredited education prescribed in § 42.1-15.1 if any portion of the monies used to fund such position are “derived from state aid.” Larger libraries that employ such individuals would be subject to a reduction in state aid.

Moreover, assuming for argument that there is any question regarding the limitation on what funds may be used to employ individuals other than employ those in full-time professional librarian positions requiring the knowledge and accredited education prescribed in § 42.1-15.1, the rules of statutory construction requires the conclusion that the limitation applies to those derived from state aid. 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.” Additionally, when the legislature amends a statute it is presumed that it acted purposefully with the intent to change existing law. Prior to July 1, 2004, § 42.1-15.1 referred to “public funds” rather than “derived from state aid.” Clearly, the General Assembly intended some change in the law by amending the language of § 42.1-15.1. Public funds such as local or federal funds, and private funds, i.e. those funds not “derived from state aid,” may be used to employ individuals other than employ those in full-time professional librarian positions requiring the knowledge and accredited education prescribed in § 42.1-15.1 absent a local or federal prohibition.

Therefore, it is my view that the intent of the librarian certification statute is to encourage that all public libraries have at least one credentialed director/librarian available to that library system, as well as an American Library Association-credentialed librarian, or a similarly credentialed professional, for positions deemed by the local bodies to require such specialized training. It is incumbent on each local or regional library board to determine whether any particular position constitutes a “full-time professional librarian position” as described in § 42.1-15.1.

QUESTION FIVE

You next ask whether § 42.1-15.1 authorizes the Library Board to “grandfather” librarians serving before 1988, though they do not meet current qualifications. If such “grandfathering” is permissible, you ask whether it must be expressly authorized by
Library Board regulations, as part of the Board’s determination of librarian “qualifications,” rather than by informal staff action.

The normal purpose of a “grandfather” provision is to delay application of some new and stricter standard. Section 42.1-15.1 provides no language suggesting that a “grandfather” provision is intended. I am not aware of any basis upon which certain librarians may be “grandfathered,” absent express legislation authorizing such “grandfathering.”

**QUESTION SIX**

Finally, you advise that the Library Board frequently receives requests from local public libraries to waive certain regulatory requirements which must be met to receive state grants-in-aid. The Board has discretion to make exceptions for libraries that are unable to meet the requirements for receiving state aid. You ask whether, in considering requests by library systems for waivers to receive state aid under § 42.1-52, the Library Board may charge a fee or require a proffer for waiver applications, and if so, whether any fee or proffer must be related directly to the expenditure of time and effort by Library staff in processing a waiver request, or whether it may be a flat fee or percentage of the grant aid for which a waiver is sought.

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. Nothing in § 42.1-52 suggests that the Library Board may impose a fee.
As a practical matter, I am advised that there is no substitute or equivalent to the American Library Association-based certification.


1To the extent that a conflict was discernable, the 2004 amendment to § 42.1-15.1 appears to reconcile any such conflict. See 2004 Va. Acts, supra note 3.

On July 1, 2004, the term “public funds” was changed to “funds derived from any state aid” thereby making the limitation on the use of governmental funds more narrow. See 2004 Va. Acts, supra note 3.

1See § 42.1-52 (LexisNexis Repl. Vol. 2002).


1See 17 VA. ADMIN. CODE ch. 110, 15-110-10 (Law. Co-op. 1996).

1See id. 15-110-10(9).


OP. NO. 04-073

LIBRARIES: STATE LIBRARY AND LIBRARY BOARD — STATE AND FEDERAL AID.

Library of Virginia, when distributing state and federal technology assistance monies to local and regional libraries, may require that such libraries adopt Internet safety policies preventing access to visual depictions of obscenity, child pornography, and other illegal materials; requirement should allow patrons to disable filters to conduct bona fide research or for other lawful purposes. Absent such spending authority, Library may not dictate measures to prevent on-line access to illegal materials.

MR. PETER E. BROADBENT, JR.
CHAIRMAN, THE LIBRARY BOARD
SEPTEMBER 22, 2004

ISSUES PRESENTED

You ask several questions regarding the relationship between the Library Board and local libraries with respect to their use of electronic filtering.

RESPONSE

It is my opinion that the Library of Virginia, when distributing state and federal technology assistance monies to local and regional libraries, may impose a requirement that such libraries adopt Internet safety policies that include the operation of technol-
ogy protection measures that prevent access to visual depictions of obscenity, child pornography, and other illegal materials. Any such funding requirement should also allow patrons to disable filters for the purpose of conducting bona fide research or for other lawful purposes.

In the absence of such spending authority, the Library is without authority to dictate to local or regional libraries measures to prevent on-line access to illegal materials. The General Assembly, however, may impose upon such libraries constitutional requirements limiting computer Internet access to obscenity, child pornography and other illegal materials.

APPLICABLE LAW AND DISCUSSION

You first ask whether the Library of Virginia may provide a local library with access to electronic information databases acquired with federal funds, without certification from the library that its Internet safety policy complies with § 9134(f)(1) of the Library Services and Technology Act.¹

Section 9141 of the Library Services and Technology Act provides grants to states to “carry[] out ongoing library activities and projects.”² In order to be approved to receive federal assistance under the Act, the Library of Virginia must submit to the Director of the Institute of Museum and Library Services a state plan³ identifying Virginia’s library needs and programs.⁴ Section 42.1-1 designates the Library of Virginia as “the library agency of the Commonwealth.” The Library is under the direction of the Library Board, a corporation whose members are appointed by the Governor.⁵ Chapter 3 of Title 42.1, §§ 42.1-46 through 42.1-59, establishes the Library Board’s spending and distribution authority. The Library has a corollary duty to supervise the manner in which state and federal monies are administered.⁶ Thus, the Library may require, as a condition for funding access to on-line databases, that local and regional libraries adopt policies to protect patrons, particularly minors, from Internet obscenity, child pornography, and other illegal materials.⁷ Such a requirement may include a mandate that recipients of such aid use filtering software or other technology protection measures to avert patron access to illegal materials.⁸

You next ask whether the Library Board may require all local public libraries to use mandatory electronic filtering similar to the filtering software approved by the Supreme Court of the United States.⁹ Further, you inquire whether the Board may require a local public library that elects to receive state aid under § 42.1-52, to certify that it uses such mandatory electronic filtering.

While affirming the constitutionality of the Children’s Internet Protection Act,¹⁰ the United States Supreme Court rejected the notion that our public libraries constitute a “designated public forum.”¹¹ The Court characterized Internet access at public libraries as a “technological extension of the book stack.”¹² The Supreme Court also rejected the district court’s conclusion that a library’s inability to review every website undercuts its traditional discretion to make content-based decisions about quality and suitability of materials, and made the following observations:
A library’s failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make. A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these judgments to heightened scrutiny; it would make little sense to treat libraries’ judgments to block online pornography any differently, when these judgments are made for just the same reason.¹³⁹

In order to be sensitive to important First Amendment concerns that may arise when technology protection measures are employed in public libraries, if the Library Board imposes funding conditions on state-aid recipients, it must also ensure that any state or federal funding requirement mandating that technology protection measures be used in local or regional public libraries also require that such technologies be readily disabled by adult patrons seeking to engage in bona fide research or any other lawful purpose.¹⁴

While Virginia law vests the Library Board with discretion to distribute state and federal monies and to thereby promote establishment of quality, comprehensive library services throughout the Commonwealth, there is no general statutory authority, apart from the Board’s spending powers, that authorizes the Library Board to impose upon local or regional libraries restrictions on patron access to Internet materials.¹⁵ The General Assembly, however, does have authority over local and regional library boards, as they are creatures of statute, and may impose constitutional limitations on patron access to illegal materials on-line in local and regional libraries.¹⁶

In the absence of such legislation, or receipt of state or federal aid that supports technological innovation in libraries, local and regional libraries may adopt collection and library development policies that reflect local interests, community standards and sensibilities. Under its general mandate “[t]o give direction, assistance and counsel to all libraries in the Commonwealth”¹⁷ the Library Board may recommend to the local and regional libraries any measures that the Board deems useful to improve the administration and maintenance of these libraries.

CONCLUSION

Accordingly, it is my opinion that the Library of Virginia, when distributing state and federal technology assistance monies to local and regional libraries, may impose a requirement that such libraries adopt Internet safety policies that include the operation of technology protection measures that prevent access to visual depictions of obscenity, child pornography, and other illegal materials. Any such funding requirement should also allow patrons to disable filters for the purpose of conducting bona fide research or for other lawful purposes.
In the absence of such spending authority, the Library is without authority to dictate to local or regional libraries measures to prevent on-line access to illegal materials. The General Assembly, however, may impose upon such libraries constitutional requirements limiting computer Internet access to obscenity, child pornography and other illegal materials.

120 U.S.C.A. § 9134(f)(1)(A)-(B) (West 2003 & Supp. 2004) (prohibiting use of federal funds by public library to purchase computers, unless library has and enforces “policy of Internet safety for minors” that includes “technology protection measure” that protects against computer Internet access to visual depictions of obscenity, child pornography, and other material that is harmful to minors; see also 47 U.S.C.A. § 254(h)(6)(B)(i), (C)(i) (West 2001) (providing that libraries having Internet access may not receive services at discount rates, unless they submit certification that they are enforcing technology protection measures with respect to minors and adults).


3 Id. § 9134 (West 2003 & Supp. 2004).

4 See id. § 9122 (West Supp. 2004); see also §§ 9121, 9123, 9131, 9134, 9162 (West 2003 & Supp. 2004); §§ 9132, 9133, 9151 9161, 9163 (West 2003); § 9141 (West Supp. 2004).


6 See § 42.1-1(8) (LexisNexis Repl. Vol. 2002) (vesting State Library with power and duty “[t]o administer and distribute state and federal library funds in accordance with law and its own regulations to the city, county, town and regional libraries of the Commonwealth”).

7 Section 42.1-36.1(A) requires every library board, or the governing body of a locality that has not established a library board, that receives state funds to file, on a biennial basis, “an acceptable use policy” governing Internet access. The policy must contain provisions designed to prevent library employees and patrons from using public library computers to obtain illegal material from the Internet. See § 42.1-36.1(A) (LexisNexis Repl. Vol. 2002). Additionally, the policy must seek to (1) “prevent access by library patrons under the age of eighteen to material which is harmful to juveniles,” and (2) “establish appropriate measures to be taken against persons who violate the policy.” Id.

8 See § 42.1-36.1(B).

9 Congress enacted the Children’s Internet Protection Act “to address the problems associated with the availability of Internet pornography in public libraries.” United States v. Am. Library Ass’n, 539 U.S. 194, 198 (2003). “Under the Act, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that it harmful to them.” Id. at 199. The Court found that the use of Internet filtering software by public libraries does not violate library patrons’ First Amendment rights, that the Children’s Internet Protection Act imposes no unconstitutional condition on public libraries, and that the Act is a valid exercise of Congress’ spending power. Id. at 214.


11 Am. Library Ass’n, 539 U.S. at 205 (“Internet access in public libraries is neither a ‘traditional’ nor a ‘designated’ public forum.”).

12 Id. at 207 (citation omitted).

13 Id. at 208.

14 Id. at 209.

15 Comparing public libraries to public broadcasting and public arts funding (id. at 204-05), the Court recognized that library access policies, including those decisions effecting Internet access, are inherently content-based, stating that “[p]ublic library staffs necessarily consider content in making collection
decisions and enjoy broad discretion in making them." Id. at 205; see also § 42.1-32.1 (providing that none of networking policies of public libraries "shall be construed to interfere with the autonomy of the governing boards of ... public ... libraries.")


OP. NO. 04-045
MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.
Meaning of 'primary law-enforcement agency' and 'jurisdiction' as those terms relate to execution of emergency custody and temporary detention orders and transportation of patients pursuant to such orders.

THE HONORABLE DALE MUTERSPAUGH
SHERIFF FOR ALLEGHANY COUNTY
JULY 15, 2004

ISSUE PRESENTED
You seek clarification of amendments made by the 2004 Session of the General Assembly to §§ 37.1-67.01 and 37.1-67.11 ("2004 enactment"). Specifically, you inquire as to a definition of the terms "primary law-enforcement agency" and "jurisdiction" in §§ 37.1-67.01(B) and 37.1-67.1(C).

RESPONSE
In cities and counties of the Commonwealth where police departments serve as the primary law-enforcement providers and sheriffs serve as officers of the courts and local jailers, the local police department is the "primary law-enforcement agency" for purposes of § 37.1-67.01(B). In counties without county police departments that rely on sheriffs' offices to perform law-enforcement functions and serve as officers of the courts and local jailers, the local sheriff's office is the "primary law-enforcement agency." Consequently, the General Assembly intends the city and county police departments, and the sheriffs' offices in counties without police departments, that perform the primary law-enforcement functions to execute emergency custody orders and provide transportation for emergency medical evaluation or treatment.

A magistrate may order either a police department or a sheriff's office, without regard to designation as the primary law-enforcement agency of a jurisdiction, to execute temporary detention orders and provide transportation for emergency medical evaluation or treatment prior to placement.

The term "jurisdiction" in §§ 37.1-67.01(B) and 37.1-67.1(C) clearly refers to the locality or political subdivision served by the law-enforcement agency.

BACKGROUND
You advise that the adjective "primary" preceding the term "law-enforcement agency" in § 37.1-67.01(B) clearly describes the law-enforcement agency a magistrate shall
order to execute an emergency custody order and transport a patient\(^2\) to a medical facility for evaluation or treatment. You note, however, that confusion arises because § 37.1-67.1(C) does not include the adjective “primary” to describe the law-enforcement agency that will be responsible for executing a temporary detention order and transporting a patient to a medical facility for emergency medical evaluation or treatment prior to placement. You state that the term “jurisdiction,” as used in these two statutes, needs clarification.

**APPLICABLE AUTHORITIES AND DISCUSSION**

Section 37.1-67.01(B) provides:

The magistrate issuing an emergency custody order shall specify the primary law-enforcement agency and jurisdiction to execute the emergency custody order and provide transportation. The magistrate shall order the primary law-enforcement agency from the jurisdiction served by the community services board that designated the person to perform the evaluation required in subsection A to execute the order and provide transportation. If the community services board serves more than one jurisdiction, the magistrate shall designate the primary law-enforcement agency from the particular jurisdiction within the community services board’s service area where the person who is the subject of the emergency custody order was taken into custody or, if the person has not yet been taken into custody, the primary law-enforcement agency from the jurisdiction where the person is presently located to execute the order and provide transportation. Transportation under this section shall include transportation to such medical facility as may be necessary to obtain emergency medical evaluation or treatment. Such evaluation or treatment shall be conducted immediately in accordance with state and federal law. [Emphasis added.]

Section 37.1-67.1(C) provides:

The magistrate issuing the temporary detention order shall specify the law-enforcement agency and jurisdiction that shall execute the temporary detention order and provide transportation. The magistrate shall specify in the temporary detention order the law-enforcement agency of the jurisdiction in which the person resides to execute the order and provide transportation; however, if the nearest boundary of the jurisdiction in which the person resides is more than 50 miles from the nearest boundary of the jurisdiction in which the person is located, the law-enforcement agency of the jurisdiction in which the person is located shall execute the order and provide transportation. Law-enforcement agencies may enter into agreements to facilitate the execution of temporary detention...
orders and provide transportation. Such order may include transportation of the person to such other medical facility as may be necessary to obtain emergency medical evaluation or treatment prior to placement. Such evaluation or treatment shall be conducted immediately in accordance with state and federal law. [Emphasis added.]

A 1996 opinion of the Attorney General provides a detailed explanation of the legislative history of the responsibility of both sheriffs’ offices and police departments for transporting patients subject to emergency custody and involuntary temporary detention orders under §§ 15.2-1724, 15.2-1704, 37.1-67.01, and 37.1-67.1. The opinion notes that, although the General Assembly does not define the term “law-enforcement officer” in §§ 37.1-67.01 and 37.1-67.1, §§ 15.2-1724 and 15.2-1704 specify that police officers may be involved in the transportation process. Furthermore, police officers are included as “law-enforcement officers” referred to in §§ 37.1-67.01 and 37.1-67.1. The 1996 opinion concludes that the General Assembly has not placed the primary responsibility for transporting persons under emergency custody or temporary detention orders on either sheriffs’ offices or police departments, but that, as a practical matter, sheriffs may be involved most often with transportation pursuant to a temporary detention order. The opinion further concludes that, under §§ 37.1-67.01 and 37.1-67.1, any law-enforcement officer requested by a court to execute an emergency custody or a temporary detention order should do so, without delay.

The 1996 opinion also notes that neither § 37.1-67.01 nor § 37.1-67.1 prevents a magistrate from designating the law-enforcement office to provide transportation for a patient under an emergency custody or a temporary detention order. The 1996 opinion, therefore, concludes that sheriffs’ deputies may remain the primary providers of transportation for temporary detention orders.

Furthermore, a 1981 opinion of the Attorney General notes that sheriffs’ departments in counties where such departments comprise the primary local law-enforcement agency receive state funding; however, in cities and counties where police departments perform the primary law-enforcement functions, sheriffs serve primarily as officers of the courts and local jailers.

“The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.” The 2004 enactment of §§ 37.1-67.01(B) and 37.1-67.1(C) does not alter the conclusion of the 1981 or 1996 opinion. It is clear that the 2004 enactment is consistent with the conclusions in those opinions.

I agree with these prior opinions. It is my opinion that the General Assembly intends the term “primary law-enforcement agency” in § 37.1-67.01(B) to mean “police department” in cities and counties where such departments perform law-enforcement functions and sheriffs serve primarily as officers of the court and local jailers. I must
also conclude that the sheriff’s office in any county that has no police department, and which performs law-enforcement functions and serves as officer of the court and local jailer, is the county’s “primary law-enforcement agency” within the meaning of § 37.1-67.01(B). As a result of 2004 enactment, the General Assembly permits magistrates to continue to use sheriffs’ deputies as the primary providers of transportation for temporary detention orders, as noted in the 1996 opinion, or police officers.

In the execution of emergency custody orders and transportation of patients to medical facilities to obtain emergency medical evaluation or treatment, however, the General Assembly evidences the intent that magistrates use police departments in cities and counties with such departments that perform law-enforcement functions and where sheriffs serve as officers of the court and local jailers. In counties without police departments, the General Assembly intends for magistrates to use sheriffs’ offices to execute emergency custody orders and transport patients to medical facilities.

You also seek a definition of the term “jurisdiction” as used in §§ 37.1-67.01(B) and 37.1-67.1(C). 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. The 2004 enactment does not define the term “jurisdiction,” nor is the term defined in Title 37.1. Generally, the term “jurisdiction” means “[a] geographic area within which political or judicial authority may be exercised.” Consequently, the term “jurisdiction” clearly refers to the locality or political subdivision that the law-enforcement agency serves.

CONCLUSION

Accordingly, in cities and counties of the Commonwealth where police departments serve as the primary law-enforcement providers and sheriffs serve as officers of the courts and local jailers, the local police department is the “primary law-enforcement agency” for purposes of § 37.1-67.01(B). In counties without county police departments that rely on sheriffs’ offices to perform law-enforcement functions and serve as officers of the courts and local jailers, the local sheriff’s office is the “primary law-enforcement agency.” Consequently, the General Assembly intends the city and county police departments, and sheriffs’ offices in counties without police departments, that perform the primary law-enforcement functions to execute emergency custody orders and provide transportation for emergency medical evaluation or treatment.

A magistrate may order either a police department or a sheriff’s office, without regard to designation as the primary law-enforcement agency of a jurisdiction, to execute temporary detention orders and provide transportation for emergency medical evaluation or treatment prior to placement.

The term “jurisdiction” in §§ 37.1-67.01(B) and 37.1-67.1(C) clearly refers to the locality or political subdivision served by the law-enforcement agency.

2As used in this opinion, the term "patient" refers to a person who "is mentally ill and in need of hospitalization." VA. CODE ANN. § 37.1-67.01(A) (LexisNexis Supp. 2004).

3Section 15.2-1724 authorizes law-enforcement officers to go beyond their territorial limits to execute temporary detention or emergency custody orders for mental health evaluations.

4Section 15.2-1704 authorizes police officers "to execute and serve temporary detention and emergency custody orders."


1Id. at 162.

1Id.

1Id. at 163 (citing 1 H S. Docs., REPORT OF THE J OINT LEGISLATIVE AUDIT AND REVIEW COMMISSION ON REVIEW OF THE INVOLUNTARY COMMITMENT PROCESS, H. Doc. No. 8, at 12 (1995)).

1Id.

1Id. at 164.

1Id.


11Title 37.1 relates generally to mental health.

11BLACK’S LAW DICTIONARY 855 (7th ed. 1999).

OP. NO. 04-052

MENTAL HEALTH GENERALLY: COMMUNITY MENTAL HEALTH SERVICES.

TAXATION: LOCAL OFFICERS – TREASURERS.

Responsibility for treasurer of locality that created community services board, or treasurer of locality of fiscal agent of multi-jurisdictional board, to deposit all state and federal funds. Treasurer must maintain and control funds in accordance with statutes. Direct control over such funds by a community services board requires compliance with statutes governing treasurers and regulations promulgated by locality governing such boards. Attorney General declines to render opinions on matters of local concern and procedure.

THE HONORABLE ILVA M. JAMES
TREASURER FOR NORTHAMPTON COUNTY
OCTOBER 14, 2004

ISSUE PRESENTED

You inquire concerning the extent of your responsibilities with respect to the local community services board, in your capacities as the designated fiscal agent for the board, and as county treasurer, as well as your authority to delegate duties you perform for the board. Specifically you ask whether someone other than the fiscal agent for a
local community services board has authority to open and maintain a bank account for the receipt and disbursement of board funds without violating § 58.1-3127, which pertains to the collection of taxes and levies by treasurers.

RESPONSE

It is my opinion that as community services boards are agencies of the political subdivision or subdivisions that created them, all state and federal funds therefor must be deposited with the locality’s treasurer (in the case of a board serving only one political subdivision), or the treasurer in the locality served by the fiscal agent. Therefore, that treasurer must account for these funds as required by §§ 58.1-3127 and 58.1-3127.1. These requirements do not preclude the treasurer from depositing these funds in a bank account maintained and controlled by the board pursuant to the regulations governing it, provided that the treasurer continues to comply with the requirements of the aforesaid sections of the Code. The ability of a treasurer to comply with these sections, however, depends upon an interpretation of the applicable local regulations governing the board. The Attorney General does not render opinions on matters of local concern and procedure. Therefore, no opinion is offered regarding local applicable rules and procedures for the community services board in question.

BACKGROUND

You relate that you are the treasurer for Northampton County and serve as the fiscal agent for the local community services board. You state that federal and state funds designated for the local board’s use are direct-deposited into a bank account that you maintain. You further note that you sign all checks disbursed from this bank account. The director of the local community services board has requested that you relinquish control of the board’s bank account to him.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3127 relates to the duties of a local treasurer:

A. Each treasurer shall receive the state revenue and the levies and other amounts payable into the treasury of the political subdivision of the Commonwealth served by the treasurer. Such treasurer shall account for and pay over the revenue received in the manner provided by law.

B. The treasurer shall keep a correct account of all moneys received and disbursed by him. The treasurer shall keep subject to the provisions of § 58.1-3, in the books, papers and moneys pertaining to his office at all times ready for inspection of the attorney for the Commonwealth or governing body or any taxpayer of the county and shall, when required by such attorney, governing body or any judge of a court of record, exhibit a statement of his accounts and the books containing a list of the warrants drawn upon him.

Section 58.1-3127.1 places similar requirements on the treasurer in relation to federal funds:
All amounts to be received or expended by any department or agency, or department or agency head, of a political subdivision of the Commonwealth by virtue of a federal grant, gift, or forfeiture or other disposition of federal funds shall be made payable to the treasury or treasurer of the political subdivision and shall not be made payable to such department or agency, or department or agency head. Accounting and disbursement provisions of § 58.1-3127 shall apply to such amounts. (Emphasis added.)

Chapter 10 of Title 37.1 provides generally for the establishment, membership and duties of a community services board. Section 37.1-195 requires a city or county, or a combination of each or both ("county-city combination"), that establishes a community services board to designate an official of the county or city, or county-city combination, to act as fiscal agent. A fiscal agent serving joint boards is required to review and act on the independent audit of a board and arrange for the provision of legal services to the board.

Prior opinions of the Attorney General conclude that a community services board is an agency or instrumentality of local government. The General Assembly, however, has revised the statutes governing community services boards. The 1998 Session of the General Assembly established three types of community services boards—operating boards, administrative policy boards, and policy-advisory boards—and required each county or city, or county-city combination, to designate which type of board it has established. In addition, certain eligible localities may establish a behavioral health authority.

The powers and duties of the boards in § 37.1-197 also changed, depending on the type of board involved. The 1998 Session of the General Assembly amended § 37.1-197(A)(10), relating to operating community services boards or policy-advisory boards, and added B(10) to § 37.1-197, relating to administrative policy community services boards. Both statutory subdivisions state that, with regard to the ability to disperse funds, the boards "[h]ave authority, notwithstanding any provision of law to the contrary, to disburse funds appropriated to it in accordance with such regulations as may be established by the governing body or bodies of the political subdivision or subdivisions that established it." A community services board, however, continues to remain responsible to the governing body or bodies of the county or city, or county-city combination, that established it.

Because the community services board, as an agency or instrumentality of local government, continues to remain responsible to the governing body or bodies that established it, state and federal funds to be received or expended by the community services board must be paid to the treasurer and accounted for in accordance with §§ 58.1-3127 and 58.1-3127.1. The treasurer may, however, permit the community services board to disburse funds in accordance with the regulations established by the governing body or bodies that established the board without violating §§ 58.1-3127 and 58.1-3127.1 as long as the regulations are consistent with these
provisions. Whether funds may be deposited in an account under the control of the community services board would therefore depend upon the regulations in place in the governing locality.

As a general rule, the Attorney General does not issue opinions on matters that do not require an interpretation of federal or state law, rule or regulation. Inasmuch as community services boards are created at the local level, and their rules and procedures are a matter of local ordinances, it would not be appropriate to render an opinion on internal governance issues of the described community services board.

CONCLUSION

Accordingly, it is my opinion that as community services boards are agencies of the political subdivision or subdivisions that created them, all state and federal funds therefor must be deposited with the locality’s treasurer (in the case of a board serving only one political subdivision), or the treasurer in the locality served by the fiscal agent. Therefore, that treasurer must account for these funds as required by §§ 58.1-3127 and 58.1-3127.1. These requirements do not preclude the treasurer from depositing these funds in a bank account maintained and controlled by the board pursuant to the regulations governing it, provided that the treasurer continues to comply with the requirements of the aforesaid sections of the Code. The ability of a treasurer to comply with these sections, however, depends upon an interpretation of the applicable local regulations governing the board. The Attorney General does not render opinions on matters of local concern and procedure. Therefore, no opinion is offered regarding local applicable rules and procedures for the community services board in question.

1See infra notes 16 and 17.

2Section 58.1-3 generally prohibits state and local tax and revenue officials from disclosing confidential information about the transactions, property, income or business of any particular taxpayer.


4The fiscal agent acts on behalf of a community services board designated as an operating board (§ 37.1-195(C)) or an administrative policy board (§ 37.1-195(D)).

5The fiscal agent of such an operating board is not necessarily the local treasurer.

6Section 37.1-195(C), (D).


8See § 37.1-194.1 (defining “administrative policy community services board” or “administrative policy board,” “operating community services board” or “operating board,” “policy-advisory community services board” or “policy-advisory board”).

In 1997, the General Assembly authorized the governing body of any city with a population of 350,000 or more or with a population between 200,000 and 250,000, and any county with a population between 200,000 and 210,000, to establish a behavioral health authority by resolution. See 1997 Va. Acts ch. 587, at 976, 1398 (adding § 37.1-244).


See id. at 1559.

See id. at 1560.

Section 37.1-197(A)(10), (B)(10).

See § 37.1-195(A) (“The board appointed pursuant to this section shall be responsible to the governing body or bodies of the county or city or combination thereof that established such board.”).


OP. NO. 04-050
MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY – PERMITS FOR EXCESSIVE SIZE AND WEIGHT.

Weight limitation and 50-mile restriction prescribed for trucks hauling gravel, sand, or crushed stone apply only in coal severance counties. No prohibitions or restrictions imposed on packaging of gravel, sand, or crushed stone.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
AUGUST 13, 2004

ISSUES PRESENTED

You ask whether § 46.2-1143(H) applies only to counties that impose the severance tax authorized by § 58.1-37121 (“coal severance counties”). You next inquire concerning packaging of the materials addressed in § 46.2-1143(H) for delivery.1 Section 46.2-1143(H) prescribes weight and mileage limitations for trucks hauling gravel, sand, or crushed stone in coal severance counties.

RESPONSE

It is my opinion that the weight limitation and 50-mile restriction prescribed in § 46.2-1143(H) for trucks hauling gravel, sand, or crushed stone apply only in coal severance counties. Section 46.2-1143(H) imposes no prohibitions or restrictions on the packaging of gravel, sand, or crushed stone.

BACKGROUND

You relate that there is confusion regarding the application of § 46.2-1143(H) to trucks hauling gravel, sand, or crushed stone in certain counties. You request clarification concerning delivery of these materials outside coal severance counties.

APPLICABLE LAW AND DISCUSSION

Section 46.2-1143(H) prescribes weight and mileage limitations for trucks hauling gravel, sand, or crushed stone in coal severance counties:
Until July 1, 2007, in counties that impose a severance tax on coal and gases as authorized by § 58.1-3712, the weight limits prescribed in subsection B of this section shall also apply to trucks hauling gravel, sand, or crushed stone no more that 50 miles from origin to destination.

Prior to July 1, 1999, § 46.2-1143(A) provided a mechanism for “[t]he Commonwealth Transportation Commissioner and local authorities of cities and towns in their respective jurisdictions” to issue overweight permits for the operation of vehicles “used exclusively for hauling coal from a mine or other place of production to a preparation plant, loading dock, or railroad.” Effective July 1, 1999, the General Assembly added subsection H to § 46.2-1143, to allow the increased weight limits described in subsection B to “apply to trucks hauling gravel, sand, or crushed stone no more than fifty miles from origin to destination” in coal severance counties. Section 46.2-1143(H) is clear that the increased weight limit prescribed by § 46.2-1143(B) applies only in coal severance counties and the 50-mile trip “from origin to destination” traverses coal severance counties only.

The General Assembly did not require the conditions contained in other subsections of § 46.2-1143 to apply to trucks hauling gravel, sand, or crushed stone, nor has the General Assembly limited how these materials may be physically transported in a truck. As such, the manner in which the gravel, sand, or crushed stone is packaged within the truck should not place the truck in violation of § 46.2-1143(H).

CONCLUSION

Accordingly, it is my opinion that the weight limitation and 50-mile restriction prescribed in § 46.2-1143(H) for trucks hauling gravel, sand, or crushed stone apply only in coal severance counties. Section 46.2-1143(H) imposes no prohibitions or restrictions on the packaging of gravel, sand, or crushed stone.

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1Section 58.1-3712 provides a mechanism for counties and cities to impose a severance tax on coal and gases.

2You also inquire concerning the different types of materials and products allowed by the statute. Section 46.2-1143(H) mentions only “gravel, sand, or crushed stone.” Whether a particular material or commodity is considered gravel, sand, or crushed stone is a factual determination. The authority of the Attorney General to issue official advisory opinions is limited to questions of law. See Op. Va. Att’y Gen.: 1999 at 132, 132; 1986-1987 at 1, 6; 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 668 (1974) (“Giving ... opinions on matters of law is a ... major responsibility of the Attorney General.”).

3Section 46.2-1143(B) sets forth axle and maximum gross weight restrictions for vehicles hauling coal.


5Id. at 1770 (quoting § 46.2-1143(H)).

6An owner or operator of a truck hauling sand, gravel, or crushed stone is subject to the penalties authorized under § 46.2-113 only for a violation of the weight limits prescribed in § 46.2-1143(B). Va. Code Ann. § 46.2-1143(H) (LexisNexis Supp. 2004).
You ask whether a foreign corporation authorized to transact business in Virginia, but which has a principal place of business outside the Commonwealth and no assets in Virginia, is "resident in this Commonwealth," as that phrase is used in § 49-26.

RESPONSE

It is my opinion that a foreign corporation authorized to transact business in Virginia, but which has a principal place of business outside the Commonwealth and no assets in Virginia, is not "resident in this Commonwealth," as that phrase is used in § 49-26.

BACKGROUND

You relate that a corporation is incorporated in one state, has its principal place of business in another state, and is qualified to conduct business in Virginia. This foreign corporation served as the general contractor on a construction project in Virginia. A dispute between the corporation and a subcontractor ensued, and the subcontractor filed suit against the corporation's bonding company ("surety") in connection with the project. The surety demanded that, pursuant to §§ 49-25 and 49-26, the subcontractor name the corporation as a party in the lawsuit. The subcontractor refused to add the corporation based on the fact that the corporation is not resident in the Commonwealth of Virginia.

APPLICABLE LAW AND DISCUSSION

A. RELEVANT STATUTES

Section 49-25 provides that "[t]he surety ... of any person bound by any contract may, if a right of action has accrued thereon, require the creditor ..., by notice in writing, to institute suit thereon." Section 49-25 further provides that "[s]uch written notice shall also notify the creditor ... that failure to act will result in the loss of the surety ... as security for the debt in accordance with § 49-26."

Section 49-26 states:

If such creditor ... shall not, within thirty days after such require-
ment, institute suit against every party to such contract who is resi-
dent in this Commonwealth and not insolvent and prosecute the same
with due diligence to judgment and by execution, he shall forfeit his right to demand of such surety … the money due by any such contract for the payment of money …. [Emphasis added.]

Neither § 49-25 nor § 49-26 defines “resident in” as that term is used in § 49-26.

Predecessor statutes to §§ 49-25 and 49-26 required a creditor to institute suit upon receiving notice from a surety that his principal “was likely to become insolvent, or to migrate from the commonwealth.” It appears that the original intent of this statute was to protect a surety’s ability to recover assets of a debtor who the surety fears will either become insolvent or leave the Commonwealth. Given the purpose underlying the statute, i.e., protecting a surety’s ability to recover assets a principal/debtor may have in the Commonwealth, it follows that the phrase “resident in this Commonwealth” limits the obligation of a creditor to institute suit only against those debtors who are located within, or have assets located in, Virginia.

B. OTHER VIRGINIA STATUTES WHICH PROVIDE GUIDANCE

1. VIRGINIA STOCK CORPORATION ACT

The Virginia Stock Corporation Act does not designate whether a corporation is “resident in this Commonwealth.” Instead, the Act distinguishes between “domestic corporations” and “foreign corporations.”

2. UNIFORM COMMERCIAL CODE

The Uniform Commercial Code, as adopted by Virginia, sets forth a mechanism for determining the location of a debtor. Pursuant to § 8.9A-307(e), “[a] registered organization … is organized under the law of a state [and] is located in that state.” (Emphasis added.) Under this analysis, the foreign corporation is not “located” in Virginia; instead, it is “located” in the state in which it was incorporated.

C. CASE LAW

1. ATTACHMENT

In a case involving the attachment of a foreign corporation’s property, the Supreme Court of Virginia has stated:

Nothing is better established by all the cases and text writers on the subject of corporations, than that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created. While it may, by its agents, transact business anywhere, unless prohibited by its charter or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter…. “It exists by force of the law (creating it), and where that ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.” “A corporation cannot change its residence or its citizenship. It can have its legal home only at the
place where it is located by or under the authority of its charter, but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws.\textsuperscript{9}

These principles have been cited with approval in subsequent decisions addressing attachments.\textsuperscript{10} It is important to note, however, that these principles were set forth within the context of determining whether an entity was a “foreign corporation,”\textsuperscript{11} and not whether the entity was resident in the Commonwealth.

2. LONG-ARM JURISDICTION

The concept of residence arises in the application of § 8.01-328.1, Virginia’s “long-arm statute.”\textsuperscript{12} Supreme Court cases applying this statute have considered whether courts may assert jurisdiction over a nonresident under the “long-arm statute.”\textsuperscript{13} These cases, however, do not typically address the meaning of the term “resident.”

Nevertheless, another possible interpretation of the term “resident in”\textsuperscript{14} could involve minimum contacts similar to those required for long-arm jurisdiction. When interpreting a statute, “‘every part is presumed to have some effect and is not to be disregarded unless absolutely necessary.’”\textsuperscript{15} This principle dictates that every word in § 49-26 be given meaning. If the General Assembly had not included in § 49-26 the phrase “resident in,” a creditor instituting suit pursuant to this section would still be bound by the long-arm statute’s limitations. An interpretation equating “resident in” to minimum contacts would render the phrase meaningless, because the minimum contacts limitation is already imposed on creditors who proceed under § 49-26. Because the General Assembly elected to add the phrase “resident in” to § 49-26, it must have intended the phrase mean something more than minimum contacts.

Given that the legislative purpose underlying § 49-26 is protecting a surety’s ability to recover assets a principal/debtor may have in the Commonwealth, and that the General Assembly must have intended the phrase “resident in” to mean something more than minimum contacts, it is my opinion that a foreign corporation authorized to do business in Virginia, but which has its principal place of business outside the Commonwealth and no assets in Virginia, is not “resident in this Commonwealth” for the purposes set forth in § 49-26. Therefore, the subcontractor is not required to institute suit against the corporation pursuant to § 49-26.

CONCLUSION

Accordingly, it is my opinion that a foreign corporation authorized to transact business in Virginia, but which has a principal place of business outside the Commonwealth and no assets in Virginia, is not “resident in this Commonwealth,” as that phrase is used in § 49-26.

\textsuperscript{1}Your request does not state that the corporation in question has assets in Virginia. The analysis set forth in this opinion may differ if the corporation has assets in the Commonwealth.

\textsuperscript{2}Wright’s Adm’r v. Stockton, 32 Va. (5 Leigh) 153, 158 (1834) (interpreting 1 Rev. Code ch. 116, § 6, 7, 8 (1819)).
OP. NO. 04-077

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES – DUTIES OF SHERIFFS.

Fees assessed by governing body for courtroom security that are appropriated to sheriff's office may only be used to compensate deputy sheriff's salary for time actually spent performing courthouse security duties and to fund equipment and other personal property related to such duties.

MR. FRANKLIN P. SLAVIN, JR.
COUNTY ATTORNEY FOR BLAND COUNTY
OCTOBER 19, 2004

ISSUE PRESENTED

You ask whether funds collected pursuant to § 53.1-120(D), which permits a governing body to assess a courtroom security fee, may be used to pay a courtroom deputy's salary and expenses when the deputy does not spend 100% of his duty time assigned to courtroom security.

RESPONSE

It is my opinion that fees assessed for courtroom security, which are subsequently appropriated by the governing body to the sheriff's office, may only be used to com-
pensate a deputy sheriff’s salary for the time actually spent performing duties related to courthouse security and to fund equipment and other personal property related to courthouse security.

BACKGROUND

You relate that a Bland County deputy sheriff provides courthouse security for the general district court two days per week and for the circuit court two days per month. The remainder of this deputy sheriff’s on-duty time is unrelated to courthouse security. Your inquiry relates to the source of funding for such deputy’s salary.

APPLICABLE LAW AND DISCUSSION

Section 53.1-120(D) allows localities to assess up to $5 in costs in each criminal and traffic case in which the defendant is convicted. The statute also delineates the manner in which the funds are to be used. Section 53.1-120(D) provides, in pertinent part, that:

Any county or city, through its governing body, may assess a sum not in excess of $5 as part of the costs in each criminal or traffic case in its district or circuit court in which the defendant is convicted of a violation of any statute or ordinance.... The assessment shall be collected by the clerk of the court in which the case is heard, remitted to the treasurer of the appropriate county or city and held by such treasurer subject to appropriation by the governing body to the sheriff’s office for the funding of courthouse security personnel, and, if requested by the sheriff, equipment and other personal property used in connection with courthouse security.

By its own terms, § 53.1-120(D) provides that the assessment is subject to appropriation by the governing body to the sheriff’s office to fund courthouse security personnel. Further, § 53.1-120(D) provides that should the sheriff so request, the appropriation may be used to fund “equipment and other personal property used in connection with courthouse security.” The use of the word “shall” in the statute generally indicates that the procedures are intended to be mandatory.1 The statute does not state that the assessment may be used for any other purpose. It is a well-established principle 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.2 Therefore, § 53.1-120(D) provides that such funds are to be used to fund courthouse security personnel and equipment and does not permit any other use of these funds.

The statute, however, does not define the terms “courthouse security personnel” or “to fund.” “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.”3 “[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent.”4 “The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms.”5 Section 53.1-120(D) provides a mechanism
for funding so that the Sheriff may “ensure that the courthouses and courtrooms within
his jurisdiction are secure from violence and disruption.” This legislative purpose
is furthered by using the assessment to compensate deputy sheriffs for providing
courthouse security for their respective courts. Use of the assessment to compensate
deputy sheriffs for time spent performing duties unrelated to courthouse security,
however, would not fulfill such purpose.

CONCLUSION

Accordingly, it is my opinion that fees assessed for courtroom security, which are
subsequently appropriated by the governing body to the sheriff’s office, may only be
used to compensate a deputy sheriff’s salary for the time actually spent performing
duties related to courthouse security and to fund equipment and other personal property
related to courthouse security.

Gen. 64, 68.

maxim, expressio unius est exclusio alterius, as applied to statutory construction); 1992 Op. Va. Att’y
Gen. at 145, 146.

3. See Loudoun County Dep’t Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993); see also
ordinary meaning).

Gen. 233, 236.


7. Section 53.1-120(B).

8. For example, when a deputy is regularly scheduled for courtroom security for one-half of the
available workdays for a given month it would be appropriate to proportionally fund the personnel cost
of such deputy.

OP. NO. 04-072

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES
- DUTIES OF SHERIFFS.

2004 APPROPRIATION ACT: COMPENSATION BOARD.

Authority for sheriff and chief judge of circuit, general district, or juvenile and domestic
relations general district court to designate number, type, and working schedules of
courtroom deputies by agreement and only within parameters of relevant appropriations
act. For cases presenting substantial security risk, judge may order sheriff to provide
additional security; may not designate specific personnel.

THE HONORABLE ROBERT J. MCCABE
SHERIFF FOR THE CITY OF NORFOLK
OCTOBER 7, 2004
ISSUE PRESENTED
You ask whether a district court judge has the authority to designate individuals to provide courtroom security without the advanced knowledge or permission of the sheriff.

RESPONSE
It is my opinion that § 53.1-120 authorizes the chief judge of the circuit, general district, or juvenile and domestic relations general district court to designate the number, type, and working schedules of courtroom security deputies only by agreement with the sheriff and then only within the parameters established by the relevant appropriation act. It is further my opinion that for cases presenting substantial security risks, a judge may order a sheriff to provide additional security, but may not designate the specific personnel.

APPLICABLE LAW AND DISCUSSION
The designation of deputies to provide courthouse security is a joint function exercised by the sheriff and the chief judge of the respective circuit, general district, or juvenile and domestic relations general district court ("chief judge"). Section 53.1-120 provides:

A. Each sheriff shall ensure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption and shall designate deputies for this purpose....

B. The chief circuit court judge, the chief general district court judge and the chief juvenile and domestic relations district court judge shall be responsible by agreement with the sheriff of the jurisdiction for the designation of courtroom security deputies for their respective courts. If the respective chief judges and sheriff are unable to agree on the number, type and working schedules of courtroom security deputies for the court, the matter shall be referred to the Compensation Board for resolution in accordance with existing budgeted funds and personnel.

C. The sheriff shall have the sole responsibility for the identity of the deputies designated for courtroom security.

Primary authority for the courthouse and courtroom security lies with the sheriff. The sheriff’s authority covers the selection of specific deputies. The chief judge and the sheriff, however, have a joint responsibility to evaluate courtroom security needs and to designate, by agreement, the number and schedules of the deputies. Accordingly, § 53.1-120 does not confer sole authority upon either the chief judge or the sheriff to designate the number of courtroom deputies.

Should the chief judge and the sheriff be unable to reach an agreement regarding courtroom security, they must refer the issue to the Compensation Board.
when the chief judge and sheriff disagree, neither may designate a deputy until the Compensation Board resolves the matter.

The 2004 Appropriation Act\(^5\) supplies additional parameters to the authority granted in § 53.1-120 for designating deputies:\(^6\)

Notwithstanding the provisions of § 53.1-120, or any other section of the Code of Virginia, unless a judge provides the sheriff with a written order stating that a substantial security risk exists in a particular case, no courtroom security deputies may be ordered for civil cases, not more than one deputy may be ordered for criminal cases in a district court, and not more than two deputies may be ordered for criminal cases in a circuit court. In complying with such orders for additional security, the sheriff may consider other deputies present in the courtroom as part of his security force.\(^7\)

By employing the language, "[n]otwithstanding the provisions of § 53.1-120," the General Assembly evinces a clear intent that, to the extent any conflict exists between § 53.1-120 and the 2004 Appropriation Act, the Act prevails.\(^8\) While the Act limits the number of deputies that may be designated, it does not alter the requirement that the sheriff and the chief judge must agree on the number, type, and working schedules of the deputies, except when the judge determines there is a substantial security risk.\(^9\)

A prior opinion of this Office concludes that a local sheriff is not required to provide an additional deputy for courtroom security unless the judge enters an order finding that there is a substantial security risk.\(^10\) When a judge finds that a particular case poses a substantial security risk, the personnel limits established by the 2004 Appropriation Act may be exceeded. In that instance, no agreement between the judge and the sheriff is required. The Act does not, however, authorize a judge to designate deputies without notifying the sheriff, nor does it alter the sheriff’s authority to appoint specific deputies. Although the Act contemplates that a sheriff will comply with a judge’s order for additional security in a particular case, the sheriff retains the authority to determine the specific personnel for such security.

CONCLUSION

Accordingly, it is my opinion that § 53.1-120 authorizes the chief judge of the circuit, general district, or juvenile and domestic relations general district court to designate the number, type, and working schedules of courtroom security deputies only by agreement with the sheriff and then only within the parameters established by the relevant appropriation act. It is further my opinion that for cases presenting substantial security risks, a judge may order a sheriff to provide additional security, but may not designate the specific personnel.

ISSUE PRESENTED
You inquire regarding the application of § 53.1-116 to contempt proceedings, and ask whether good conduct credits may be awarded to persons confined in the local jail for contempt of court for failure to make court-ordered support payments.

RESPONSE
Section 53.1-116(A) embodies the legislative intent that prisoners sentenced to 12 months or less in jail for misdemeanors shall earn good conduct credits to reduce the length of their imprisonment. Section 53.1-116 applies solely to prisoners serving criminal sentences. Therefore, it is my opinion that the sheriff or jail superintendent responsible for determining the length of a jail inmate’s term of confinement must ascertain whether the individual is being detained pursuant to a civil or a criminal contempt finding and award only those prisoners serving criminal contempt sentences the good conduct credits prescribed in § 53.1-116(A).

BACKGROUND
You state that the sheriff’s office in your locality is concerned about calculating the credit of a person serving a contempt sentence in jail for failure to pay child or spousal
support. Virginia’s juvenile and domestic relations district courts and circuit courts have civil and criminal options available in proceedings against individuals who fail to make court-ordered support payments. When confronted with an individual who has not complied with a support order, the court may determine that incarceration in jail is an appropriate way to address the individual’s failure to make support payments. Where the court determines that the individual may have the ability to comply with the support order, the court may find the individual in civil contempt and impose a term of incarceration in an effort to coerce the individual to make payments. Where the court intends to punish a person convicted of failure to comply with the support order, the court may proceed criminally and impose on the individual a term of incarceration for contempt of the court’s support order.

APPLICABLE LAW AND DISCUSSION

Section 53.1-116(A) provides:

> Each prisoner sentenced to 12 months or less for a misdemeanor or any combination of misdemeanors shall earn good conduct credit at the rate of one day for each one day served, including all days served while confined in jail prior to conviction and sentencing, in which the prisoner has not violated the written rules and regulations of the jail unless a mandatory minimum sentence is imposed by law.

Misdemeanors are criminal offenses that are punishable by confinement in jail and/or fines. By its own terms, § 53.1-116(A) applies to a sentence imposed for criminal contempt.

A court, in determining whether an individual is in violation of a support order, clearly has civil contempt as an available option. A civil contempt finding may be appropriate where the court determines that the individual is capable of purging himself of contempt.

> It is axiomatic that, in a civil contempt proceeding, the contemnor must be in a position to purge himself of contempt.

> “If it is for civil contempt the punishment is remedial .... [I]mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do.”

The court imposing a civil contempt sentence for failure to comply with a support order may not require the individual’s confinement for more than twelve months. In order for a court to hold a person in civil contempt, the person confined must have the ability to effect his sooner release by purging himself of the contempt.

Conversely, a court may impose a punishment on an individual for failure to comply with the support order. This is the only option available to the court for confinement
where the person in violation of the order is not able to purge himself of contempt. Where the sentence the court imposes is intended to punish for past conduct, and an individual has no ability to purge himself of the contempt and thereby obtain immediate release from confinement, the court must apply § 53.1-116. The conviction in this situation is in the nature of a misdemeanor conviction, \(^5\) and the good conduct credits available under § 53.1-116(A)—that a prisoner receive a credit of one day for every day he has served without violating the written rules and regulations of the jail—clearly would apply.

The question of whether a prisoner confined in jail receives good conduct credits to reduce the time he must serve to satisfy a contempt sentence turns on whether the sentence is civil or criminal. If the court has given the person an opportunity to effect his early release by purging himself of the contempt, the sentence is civil, and the prisoner would not receive credits. If, however, the court punishes a person who is unable to purge himself of contempt, then the sentence is criminal, and the prisoner is eligible to receive credits.

CONCLUSION

Accordingly, § 53.1-116(A) embodies the legislative intent that prisoners sentenced to 12 months or less in jail for misdemeanors shall earn good conduct credits to reduce the length of their imprisonment. Section 53.1-116 applies solely to prisoners serving criminal sentences. Therefore, it is my opinion that the sheriff or jail superintendent responsible for determining the length of a jail inmate’s term of confinement must ascertain whether the individual is being detained pursuant to a civil or a criminal contempt finding and award only those prisoners serving criminal contempt sentences the good conduct credits prescribed in § 53.1-116(A).

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\(^2\) See Thompson v. Commonwealth ex rel. Hornes, No. 0390-01-2, 2003 Va. App. LEXIS 42, at *6-7 (Feb. 4, 2003) (affirming juvenile court’s decision holding Thompson in civil contempt and affirming his sentence for indeterminate term, not to exceed twelve months, or until such time that he purges his contempt).

\(^3\) Id. at *4 (quoting Gompers v. Buck Stove & Range Co., 221 U.S. 418, 441-42 (1911)).

\(^4\) See VA. CODE ANN. § 20-115 (Michie Repl. Vol. 2000) (“[I]n no event shall commitment ... be for more than twelve months.”); see also VA. CODE ANN. § 16.1-278.16 (LexisNexis Repl. Vol. 2003) (providing that in cases where respondent has failed to comply with support obligation, court may order commitment as provided in § 20-115 or impose sentence of up to twelve months in jail); Thompson, 2003 Va. App. LEXIS 42, at *5-6 (quoting §§ 16.1-278.16, 20-115).

No requirement that sheriff, jail superintendent, or locality pay for treatment of inmate’s preexisting medical condition, except when condition is communicable, life threatening, or serious medical need. Responsibility of sheriff to transport inmate to medical facility and pay for treatment that is not available at jail.

THE HONORABLE ROBERT T. WILLIAMSON
SHERIFF FOR FREDERICK COUNTY
APRIL 16, 2004

ISSUE PRESENTED
You ask whether a sheriff, jail superintendent, or locality must pay for the treatment of an inmate, with a preexisting condition of a communicable disease, a serious medical need, or a life threatening condition, pursuant to the 2003 amendment of § 53.1-126; or whether the sheriff is required only to transport such inmate to a medical facility when medical treatment is unavailable at the jail.

RESPONSE
It is my opinion that a sheriff, jail superintendent, or locality is not required to pay for the medical treatment of an inmate with a preexisting condition, except when that condition is a communicable disease, a serious medical need, or a life threatening condition. It is further my opinion that when medical treatment for a communicable disease, a serious medical need, or a life threatening condition is not available at the jail, a sheriff is required to transport the inmate to a medical facility and pay for the treatment.

APPLICABLE LAW AND DISCUSSION
Section 53.1-126 previously imposed a duty upon sheriffs and jail superintendents to provide necessary medical services. A prior opinion of the Attorney General concludes that § 53.1-126 obligates the sheriff for the medical expenses incurred in the treatment of inmates housed in his facility. In 2003, the General Assembly amended § 53.1-126 (the “2003 amendment”) to add limitations to the required payment for medical treatment:

Nothing herein shall be construed to require a sheriff, jail superintendent or a locality to pay for the medical treatment of an inmate for any injury, illness, or condition that existed prior to the inmate’s commitment to a local or regional facility, except that medical treatment shall not be withheld for any communicable diseases, serious medical needs, or life threatening conditions.

The 2003 amendment contains two provisions. The first provision exempts payment for an inmate’s preexisting medical conditions from the general requirement that a sheriff pay for the medical care of inmates housed in his facility. The second provision, however, limits the exception to conditions that do not include communicable diseases, serious medical needs, or life threatening conditions. Thus, even when an inmate has a communicable disease, serious medical need, or life threatening condition that existed prior to his incarceration, the sheriff is responsible for providing medical care at the correctional facility or paying for the costs of outside medical treatment.
Section 53.1-126 provides that when the medical facilities at a jail are adequately equipped, its medical staff may treat the inmate. The cost of treating an inmate at the jail is borne by the sheriff. Should the jail’s medical staff determine that its facilities are inadequate to treat the inmate’s condition, the sheriff must transport the inmate to a hospital or other appropriate medical facility and pay for the treatment.

This interpretation of § 53.1-126 follows the general scheme of funding local correctional facilities. Generally, the state will provide funds to the localities to pay for the operating costs of local correctional facilities. Medical services are a portion of the operating costs. The Commonwealth has not manifested a willingness to take on additional expenses for inmate medical services, with one exception. The administrator of a local jail may petition the court to transfer an inmate, whom it convicted of a misdemeanor, and who is afflicted with a contagious disease, to the Department of Corrections. Once transferred, the Department is responsible for the inmate’s care. In all other instances where medical treatment is required, however, the sheriff, jail superintendent, or locality remains responsible for the cost of inmate medical services.

CONCLUSION

Accordingly, it is my opinion that a sheriff, jail superintendent, or locality is not required to pay for the medical treatment of an inmate with a preexisting condition, except when that condition is a communicable disease, a serious medical need, or a life threatening condition. It is further my opinion that when medical treatment for a communicable disease, a serious medical need, or a life threatening condition is not available at the jail, a sheriff is required to transport the inmate to a medical facility and pay for the treatment.

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32003 Va. Acts chs. 928, 1019, at 1408, 1408, 1650, 1650, respectively. Both chapters are nearly identical; however, Chapter 1019 added the phrase “serious medical needs” to the amendment. 2003 Va. Acts ch. 1019, supra.


5A sheriff may charge inmates up to $1 per day to defray the costs of their keep, which would include medical treatments. See VA. CODE ANN. § 53.1-131.3 (LexisNexis Supp. 2003). Additionally, a sheriff may establish a program where inmates pay a portion of their medical expenses. See § 53.1-133.01 (LexisNexis Repl. Vol. 2002). Of course, a sheriff may recoup the cost of treating an injury from an inmate who intentionally inflicts injury on himself or another. See § 53.1-133.01:1 (LexisNexis Supp. 2003).


OP. NO. 04-075

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES — FUNDING LOCAL CORRECTIONAL FACILITIES AND PROGRAMS.

Use of state funds appropriated for local correctional facility limited to payment of expenses incurred for persons confined in facility. Surplus funds may be returned to local treasury to be used for such operating expenses; excess funds not so used must be returned to state treasury.

THE HONORABLE J. T. "TOMMY" WHITT
SHERIFF FOR MONTGOMERY COUNTY
OCTOBER 19, 2004

ISSUE PRESENTED

You inquire regarding the proper interpretation of § 53.1-86, as it relates to the disposition of excess state funds appropriated for the operation of the local jail, at the end of the apportionment year. Specifically, you ask if your locality may revert such funds to its local treasury and appropriate the funds to pay the operational expenses of the local jail, and failing that, whether it must return such funds to the Commonwealth’s treasury.

RESPONSE

It is my opinion that § 53.1-86 limits the use of state funds appropriated for a local correctional facility to the payment of expenses incurred for persons confined in the correctional facility. It is further my opinion that surplus funds, if any, may be returned to the local treasury to be used for such operating expenses. Finally, it is my opinion that any excess funds not so used must be returned to the state treasury.

APPLICABLE LAW AND DISCUSSION

Article 3, Chapter 3 of Title 53.1, §§ 53.1-80 through 53.1-90, governs the funding of local correctional facilities and programs. On a quarterly basis, the Compensation Board allocates to the locality funds that the General Assembly has appropriated in the general appropriations act. The allocation for each locality is based upon the number of prisoner days at the jail during the quarter which precedes payment. Thus, this allocation is a reimbursement, quarterly in arrears, of expenses already incurred in the housing and care of inmates. These statutes also prescribe the manner of funding salaries and benefits for medical and treatment personnel in local jails.

By contrast, Articles 3 and 6.1, Chapter 16 of Title 15.2 control the funding of salaries for all other employees of local jails, including sheriffs and deputy sheriffs. Chapter 16 also regulates the funding of the expenses of each local sheriff’s office, but does not include jail operating costs, which are governed by §§ 53.1-83.1 and 53.1-85.

With respect to the disposition of funds for jail operating costs received pursuant to § 53.1-85, § 53.1-86 provides in pertinent part:
No locality receiving state funds under § 53.1-85 shall use such funds for any purpose other than for paying expenses incurred as the result of the confinement of persons in local correctional facilities. The Department of Corrections shall require a locality to return any portion of state funds expended in violation of this provision to the state treasury. Should an unexpended balance of state funds exist at the end of the apportionment year, the unencumbered funds in such balance may be reverted to the local treasury and subsequently shall be expended for operating expenses of local correctional facilities. [Emphasis added.]

The language of § 53.1-86 is plain and unambiguous. In a prior opinion, this Office summarized its meaning:

Section 53.1-86 forbids the use of funds allocated pursuant to § 53.1-85 for any purpose other than jail operating costs. If a surplus of state funds exists at the end of any apportionment year, these funds revert to the local treasury "and subsequently shall be expended for operating expenses of local correctional facilities." This language forbids the use of these state funds for any purpose other than reimbursement of jail operating expenses and requires that any funds not so used be returned to the state treasury. Thus, the practical operation of this language requires that surplus funds, if any, be returned to the local treasury. Subsequently, the funds are either used for the expenses of the local jail or returned to the state treasury. In practice, however, this is a reimbursement of sums already expended for jail operating costs and not a prospective grant.

CONCLUSION

Accordingly, it is my opinion that § 53.1-86 limits the use of state funds appropriated for a local correctional facility to the payment of expenses incurred for persons confined in the correctional facility. It is further my opinion that surplus funds, if any, may be returned to the local treasury to be used for such operating expenses. Finally, it is my opinion that any excess funds not so used must be returned to the state treasury.

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3 See § 53.1-85; see also 1987-1988 Op. Va. Att’y Gen. 472, 475 (noting that financial scheme for jail operating expenses is reimbursement). Although the Compensation Board has not adopted any regulations to implement the provisions of §§ 53.1-84 through 53.1-86, as authorized in § 53.1-84, it has issued procedures for localities to seek the available reimbursement through the Local Inmate Data System. See Compensation Board website at http://www.scb.state.va.us/LIDS information/fy05lids.pdf.
5 Id.
OP. NO. 03-107

PROPERTY AND CONVEYANCES: PROPERTY OWNERS’ ASSOCIATION ACT.

Members’ petition for special meeting of board of directors of property owners’ association is not “communication” requiring board to provide reasonable, effective, and free method of exchange with other owners.

THE HONORABLE VINCENT F. CALLAHAN, JR.
MEMBER, HOUSE OF DELEGATES
FEBRUARY 17, 2004

ISSUE PRESENTED

You ask if a members’ petition for a special meeting of the board of directors of a property owners’ association is a “communication” that is required to be reasonably, effectively, and freely disseminated to all members of the property owners’ association pursuant to § 55-510.2.

RESPONSE

It is my opinion that, in the situation described, a members’ petition for a special meeting of the board of directors of a property owners’ association is not a “communication” that requires the board to provide a reasonable, effective, and free method of exchange with other owners.

BACKGROUND

You relate a situation involving a planned unit development consisting of over 4,200 individually owned lots that are assessed annually at $675 each. You note that the association’s bylaws provide for a special meeting of the board of directors to be called to address issues of concern to members, upon submission of a petition requesting such a meeting, signed by at least 800 members in good standing. You further relate that some members of the association have requested that the board disseminate their petition, which they believe is a “communication” pursuant to § 55-510.2, to members as an attachment to the association’s periodic publication. You advise that the association has refused to circulate the petition with its periodic publication or to provide any other means of dissemination of the petition. You further advise that the members requesting the petition believe that the association’s refusal to disseminate the petition is a violation of § 55-510.2, and that their only alternative is a direct mailing, which they estimate would be costly and labor-intensive due to the size of the association.

APPLICABLE LAW AND DISCUSSION

The Virginia Property Owners’ Association Act, §§ 55-508 through 55-516.2, governs the rights and responsibilities of property owners’ associations and their boards of
directors. Section 55-510.2 provides that "[t]he board of directors shall establish a reasonable, effective, and free method, appropriate to the size and nature of the association, for lot owners to communicate among themselves and with the board of directors regarding any matter concerning the association." Because the Act does not define the term "communicate" as used in § 55-510.2, and there is no case law addressing the nature of the communication meant to be covered by § 55-510.2, we must give the term its common, ordinary meaning.1 The term "communication" means "[t]he expression or exchange of information by speech, writing, or gestures.... The information so expressed or exchanged."2 In addition, "petition" means "[a] formal written request presented to a court or other official body."3

Because the petition for a special meeting of the board of directors4 has to be signed by at least 800 members in good standing before it may be submitted to the board, the members’ request for the unsigned petition to be attached to the association’s periodic publication is, in effect, a request for the association to provide a free mailing or delivery service. The members’ purpose in attaching the petition to the periodic publication appears to be to circulate the petition for signatures rather than to communicate information among members about matters concerning the homeowners’ association. While the alternatives to disseminating such a petition, which may include door-to-door solicitations, direct mailings, etc., are more labor-intensive and, in the case of a direct mailing, more expensive, these are viable alternatives. Since the members’ petition in this situation is an unexecuted formal written request directed to the board of directors, rather than the conveyance of information to other members on a matter concerning the association, I do not believe the petition is a “communication” falling within the purview of § 55-510.2.5 Therefore, the board of directors is not required to pay for its dissemination.

**CONCLUSION**

Accordingly, it is my opinion that, in the situation described, a members’ petition for a special meeting of the board of directors of a property owners’ association is not a “communication” that requires the board to provide a reasonable, effective, and free method of exchange with other owners.

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1 Op. Va. Att’y Gen.: 2001 at 22, 25; 1993 at 210, 213; see, e.g., Anderson v. Commonwealth, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944) (noting that words “listed or assessed” have well-recognized meaning and are commonly used to express thought that personal property must be placed on roll of tangible person property for purposes of taxation).

2 BLACK’S LAW DICTIONARY 273 (7th ed. 1999).

3 Id. at 1165.

4 A homeowners’ association is not required to hold special meetings. Instead, § 55-510(E) provides that an association meeting “shall be held in accordance with the provisions of the bylaws at least once each year after the formation of the association,” and requires that association members be notified of such meeting, or any other meeting, within the time frames and in the manner prescribed in subsection E.

5 I note, however, that a letter to members of the property association that describes the petition and the concerns it addresses would appear to be a communication.
School board may act as responsible public entity under Act. Authority of school board acting as responsible public entity to enter into comprehensive agreement only after receiving local governing body approval.

THE HONORABLE HARRY J. PARRISH
MEMBER, HOUSE OF DELEGATES
MARCH 24, 2004

ISSUES PRESENTED

You ask whether an elected school board may be a responsible public entity under the Public-Private Education Facilities and Infrastructure Act of 2002. You further ask whether a school board acting as a responsible public entity under the Act may enter into a comprehensive agreement to construct a new school without the approval of the local governing body.

RESPONSE

It is my opinion that a school board may act as a responsible public entity under the Public-Private Education Facilities and Infrastructure Act of 2002. A school board acting as a responsible public entity has authority to enter into a comprehensive agreement under the Act only after having received approval from the local governing body.

APPLICABLE LAW AND DISCUSSION

Section 56-575.1 of the Public-Private Education Facilities and Infrastructure Act of 2002 defines certain terms as used in the Act. A “responsible public entity” is “a public entity that has the power to acquire, design, construct, improve, renovate, expand, equip maintain, operate, implement, or install the applicable qualifying project.” A “qualifying project” is broadly defined to include “(i) any educational facility ... ; (ii) any building or facility for principal use by any public entity; (iii) any improvements ... necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications ... infrastructure; (v) a recreational facility; or (vi) technology infrastructure.”

A “comprehensive agreement” is an “agreement between the operator and the responsible public entity,” the “operator” being “the private or other non-governmental entity that is responsible for any and all of the stages of a qualifying project, or a portion thereof.”

Section 56-575.16(6) of the Act provides that “[a] responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement ... only with the approval of the local governing body.”

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning. “Where the language of a statute is clear and unambiguous rules of statutory construction are not required.”
Under the plain language of the statute, a public entity, such as an elected school board, may act as a "responsible public entity" if it "has the power to acquire, design, construct, improve, renovate, expand, equip, maintain, operate, implement, or install the ... qualifying project." The Act does, however, expressly require that a school board acting as a responsible public entity have the approval of the local governing body before entering into a comprehensive agreement under the Act.

CONCLUSION

Accordingly, it is my opinion that a school board may act as a responsible public entity under the Public-Private Education Facilities and Infrastructure Act of 2002. A school board acting as a responsible public entity has authority to enter into a comprehensive agreement under the Act only after having received approval from the local governing body.

1 Persons may be appointed or elected to a school board. See VA. CODE ANN. § 22.1-29 (LexisNexis Repl. Vol. 2003). This opinion relates to an appointed or elected school board.


3 Id. In your request letter, you indicate that there is a question as to whether a public entity that desires to qualify as a "responsible public entity" must have the power to condemn property through the power of eminent domain. There is nothing within the plain language of the Public-Private Education Facilities and Infrastructure Act of 2002 that requires a responsible public entity to have the authority to condemn property.

4 Id.


an extension of time to file, must resubmit an initial registration and pay the initial fee of $100 and the required annual registration fee.

BACKGROUND

Your letter relates to an organization that registered as a charitable organization with the Commissioner of Agriculture and Consumer Services ("Commissioner"). It is my understanding that this organization allowed its registration to lapse by not filing a registration renewal, or requesting an extension of time to file. You relate that representatives of the Office of Consumer Affairs within the Department of Agriculture and Consumer Services subsequently informed the organization that it would need to resubmit an initial registration, including an initial fee of $100 and the required annual registration fee.

APPLICABLE LAW AND DISCUSSION

Section 57-49(A) requires "[e]very charitable organization, ... which intends to solicit contributions within the Commonwealth, or have funds solicited on its behalf, ... [to] file an initial registration statement with the Commissioner." Section 57-49(E) addresses the annual registration fee amounts for such charitable organizations. Section 57-49(E) provides a sliding scale for the annual registration fee ranging from $30 to $325. The annual fee is based on the amount of gross contributions the organization received for the preceding year. "Organizations with no prior financial history filing an initial registration shall be required to pay an initial fee of $100. Organizations with prior financial history filing an initial registration shall be required to pay an initial fee of $100 in addition to the annual registration fee." Finally, § 57-49(E) provides that "[a]ny organization which allows its registration to lapse, without requesting an extension of time to file, shall be required to resubmit an initial registration."

As a general rule, "[w]here the language of a statute is clear and unambiguous rules of statutory construction are not required." Following the plain language of the statute, it is clear that an organization which allows its registration to lapse, without first requesting an extension of time to file, must resubmit an initial registration. It is equally clear that an organization with a prior financial history filing an initial registration must pay both the initial fee of $100 and the required annual registration fee.

CONCLUSION

Accordingly, it is my opinion that a charitable organization that allows its registration with the Commissioner of Agriculture and Consumer Services to lapse, without requesting an extension of time to file, must resubmit an initial registration and pay the initial fee of $100 and the required annual registration fee.

Fairfax and Arlington Counties may raise respective local cigarette taxes to amount not to exceed greater of 5¢ per pack of cigarettes or amount of state tax levied on cigarettes.

THE HONORABLE GARY A. REESE
MEMBER, HOUSE OF DELEGATES
JULY 22, 2004

ISSUE PRESENTED
You ask whether the county governing bodies of Fairfax and Arlington may raise their respective local cigarette taxes to the increased amount of the state tax to be levied upon cigarettes effective September 1, 2004.

RESPONSE
It is my opinion that, pursuant to § 58.1-3831, the governing bodies of Fairfax and Arlington Counties may raise their respective local cigarette taxes to an amount not to exceed the greater of five cents per pack of cigarettes or the amount of the state tax levied on cigarettes. In enacting a cigarette tax increase at the 2004 Special Session I, I note that the General Assembly did not amend § 58.1-3831, which addresses the imposition of a local cigarette tax by Fairfax and Arlington Counties.

APPLICABLE LAW AND DISCUSSION
The 2004 Special Session I of the General Assembly increased the state cigarette excise tax to one cent per cigarette sold, stored or received on and after August 1, 2004 (or twenty cents per pack), and authorized a one and one-half cent increase in the state tax levied on each cigarette sold, stored or received on and after July 1, 2005 (or thirty cents per pack). These cigarette excise tax changes will become effective September 1, 2004.

Section 58.1-3831 specifically authorizes Fairfax and Arlington Counties to impose a local cigarette tax as follows:

Fairfax and Arlington Counties shall have the power to levy tax upon the sale or use of cigarettes. Such tax shall be in such amount and on such terms as the governing body may by ordinances prescribe, not to exceed five cents per pack or the amount levied under state law, whichever is greater. The provisions of § 58.1-3830 shall apply to such counties, mutatis mutandis.

Sections 58.1-3830 and 58.1-3832 set out the general provisions applicable to the imposition of a cigarette tax by localities, including entering into arrangements with the Department of Taxation for the use of dual stamps and delegating by ordinance its administrative and enforcement authority regarding cigarette taxes to an agency or authority pursuant to § 15.2-1300.
From the clear and unambiguous language of § 58.1-3831, Fairfax and Arlington Counties each have an option to impose a local cigarette tax, the maximum amount of which may not exceed the greater of five cents per pack or the amount of the state excise tax on cigarettes. The respective local tax may be at a rate less than the greater of either of these two amounts, but may not exceed it.

As noted in § 58.1-3831, the terms and conditions of § 58.1-3830, allowing localities to levy a tax on cigarettes, apply mutatis mutandis to Fairfax and Arlington Counties, as their individual conditions and details dictate. Inasmuch as the current state excise tax on cigarettes is two and one-half cents per pack, the rate of five cents granted in § 58.1-3831 to Fairfax and Arlington Counties is greater. Thus, at the present time, five cents is the maximum rate at which the counties may set their respective cigarette taxes. However, on and after September 1, 2004, when the state excise tax increases to twenty cents per pack, the state tax rate will exceed the five-cent per pack rate. Accordingly, as that will be the greater amount, twenty cents per pack would then become the maximum local cigarette tax rate that Fairfax and Arlington may impose. Likewise, on an after July 1, 2005, absent a change in the law, when the state excise tax increases to thirty cents per pack, thirty cents will become the maximum local cigarette tax rate for Fairfax and Arlington Counties. Any amendment to the ordinances in Fairfax and Arlington Counties to raise the cigarette tax, however, is subject to the notice requirements set forth in § 15.2-1427.

CONCLUSION

Accordingly, it is my opinion that, pursuant to § 58.1-3831, the governing bodies of Fairfax and Arlington Counties may raise their respective local cigarette taxes to an amount not to exceed the greater of five cents per pack of cigarettes or the amount of the state tax levied on cigarettes. In enacting a cigarette tax increase at the 2004 Special Session, I note that the General Assembly did not amend § 58.1-3831, which addresses the imposition of a local cigarette tax by Fairfax and Arlington Counties.
see also 2000 Op. Va. Att’y Gen. 199, 200 (interpreting extent of consumer utilities taxes authorized by § 58.1-3812 and noting that, whenever there is doubt as to meaning or scope of laws imposing tax, such laws are to be construed against government and in favor of citizen).


OP. NO. 03-123

TAXATION: LICENSE TAXES.

Authority for Virginia BPOL licensee to deduct, from its base of taxable gross receipts, gross receipts attributable to business conducted in another state or foreign country, wherein such licensee is liable for or subject to income or other tax based on income.

THE HONORABLE RILEY E. INGRAM
MEMBER, HOUSE OF DELEGATES
JANUARY 13, 2004

ISSUE PRESENTED

You inquire concerning the application of § 58.1-3732(B)(2) in calculating gross receipts pursuant to the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735.

RESPONSE

It is my opinion that § 58.1-3732(B)(2) permits a Virginia licensee to deduct, from its base of taxable gross receipts, the gross receipts attributable to business conducted in another state or foreign country, wherein such licensee is liable for or subject to income or other tax based on income.

APPLICABLE LAW AND DISCUSSION

The 1996 Session of the General Assembly enacted legislation requiring uniformity of ordinances governing BPOL taxes.1 The BPOL tax provisions addressed in the 1996 legislation bring uniformity to BPOL tax administration.2 Section 58.1-3701 mandates that the Department of Taxation promulgate guidelines, which, by their nature, must amplify and clarify statutory provisions.3 The Department has issued Guidelines for Business, Professional and Occupational License Tax4 ("2000 BPOL Guidelines"), which, pursuant to § 58.1-3701, are “ accorded the weight of a regulation.” Section 58.1-3701 specifically authorizes the Tax Commissioner “to issue advisory written opinions” interpreting the BPOL tax.

Generally, the BPOL tax is imposed against gross receipts. Section 58.1-3700.1 defines “gross receipts” as “the whole, entire, total receipts [of a business], without deduction.” The general situs or attribution rules in § 58.1-3703.1(A)(3) determine the assignment of gross receipts to a particular locality.5 Additionally, § 58.1-3732 mandates certain deductions from gross receipts:
B. The following shall be deducted from gross receipts or gross purchases that would otherwise be taxable:

2. Any receipts attributable to business conducted in another state or foreign country in which the taxpayer is liable for an income or other tax based upon income. [Emphasis added.]

Section 58.1-3732(B)(2) specifically provides that the measurable base for the BPOL tax must be reduced by the amount of gross receipts attributable to business conducted in another state or foreign country wherein the taxpayer is subject to income or other tax based on income.

The 2000 BPOL Guidelines confirm that § 58.1-3732(B)(2) does not require that the gross receipts for a business conducted out-of-state be fully or partially taxable. It is sufficient that the licensee "is liable for" an income or income-like tax measured on gross receipts. The BPOL tax statutes do not require that the gross receipts be taxed in whole, in part, or even taxed at all by the other state or foreign country. Thus, the taxpayer may be subject to possible taxation based on income. Considering the various attribution methodologies and "tax preference" items, such as tax credits or loss carry forwards, it is conceivable that a licensee may be required to pay tax on only a portion, if any, of the gross receipts attributable to other jurisdictions.

Conversely, for the several states that do not impose income or income-like taxes, the gross receipts of a Virginia licensee attributable to business conducted in such nontaxing states would not be deducted from the licensee's gross receipts. Such gross receipts accordingly are subject to the BPOL tax in the appropriate Virginia localities.

Construction placed on the law by agencies charged with administrative duties in connection with the law is entitled to great weight, particularly when the agency has been charged by the General Assembly with construing individual statutes that constitute part of a complex statutory scheme. The Department of Taxation and the Tax Commissioner, the agency and official charged with promulgating the BPOL tax guidelines and issuing advisory opinions, concur in these conclusions.

Finally, you should note that not all taxes designated as "income taxes" are considered income taxes for Virginia purposes. Likewise, not all taxes designated as another type of tax, such as a franchise tax, may be measured by income in accordance with the requirement of § 58.1-3732(B)(2). For these reasons, I refer you to the Tax Commissioner who is authorized to issue opinions on questions involving the types of taxes that qualify for the deduction from gross receipts. In addition, the Tax Commissioner has specific information on the allocation and apportionment methods used in other jurisdictions.

CONCLUSION

Accordingly, it is my opinion that § 58.1-3732(B)(2) permits a Virginia licensee to deduct, from its base of taxable gross receipts, the gross receipts attributable to business
conducted in another state or foreign country, wherein such licensee is liable for or subject to income or other tax based on income.

5The BPOL tax applies specific rules to various types of occupations and activities, which inherently are temporary or itinerate in nature. See, e.g., § 58.1-3715(B) (Michie Repl. Vol. 2000) (governing contractors without definite place of business in locality, where contractor’s business exceeds or will exceed $25,000 for license year); § 58.1-3717 (Michie Repl. Vol. 2000) (governing taxation of peddlers and itinerate merchants).
62000 BPOL GUIDELINES § 2.6, supra note 4, (providing that taxpayer qualifies for deduction from gross receipts when taxpayer files return for income or income-like tax in another state or foreign country); see also § 58.1-3732(B)(2) (LexisNexis Supp. 2003).
7See 2000 BPOL GUIDELINES § 2.6, supra note 4 (“The Virginia taxpayer, however, need not actually pay any tax to take the deduction.”).
8“A taxpayer is liable for an income or other tax based upon income if the taxpayer files a return for such tax in another state or country. Thus, in order to take the deduction, the taxpayer must be required by the laws of another state or foreign country to file an income tax return or other return for a tax based upon income.” Tax Comm’r Priv. Ltr. Rul. PD 97-490 (Dec. 19, 1997) (citation omitted) (interpreting 1997 BPOL GUIDELINES § 3.3.4), available at http://policylibrary.tax.state.va.us/OTP/Policy.nsf. Since the Tax Commissioner’s ruling, § 3.3.4 has been amended and renumbered as § 2.6. See 2000 BPOL GUIDELINES § 2.6, supra note 4.
9See, e.g., Tax Comm’r Priv. Ltr. Rul. PD 94-175 (June 8, 1994) (noting that, although taxpayer had income from Virginia sources and sufficient nexus with Virginia to subject it to corporate income tax, no actual tax payment was due Virginia, because taxpayer had no positive Virginia apportionment factor), available at http://policylibrary.tax.state.va.us/OTP/Policy.nsf.
10See supra notes 8, 9.
12See supra notes 8, 9 and accompanying text.

OP. NO. 04-044

TAXATION: MISCELLANEOUS TAXES — CONSUMER UTILITY TAXES.

Authority for county, city, or town to impose consumer utility tax on mobile service providers. When tax is imposed, requirement that service provider collect tax on each
telephone number included in bundled mobile telecommunications service plan billed to mobile service consumer. Provider shall apply 10% tax to monthly gross charges not exceeding $30 that are attributable to each itemized or nonitemized local mobile telecommunications service number included in bill. Application of this interpretation to any particular mobile telecommunications service plan is question of fact for determination by local tax official.

THE HONORABLE SHARON M. MCDONALD
COMMISSIONER OF THE REVENUE FOR THE CITY OF NORFOLK
SEPTEMBER 7, 2004

ISSUE PRESENTED

You inquire concerning the proper interpretation and application of the consumer utility tax imposed pursuant to § 58.1-3812. You ask whether § 58.1-3812 requires mobile telecommunications service providers to collect a consumer utility tax on each telephone number included within a family service plan or against the aggregate nonitemized charge billed to the mobile service consumer.

RESPONSE

Section 58.1-3812 authorizes a county, city, or town to impose a consumer utility tax on mobile service providers. Should a county, city, or town impose such a tax, it is my opinion that § 58.1-3812 also requires a service provider to collect a consumer utility tax on each telephone number included in a bundled mobile telecommunications service plan billed to a mobile service consumer. According to Virginia law, the provider shall apply a 10 percent tax to monthly gross charges not exceeding $30 that are attributable to each itemized or nonitemized local mobile telecommunications service number included in the bill. The application of this interpretation to any particular mobile telecommunications service plan is a question of fact for determination by the local tax official.

BACKGROUND

You relate that service providers in Hampton Roads offer several mobile telecommunications service plans to consumers. Many providers offer a family plan of service, in which various services provided to a group of related individuals are bundled together. You state that family plans consist of two parts. The first part of the family plan defines the initial contract and details the number of minutes and features selected by the primary subscriber. A primary telephone number for account identification is assigned and one initial mobile telephone is activated. The second part of the family plan includes the additional secondary telephone components of the plan. A separate telephone number is assigned and activated for each secondary user phone. You advise that most service providers itemize the charges for secondary telephone lines and apply the tax rates and fees to the individual telephone numbers on the primary subscriber’s monthly bill.

You identify a major service provider whose practice is not to itemize the charges for secondary mobile telecommunications service numbers. Instead, the service provider combines into a single account, the lines attributable to all secondary numbers,
charges one fee, and assesses taxes on the aggregate monthly charge, disregarding the charges attributable to the individual secondary telephone lines. This practice has the effect of reducing local consumer utility tax revenue, because § 58.1-3812(A) limits the tax rate that may be billed for each mobile telecommunications service number to a maximum monthly gross charge of $30.

APPLICABLE LAW AND DISCUSSION

Article 4, Chapter 38 of Title 58.1, §§ 58.1-3812 through 58.1-3816.2, comprises the statutory scheme relating to local consumer utility taxes. Section 58.1-3812(A) provides that

any county, city or town may impose a tax on a taxable purchase by a consumer of local telecommunication service if the consumer’s service address is located in such county, city or town.... [T]he tax may be imposed only at a rate equal to 10 percent of the monthly gross charge to a consumer of local mobile telecommunications service and shall not be applicable to any amount so charged in excess of $30 per month for each mobile telecommunications service number billed to a mobile service consumer. [Emphasis added.]

Section 58.1-3812(G) provides that “[a] service provider of local telecommunication services shall collect the tax from the consumer by adding the tax to the monthly gross charge for such services.” Section 58.1-3812(L) explains the purpose of a “bundled transaction” and the charges attributable to such services:

L. 1. For purposes of this article, a bundled transaction of services includes services taxed under this section and consists of distinct and identifiable properties, services, or both, sold for one nonitemized charge for which the tax treatment of the distinct properties and services is different.

2. In the case of a bundled transaction described in subdivision L 1, if the charge is attributable to services that are taxable and services that are nontaxable, the portion of the charge attributable to the nontaxable services shall be subject to tax unless the provider can reasonably identify such nontaxable portion from its books and records kept in the regular course of business.

3. In the case of a bundled transaction described in subdivision L 1, if the charge for such services is attributable to services that are subject to tax at different rates, the total charge shall be treated as attributable to the services subject to tax at the highest rate unless the provider can reasonably identify the portion of the charge attributable to the services subject to tax at a lower rate from its books and records kept in the regular course of business for other purposes. [Emphasis added.]
Section 58.1-3812(M) defines the following terms as used in Article 4:

"Consumer" means a person who, individually or through ... permittees, makes a taxable purchase of local telecommunication services.

"Gross charges" means ... the amount charged or paid for the taxable purchase of local telecommunication services.

"Local telecommunication service," subject to the exclusions stated in this section, includes, without limitation, the two-way local transmission of messages through use of ... local mobile telecommunications service.

"Mobile service consumer" means a person having a telephone number for local mobile telecommunications service who has made a taxable purchase of such service or on whose behalf another person has made a taxable purchase of such service.

"Mobile telecommunications service" means commercial mobile radio service, as defined in 47 C.F.R. § 20.3, as in effect on June 1, 1999.

"Service provider" means every person engaged in the business of selling local telecommunication services to consumers. [Emphasis added.]

The plain and unambiguous language of § 58.1-3812(A) evinces the intent of the General Assembly that a 10 percent consumer utility tax be applied to the monthly charges for each mobile telecommunications service number billed to a mobile service consumer not exceeding the gross amount of $30. This language clearly applies to the described family plans.

Further evidence of this legislative intent may be gleaned from the definitions of "consumer" and "mobile service consumer" in § 58.1-3812(M). Essentially, a "consumer" is any person who, individually or through others, "makes a taxable purchase of local telecommunication services," which include "local mobile telecommunications service." Others in a consumer’s family or affinity group would be "permittees." A "mobile service consumer," to whom such service is billed, includes any person "having a telephone number for local mobile telecommunications service who has made a taxable purchase of such service or on whose behalf another person has made a taxable purchase of such service." These definitions, read together with the statutory scheme explained in the previous paragraph, include the type of family service plans you
describe, wherein a service provider bills a primary subscriber for services rendered to other family or affinity group participants. Consistent with this interpretation, you relate that most service providers in the Hampton Roads area tax the individual secondary phone numbers billed to the primary subscriber of a family plan.

You cite the example of a service provider that makes one aggregate nonitemized charge for bundled services rendered to participants in the family plan. Notwithstanding this chosen method of billing, it is clear that the provider has included charges “for each mobile telecommunications service number” within the aggregate amount billed to the subscriber, in order to provide other members of the family or group with mobile telecommunications service.

The provision for bundled transactions in § 58.1-3812(L) indicates an intention to include and tax family plans in accordance with the scheme set out in the statute. A “bundled transaction” “consists of distinct and identifiable properties, services, or both, sold for one nonitemized charge for which the tax treatment of the distinct properties and services is different.” Accordingly, a bundled transaction includes not only a combination of taxable and nontaxable services, but also those services or properties, or both, on which the tax treatment may be different. Different tax treatment may result from the imposition of different tax rates, or the application of different caps on the tax base. This would be the case for each telephone number in a family plan, inasmuch as the tax treatment of the taxable base would vary according to amount. Where the charges for distinct services may be reasonably identified from the service provider’s books and records, different tax rates may apply to those services.1 Where the charges for such services may not be reasonably identifiable, the total charge shall be attributed to the services subject to the highest tax rate.10

It is clear from the plain and unambiguous wording of § 58.1-3812 that the General Assembly intends to apply the consumer utility tax on a monthly basis to “each mobile telecommunications service number,” whether itemized or not.12 For purposes of § 58.1-3812, the “highest rate” for taxing mobile telecommunications service would be 10 percent on the nonitemized gross charges attributable to each number billed to a mobile service consumer. If the service provider has attributed charges to distinct services and numbers, based on its books and records, the separate services and properties may be taxed at their respective tax rates. If the nonitemized charge cannot reasonably be broken down, the local taxing official must develop a reasonable method for identifying each telephone number included within the nonitemized charge so that services attributable to the number may be taxed. The gross charge for services must not exceed $30.13

You state that the service providers in Hampton Roads offer a wide variety of services and rate plans for local mobile telecommunication services. It is beyond the scope of this opinion to provide specific guidance as to a method of imposing a consumer utility tax on any of these arrangements. Such determinations are to be made by the local tax official, based on the factual provisions of each plan.14
CONCLUSION

Section 58.1-3812 authorizes a county, city, or town to impose a consumer utility tax on mobile service providers. Accordingly, should a county, city, or town impose such a tax, it is my opinion that § 58.1-3812 also requires a service provider to collect a consumer utility tax on each telephone number included in a bundled mobile telecommunications service plan billed to a mobile service consumer. According to Virginia law, the provider shall apply a 10 percent tax to monthly gross charges not exceeding $30 that are attributable to each itemized or nonitemized local mobile telecommunications service number included in the bill. The application of this interpretation to any particular mobile telecommunications service plan is a question of fact for determination by the local tax official.

1Section 58.1-3812(M) defines “taxable purchase” as “the acquisition of telecommunication services for consumption or use.”
2Section 58.1-3812(M) excludes from the definition of “gross charges” certain charges/amounts and bad debts, which are not applicable to this opinion.
3The Supreme Court of Virginia has stated that, “[w]hen a statute’s language is plain and unambiguous, we are bound by the plain meaning of that language. Therefore, when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly intended something other than that which it actually expressed.” Mozley v. Prestwould Bd. of Dirs., 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002) (citations omitted); see also 2000 Op. Va. Att’y Gen. 199, 200 (interpreting extent of consumer utilities taxes authorized by § 58.1-3812 and noting that, whenever there is doubt as to meaning or scope of laws imposing tax, such laws are to be construed against government and in favor of citizen).
5Id. (defining “consumer”).
6Id.
7Section 58.1-3812(A).
8Section 58.1-3812(L)(1).
9See § 58.1-3812(L)(2).
10Section 58.1-3812(L)(3) (emphasis added). For example, a prior opinion of the Attorney General concludes that a “universal service charge” appearing separately as a percentage on a consumer’s bill for local telecommunications service would not be considered part of the “gross charges” under § 58.1-3812, whereas if the universal service charge were to be included as a nonitemized flat monthly fee, such charge would be subject to tax. 2000 Op. Va. Att’y Gen., supra note 3, at 201.
11Section 58.1-3812(A).

In its Legislative Summary for the 1994 Session of the General Assembly, which originally authorized localities to extend collection of the consumer utility tax “to all providers of cellular ... services,” the Department of Taxation states that “[a] maximum tax of 10% of the service charge, up to $3 per month, for each mobile service consumer would be established.” (Emphasis added.) Tax Comm’r Rul. P.D. 94-227 (May 1994), available at http://policylibrary.tax.state.va.us/OTP/Policy.nsf. In its Fiscal Impact Statement for Senate Bill 858, introduced at the 2003 Session of the General Assembly, which ultimately became Chapter 160, the Department commented concerning taxation of bundled transactions: “The local consumer utility taxes on telecommunications services apply to local telecommunications services and local mobile telecommunications services, which are taxed at different rates with different caps. A growing trend in the telecommunications industry involves the bundling of these services with other...
communications services that are not subject to the local consumer utility taxes, such as long distance, cable, broadband and DSL services.

"Under this bill, a bundled transaction of communications services consists of distinct and identifiable property, services, or both, sold for one nonitemized charge for which the tax treatment of the distinct properties and services is different." (Emphasis added.) Tax Dep’t 2003 Fiscal Impact Statement, at 2 (Feb. 24, 2003), available at http://leg1.state.va.us/cgi-bin/legp504.exe?03+oth+SB858FER161+PDF.

The General Assembly, as well as localities and telecommunications service providers, have been requested to prepare legislation “establishing a new system for taxing telecommunications services in the Commonwealth.” 2004 Va. Acts ch. 634. “[T]he intent is for a new method of taxation to be enacted, effective July 1, 2005, to replace the … local consumer utility tax on consumers of local exchange and wireless services ….” Id. (quoting enacting cl. 1, § 2).

See Op. Va. Att’y Gen.: 2002 at 338, 341 (concluding that tax status of nonprofit Christian organization is factual determination to be made by local tax official); 1995 at 245, 247 (noting that whether contractor is engaged in business within locality, for purpose of imposing business license tax, is question of fact for determination by appropriate local tax official); id. at 268 (concluding that local tax official determines domicile of student, for purposes of personal property taxation, on case-by-case basis, considering all relevant facts).

OP. NO. 04-063
TAXATION: MISCELLANEOUS TAXES – TRANSIENT OCCUPANCY TAX — RETAIL SALES AND USE TAX.

County has no authority to levy lodging tax on amount hotel charges transients for rental of banquet facilities to accommodate events of limited duration.

THE HONORABLE JOHN C. WATKINS
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 7, 2004

ISSUE PRESENTED

You inquire concerning the proper interpretation and application of the transient occupancy tax imposed pursuant to § 58.1-3819. Section 58.1-3819(A) authorizes a county to impose a transient occupancy tax on hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for a certain period of time. You ask whether § 58.1-3819 prohibits a county from imposing a lodging tax on the amount charged to transients for the rental of hotel banquet facilities to accommodate specific events of limited duration.

RESPONSE

I am of the opinion that § 58.1-3819 does not authorize a county to levy a lodging tax on the amount a hotel charges transients for the rental of banquet facilities to accommodate events of limited duration.

BACKGROUND

You relate that Chesterfield County has adopted an ordinance that imposes a lodging tax pursuant to § 58.1-3819. The ordinance requires collection of an eight percent lodging tax on the total amount paid by transients to hotels “for room or space rental.” The hotel you describe owns a building in Chesterfield County and maintains both banquet facilities and guest rooms. The hotel rents its banquet facilities for customary purposes, i.e., social and business functions involving large groups of people who
meet in the hotel’s banquet room during the course of the specific event. Historically, the hotel has collected the eight percent lodging tax when it rents rooms to overnight guests, but has never collected the lodging tax from individuals or groups who rent the banquet facilities to host events.

**APPLICABLE LAW AND DISCUSSION**

The ordinance in question is a local transient occupancy tax ordinance administered by local taxing officials pursuant to §§ 58.1-3819 through 58.1-3823. Section 58.1-3819(A) authorizes

> [a]ny county, by duly adopted ordinance, [to] levy a transient occupancy tax on hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for continuous occupancy for fewer than 30 consecutive days. Such tax shall be in such amount and on such terms as the governing body may, by ordinance, prescribe.

It is well-settled that laws imposing taxes are to be strictly construed, and when uncertainty arises as to the scope or meaning of such laws, “they are construed more strongly against the government and in favor of the citizen.” Furthermore, statutes that impose taxes “are not to be interpreted to include within the subjects taxed anything which is not clearly intended by the legislature to be so included.”

A strict construction of § 58.1-3819 requires the conclusion that the statute does not include within the subjects taxed meeting rooms and banquet facilities rented within hotels, motels, boarding houses, travel campgrounds and other facilities. Section 58.1-3819(A) authorizes counties to adopt ordinances imposing a transient occupancy tax on certain “facilities offering guest rooms rented out for continuous occupancy for fewer than 30 consecutive days.” (Emphasis added). The Chesterfield County transient occupancy tax ordinance imposes a lodging tax on the amounts paid “for room or space rental.” Section 58.1-3819 is silent as to any other type of room rented except guest rooms. Other statutes employing similar language provide valuable guidance as to the significance of the statute’s failure to include other types of rooms. Section 58.1-603, which uses language similar to that in § 58.1-3819, noticeably includes other types of rooms within the definition of “retail sale” for purposes of the Virginia Retail Sales and Use Tax Act. The term “retail sale” specifically includes

> the sale or charges for any room or rooms, lodgings, or accommodations furnished to transients for less than ninety continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration.

The term “accommodations” includes “banquet facilities and meeting rooms.” Accordingly, a different result is reached under the Virginia Retail Sales and Use Tax Act.
Act, because banquet facilities and meeting rooms rented in hotels are included within the term "accommodations," which are subject to sales tax under § 58.1-603(4). The absence of language regarding other types of rooms in § 58.1-3819 does not evince a legislative intent to include meeting rooms and banquet facilities within the scope of the transient occupancy tax. Had the General Assembly intended meeting rooms and banquet facilities rented within hotels, motels, boarding houses, travel campgrounds, and other facilities to be subject to the transient occupancy tax, § 58.1-3819 would have so stated. Therefore, banquet facilities and meeting rooms rented within hotels are not subject to the transient occupancy tax under § 58.1-3819.

CONCLUSION

Accordingly, I am of the opinion that § 58.1-3819 does not authorize a county to levy a lodging tax on the amount a hotel charges transients for the rental of banquet facilities to accommodate events of limited duration.

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1 For purposes of this opinion, I assume that your inquiry is limited solely to the local transient occupancy tax and does not involve application of the Virginia Retail Sales and Use Tax Act. See Tax Comm'r Priv. Ltr. Rul. P.D. 93-167 (July 29, 1993) (concerning application of retail sales and use tax to hotel accommodations for federal contractor), available at http://policylibrary.tax.state.va.us/OTP/Policy.nsf.


6 Chesterfield County Code, supra note 2.


12 Accord 2002 Op. Va. Att’y Gen. 18, 20 (noting that had General Assembly intended to impose $10 fee on every deed admitted to record, it could have done so).

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OP. NO. 03-114


Display of commercial advertising sign on passenger vehicle for more than 50% of time does not alone disqualify vehicle from relief under Act. Determination is question of fact for local taxing official.
ISSUE PRESENTED

You inquire whether a passenger vehicle\(^1\) displaying a commercial advertising sign more than fifty percent of the time is entitled to relief under the Personal Property Tax Relief Act of 1998.

RESPONSE

It is my opinion that the display of a commercial advertising sign on a passenger vehicle for more than fifty percent of the time does not alone disqualify it from relief under the Personal Property Tax Relief Act. It is further my opinion that whether an advertising display is sufficient to disqualify a vehicle from relief under the Act is a question of fact for the local taxing official to determine.

BACKGROUND

You relate that you have determined that vehicles displaying advertising signs for more than fifty percent of the time do not qualify for tax relief under the Personal Property Tax Relief Act because they are promoting a product or service. Although the taxpayer does not depreciate the vehicle or claim business mileage on his or her federal tax return, you believe that it actually is a business vehicle because it advertises a business. You further relate that several county taxpayers question your determination. You note that the Internal Revenue Service, pursuant to their regulations, considers such vehicles to be personal, not business, use vehicles. You believe, however, that such consideration by the Internal Revenue Service is applicable only to federal taxation. You note that your determination represents a separate matter under state law.

APPLICABLE LAW AND DISCUSSION

The 1998 Special Session of the General Assembly enacted the Personal Property Tax Relief Act of 1998, consisting of §§ 58.1-3523 through 58.1-3536,\(^2\) which contemplates phasing out local personal property tax obligations for “qualifying vehicles” over a period of five years beginning in calendar year 1998.\(^3\) For purposes of the Act, § 58.1-3523 defines a “qualifying vehicle” as

\[\text{any passenger car, motorcycle, and pickup or panel truck, as those terms are defined in § 46.2-100, that is determined by the commissioner of the revenue of the county or city in which the vehicle has situs as provided by § 58.1-3511 to be (i) privately owned or (ii) leased pursuant to a contract requiring the lessee to pay the tangible personal property tax on such vehicle. In determining whether a vehicle is a qualifying vehicle, the commissioner of revenue may rely on the registration of such vehicle with the Department [of Motor Vehicles of the Commonwealth] pursuant to Chapter 6 (§ 46.2-600 et seq.) of Title 46.2.}^{[4]} \text{[Emphasis added.]}\]
Section 58.1-3523 defines “privately owned” to mean “owned by a natural person and used for nonbusiness purposes.” (Emphasis added.) Additionally, § 58.1-3523 defines “leased” to mean “leased by a natural person as lessee and used for nonbusiness purposes.” (Emphasis added.) Thus, the definition of the term “qualifying vehicle” includes the requirement that the vehicle be used for nonbusiness purposes. Finally, § 58.1-3523 defines the phrase “used for nonbusiness purposes” to mean that

the preponderance of use is for other than business purposes. The preponderance of use for other than business purposes shall be deemed not to be satisfied if: (i) the motor vehicle is expensed on the taxpayer’s federal income tax return pursuant to Internal Revenue Code § 179; (ii) more than fifty percent of the basis for depreciation of the motor vehicle is depreciated for federal income tax purposes; or (iii) the allowable expense of total annual mileage in excess of fifty percent is deductible for federal income tax purposes or reimbursed pursuant to an arrangement between an employer and employee.

While meeting any of the three tests described above will be “deemed” a disqualification, there may be facts and circumstances short of meeting one of these disqualification tests that would evidence “a preponderance of use” for other than personal purposes. Such a determination is a question of fact for the commissioner of revenue as is any other factual question related to tangible personal property. § 58.1-3532 directs the Department of Motor Vehicles to promulgate guidelines for local officials to use in administering the Personal Property Tax Relief Act. The Department has issued the Personal Property Tax Relief Guidelines for Direct Compensation Years (“DMV Guidelines”). The DMV Guidelines confirm that the question of whether a vehicle qualifies for tax relief under the Act is a factual determination for the local commissioner of the revenue, using the “preponderance of use test” to determine if the vehicle in question is being “used for nonbusiness purposes.” The DMV Guidelines note that the registration of a car in the name of a business creates a rebuttable presumption that the car is being used for business purposes. A commissioner of the revenue, therefore, may presume that a vehicle registered in the name of a business is being used for business purposes and is ineligible for relief under the Act. This presumption, however, is subject to evidence to the contrary as to the actual “preponderance of use,” which may be given to the locality. “A rebuttable presumption shifts the burden of producing evidence to the opposing party.”

Similarly, where a taxpayer has placed commercial advertising for a business, product or service on the exterior of a vehicle, which remains there for more than fifty percent of the time, it appears to the general public that the vehicle is owned and used by the commercial endeavor. This is especially true where the owner or driver of the vehicle owns the business or provides the service or product. Accordingly, it becomes
the taxpayer’s responsibility to provide adequate evidence to overcome that presumption and show that the preponderance of actual use is for nonbusiness purposes. Otherwise, a local taxing official may presume that the taxpayer uses the vehicle for business purposes, which renders it ineligible for tax relief under the Personal Property Tax Relief Act. An advertising display creates a “rebuttable presumption” of business use, which the taxpayer may refute with adequate evidence of the vehicle’s actual usage. Therefore, such a display is one of the factors that a commissioner of the revenue should consider in making the factual determination of whether a vehicle is a “qualifying vehicle” within the meaning of the Act.

While the General Assembly has chosen to incorporate “litmus tests” for uses deemed to be for business purposes based on certain limited federal income tax criteria, it has not specifically chosen to incorporate other federal criteria to establish a “preponderance of use” of any given vehicle. The commissioner of the revenue, using all the facts and circumstances, must make this determination.

CONCLUSION

Accordingly, it is my opinion that the display of a commercial advertising sign on a passenger vehicle for more than fifty percent of the time does not alone disqualify it from relief under the Personal Property Tax Relief Act. It is further my opinion that whether an advertising display is sufficient to disqualify a vehicle from relief under the Act is a question of fact for the local taxing official to determine.

1For the purposes of this opinion, I will assume that your question is limited to conventional passenger vehicles, i.e., passenger cars. I further assume that your question is not meant to include “motorcycle[s]” and “pickup or panel truck[s]” as those terms are defined in § 46.2-100. Motorcycles are in a unique category, and the federal income tax regulations provide different criteria for classification of trucks and moving vans, due to their likely use. See Temp. Treas. Reg § 1.274-5T(k)(4), (7) (2003). It, therefore, appears from the facts you present that such vehicles are not at issue. Thus, any use herein of the term “vehicles” shall mean only conventional passenger vehicles, i.e., passenger cars.


4Chapter 6 of Title 46.2, §§ 46.2-600 through 46.2-756, governs the titling and registration of motor vehicles.

5See 1991 Op. Va. Att’y Gen. 244, 246 n.2 (noting that determination of whether particular item of equipment is motor vehicle qualifying for local personal property taxation, or machinery and tools, is factual determination to be made by commissioner of revenue); see also 1989 Op. Va. Att’y Gen. 339, 341 (noting that commissioner of revenue must determine if certified property is used primarily for pollution abatement purposes).

6Section 58.1-3532 further directs that, after July 1, 1998, “the guidelines shall be updated annually.”


8See id. at 9-12; see also Dep’t Motor Vehicles, Personal Property Tax Relief Act (PPTRA): Information for Taxpayers, at www.dmv.state.va.us/webdoc/general/pptr/taxpayers.asp (last visited Jan. 29, 2004).

9See DMV GUIDELINES, supra note 7, at 9.
The term "rebuttable presumption" means "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." BLACK'S LAW DICTIONARY 1205 (7th ed. 1999). "Rebuttable presumption" is otherwise known as a "disputable presumption." Id. at 1204.

"Rebuttable presumption" is otherwise known as a "disputable presumption." Id. at 1204.

"See DMV GUIDELINES, supra note 7, at 9.


OP. NO. 04-078

TAXATION: REAL PROPERTY TAX – SPECIAL ASSESSMENT FOR LAND PRESERVATION — ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES — ENFORCEMENT BY THE COMMISSIONER OF REVENUE.

Lots, which are not ‘subdivision’ per ordinance, created after July 1, 1983, by recorded plat subject to ordinance may be aggregated to meet land-use taxation minimum acreage requirements. Local taxing official must assess back taxes and rollback taxes for 3 preceding tax years; may correct property valuation error subject to rollback taxes within 3 years of such assessment.

MR. LARRY W. DAVIS
ATTORNEY FOR ALBEMARLE COUNTY
DECEMBER 23, 2004

ISSUE PRESENTED

You inquire regarding the aggregation of lots for purposes of land-use taxation. First, you ask whether lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, which do not fall within the ordinance’s definition of “subdivision,” may be aggregated for purposes of meeting the minimum acreage requirements for favorable land-use taxation established by § 58.1-3233(2). Section 58.1-3233(2) relates to real estate devoted to agricultural, horticultural, forest, or open-space use. You next ask whether back taxes and rollback taxes, if any, must be imposed to correct inaccurate tax assessments resulting from an erroneous aggregation of contiguous lots.

RESPONSE

It is my opinion that lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, but not falling within the ordinance’s definition of “subdivision,” may be aggregated for purposes of meeting minimum acreage requirements for land-use taxation established by § 58.1-3233(2). I concur with your opinion that the local taxing official must assess back taxes and rollback taxes for the three preceding tax years and may correct an error in the valuation of property subject to rollback taxes within three years of assessment of the rollback tax.

BACKGROUND

You relate that, pursuant to § 58.1-3231, Albemarle County offers reduced real estate assessments and taxation on properties meeting certain use and size criteria. You note that § 58.1-3233(2) establishes minimum acreage requirements that must be incorporated into any local land use ordinance. You also note that § 58.1-3233(2)
allows the aggregation of certain contiguous parcels for the purpose of meeting the minimum acreage requirements. Finally, you relate that a question has arisen regarding the types of parcels that may be aggregated for purposes of meeting the minimum acreage requirements for land use assessment and taxation.

APPLICABLE LAW AND DISCUSSION

I. AGGREGATION OF LOTS

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244, provides for the special assessment of real property for land preservation. In general, to qualify for land-use assessment and taxation: (1) agricultural or horticultural property must consist of a minimum of five acres; (2) forest property must consist of a minimum of twenty acres; and (3) open-space property must consist “of a minimum of five acres or such greater minimum acreage as may be prescribed” by the locality.²

Section 58.1-3233(2) provides that “[t]he minimum acreage requirements for special classifications of real estate shall be determined by adding together the total area of contiguous real estate excluding recorded subdivision lots recorded after July 1, 1983, titled in the same ownership.”

Your inquiry focuses on the phrase “recorded subdivision lots” as used in § 58.1-3233(2). Specifically, you ask whether § 58.1-3233(2) excludes from aggregation all lots created pursuant to a locality’s subdivision ordinance or only those lots the creation of which falls within the definition of “subdivision.”

Although Title 58.1 does not define the term “subdivision,” Chapter 22 of Title 15.2, which governs planning, subdivision of land and zoning, provides the following definition:

“Subdivision,” unless otherwise defined in an ordinance adopted [by a locality], means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.2-2258.²

A 1989 opinion of the Attorney General addresses whether the reference to recorded subdivision lots in § 58.1-3233(2) refers to a subdivision plat recorded under a county’s subdivision ordinance or to any division of a tract of land.³ The 1989 opinion concludes that:

If an existing tract of land is divided into large parcels that are not subject to the county subdivision ordinance and the resulting parcels remain under common ownership, the eligibility of the resulting
combined parcels for use value assessment is consistent with the purpose of preserving the property for protected uses. On the other hand, the division of a tract under the subdivision ordinance contemplates the sale of the parcels to multiple owners.

... [T]herefore, ... the reference to recorded subdivision lots in § 58.1-3233(2) refers to a subdivision plat recorded under the local subdivision ordinance.... [P]arcel resulting from a plat not subject to the local subdivision ordinance may be combined to satisfy the minimum acreage requirements if the resulting parcels remain under common ownership.

Since the 1989 Opinion was issued, the General Assembly has not modified the meaning of the phrase “recorded subdivision lots” in § 58.1-3233(2). “[T]he General Assembly is presumed to have knowledge of the Attorney General’s interpretation of statutes, and the General Assembly’s failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s interpretation.” Therefore, since recorded subdivision lots are those lots created by a subdivision plat recorded under a local subdivision ordinance, it follows that lots created pursuant to something other than a subdivision plat would not be excluded from any aggregation of property.

This interpretation is further supported by the purposes underlying the land-use assessment and taxation program. The manifest purpose of Article 4 is to create a financial incentive to encourage the preservation and proper use of real estate devoted to agricultural, horticultural, forest, and open-space uses. The land-use taxation is intended to “ameliorate pressures which force the conversion of such real estate to more intensive uses and which are attributable in part to the assessment of such real estate at values incompatible” with the use and preservation for the desired purposes. The purpose of the minimum acreage requirements in § 58.1-3233(2) is to allow land use assessment and taxation on only those parcels large enough to further the goals of preserving agricultural, forest, and open-space lands.

If real estate currently in land-use is divided into parcels, but remaining under common ownership, large enough that the division is not subject to the locality’s subdivision ordinance, and if aggregated the new parcels otherwise satisfy § 58.1-3233(2), the aggregation of these parcels does not defeat the purposes underlying the land-use program. Divisions by subdivision plat under the subdivision ordinance, by contrast, contemplate the sale of the parcels and are contrary to the legislative purposes underlying the land-use program.

II. CORRECTION OF ERRONEOUS ASSESSMENTS

You also ask whether back taxes and rollback taxes, if any, must be imposed to correct inaccurate tax assessments resulting from an erroneous aggregation of contiguous lots. You conclude that the local taxing official must assess back taxes and rollback taxes for the three preceding tax years.
Section 58.1-3903 provides:

If the commissioner of the revenue of any county ... ascertains that any local tax has not been assessed for any tax year of the three preceding tax years or that the same has been assessed at less than the law required for any one or more of such years, ... the commissioner of the revenue or other assessing officer shall list and assess the same with taxes at the rate or rates prescribed for that year .... [Emphasis added.]

Section 58.1-3981(D) provides that “[a]n error in the valuation of property subject to the rollback tax imposed under § 58.1-3237 for those years to which such tax is applicable may be corrected within three years of the assessment of the rollback tax.” (Emphasis added.)

It is important to note the language used in § 58.1-3903, “shall,” is mandatory, while that in § 58.1-3981(D), “may,” is permissive. Back taxes for the three preceding tax years must be assessed. Correction of an error in the valuation of property subject to rollback taxes, however, is discretionary. Any such correction may be made within three years of assessment of the rollback taxes.

CONCLUSION

Accordingly, it is my opinion that lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, but not falling within the ordinance’s definition of “subdivision,” may be aggregated for purposes of meeting minimum acreage requirements for land-use taxation established by § 58.1-3233(2). I concur with your opinion that the local taxing official must assess back taxes and rollback taxes for the three preceding tax years and may correct an error in the valuation of property subject to rollback taxes within three years of assessment of the rollback tax.

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1Any 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).
5Id. at 327 (citation omitted) (emphasis added).
"Id. at 327.
11Id.
"See supra note 1.

13. 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.: 2003 at 124, 128 n.3; 1996 at 154, 158 n.3; 1989 at 250, 251-52.

14. 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. Wecms, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); see also Op. Va. Att'y Gen.: 2003 at 99, 103 n.2; 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12.

OP. NO. 04-057
TAXATION: REAL PROPERTY TAX — TAX EXEMPT PROPERTY.

Federal government has exclusive jurisdiction over Interior and Exterior Posts of Fort Story. Neither Commonwealth nor any of its political subdivisions may impose property taxes on portion of military housing project to be built on leasehold interest or on Ground Lease interest located thereon. Leasehold interests are not subject to local taxation. Military Housing Privatization Initiative precludes local taxation of project's Ground Lease interests.

THE HONORABLE PHILIP J. KELLAM
COMMISSIONER OF THE REVENUE FOR THE CITY OF VIRGINIA BEACH
JULY 21, 2004

ISSUES PRESENTED

You ask several questions regarding the proposed construction of military family housing at the United States Army base at Fort Story under the Military Housing Privatization Initiative contained in the 1996 Defense Authorization Act.

BACKGROUND

You inquire regarding the ability of the City of Virginia Beach to impose real property taxes on certain transactions and improvements to be located at Fort Story. In connection with your request, you have submitted certain documents corroborating the information set forth below.1

Fort Story is a 1,450-acre military installation on a federal enclave within the City of Virginia Beach. It is primarily a base for the United States Army. Approximately one-third of Fort Story is under the exclusive jurisdiction of the federal government (the "Interior Post"), and two-thirds is under the concurrent jurisdiction of the United States and the Commonwealth of Virginia (the "Exterior Post"). The present installation at Fort Story was created primarily by two grants from the Commonwealth—one in 19022 and the other in 1940.3

You relate that the 1996 Defense Authorization Act, in particular the Military Housing Privatization Initiative, enables the military to obtain private funding for the construction of family housing, because the Department of Defense recognized that military family housing cannot be revitalized using only traditional military construction programs. The Army has awarded a project planning contract to GMH Military Housing-Hampton Roads LLC ("GMH"), a nongovernment party, to replace
and upgrade 161 family housing units, and if necessary, to build approximately 250 new housing units to meet the on-post family housing requirements for personnel assigned to Fort Story.

At Fort Story and other military installations in Virginia, the Department of Defense, through the Secretary of the Army, and military housing contractors have entered into Community Development and Management Plans. To qualify for private financing, and to allow military personnel to receive a housing allowance to be used as rent, GMH and the Army plan to enter into an agreement to create a Delaware limited liability company ("GMH Family Housing"), which will be taxed as a partnership for federal income tax purposes.

You advise that the Army will own at least 90% interest, and up to 100% interest, depending on the actual dollar contribution by the minority contractor member, in GMH Family Housing. The majority owner, or government member, controls the selection of the manager and the terms on which financial contributions by GMH Family Housing members will be reimbursed or paid. Thus, you conclude that the Army, as the holder of the majority interest, controls GMH Family Housing.

Two members will fund GMH Family Housing. The Army will lease the real property to GMH Family Housing, under the terms of a Ground Lease, for a period of 50 years, with a right of renewal. Although the United States will contribute a certain amount of cash, as appropriated by Congress, GMH also will be required to contribute a specified cash amount of the construction costs. You relate, however, that this contribution is limited to certain costs incurred during construction. Thus, the more efficient the construction, the lower the contribution will be.

GMH Family Housing will plan, develop and construct the 250 family units, and then manage, rent and maintain the units under the guidelines of the family housing requirements of the Department of Defense. You state that all improvements are permanent structures that will be annexed to the realty. Upon termination of the military housing project, the Ground Lease and ownership of all improvements automatically will revert to the Army, at no consideration. You relate that 243 housing units will be built in the Interior Post and 7 units in the Exterior Post.

**APPLICABLE LAW AND DISCUSSION**

The 1996 National Defense Act established the Military Housing Privatization Initiative as alternative authority for the acquisition and improvement of military housing.

**A. THE INTERIOR POST**

You ask whether the federal government has exclusive jurisdiction over the portion of the Interior Post where military housing will be constructed, and if so, whether the local government is prohibited from levying any form of property tax on the leasehold interest.
Article I, § 8, Clause 17 of the Constitution of the United States authorizes the federal government "[t]o exercise exclusive legislation ... over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." The Interior Post will hold 243 units under the terms of the Ground Lease. Pursuant to the 1902 Act, the Commonwealth ceded exclusive jurisdiction to the United States, subject only to the right of the Commonwealth to serve civil and criminal process. The 1902 Act states:

1. Be it enacted by the general assembly of Virginia, That the consent of the State of Virginia is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this State required for sites for custom houses, courthouses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government.

2. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

3. The jurisdiction ceded shall not vest until the United States shall have acquired the title to said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State.

4. This act shall take effect and be in force from and after its passage.

Under the terms of the Ground Lease, the United States always retains the fee interest in the property. GMH Family Housing will have a leasehold interest for a term of fifty years. Throughout the entire term, it is anticipated that the Army will be the majority and controlling owner, and will authorize all aspects of the construction, choice of tenants, and lease rates. At termination, all improvements revert to the United States, without charge.

In the absence of a clear waiver, states and their political subdivisions may not levy taxes on property belonging to the federal government. The immunity from local taxation applies to private property within an area of exclusive federal jurisdiction.
"[W]here the lands are within the exclusive jurisdiction of the United States, under Article I, Section 8, Clause 17 of the Federal Constitution, they are immune from taxation by a state and even private property located thereon is not subject to taxation by a state." This is frequently known as the "intergovernmental tax immunity doctrine." Therefore, in the absence of congressional consent, neither the Commonwealth nor any of its political subdivisions may impose a leasehold interest on the project at Fort Story. No such consent applicable to this situation exists. As such, neither Virginia nor its political subdivisions may impose property taxes on the leased land or on improvements made to the Interior Post.

B. THE EXTERIOR POST

You ask whether the federal government has exclusive jurisdiction over the portion of the Exterior Post where military housing will be constructed.

Seven of the military housing units will be constructed on Ground Lease property lying in the Exterior Post. Although these units are subject to the United States Constitution granting the federal government the exercise of exclusive jurisdiction over all lands purchased with the consent of the state legislature, the property on which these units are to be located must also comply with the provision of the 1940 Act that the Commonwealth and the federal government exercise concurrent jurisdiction over crimes and offenses committed on lands acquired by the United States and used for any military purpose. Otherwise, the federal government retains exclusive jurisdiction, subject to the right of the Commonwealth to serve civil and criminal process. The 1940 Act, however, provides the following condition under which state jurisdiction may be reasserted:

[In the event that the said lands or any part thereof shall be sold or leased to any private individual, or any association or corporation, under the terms of which sale or lease the vendee or lessee shall have the right to conduct thereon any private industry or business, then the jurisdiction ceded to the United States over any such lands so sold or leased shall cease and determine, and thereafter the Commonwealth of Virginia shall have all jurisdiction and power she would have had if no jurisdiction or power had been ceded to the United States. This provision, however, shall not apply to post exchanges, officers’ clubs, and similar activities on lands acquired by the United States for purposes of National defense.]

Therefore, once the ceded property is sold or leased to a "private" individual, association, or corporation and the terms of the sale or lease provide the buyer or lessee with the right to conduct "any private industry or business" thereon, Virginia would regain jurisdiction over the relevant property. It is clear, however, that the military housing project does not trigger this reversionary condition. As a threshold matter, where,
as here, the federal government is engaging in a ground lease to another entity, and reserves the right to retain all improvements made thereon at no charge, the property is considered to continue to be owned by the federal government.\textsuperscript{22} In this case, that other “entity” is not “private,”\textsuperscript{23} but is a government-controlled corporation or, in other words, an instrumentality of the federal government.

Moreover, the federal government has a long history of using publicly owned corporations, quasi-public corporations, and other government-controlled entities to achieve governmental purposes while using techniques available in the private sector.\textsuperscript{24} The “privatization” contained in the Military Housing Privatization Initiative is an example of the federal government seeking to use private sector expertise to accomplish a governmental function. Indeed, there is Virginia precedent for these types of structures,\textsuperscript{25} as well as for federal military housing within the Commonwealth.\textsuperscript{26} Given the overwhelming preponderance of federal ownership of family housing, as well as for its authorization for all aspects of construction, its choice of tenants and establishment of lease rates, it is clear that this is not the type of “private individual, or any association or corporation ... [engaging in] any private industry or business,” within the meaning of the 1940 Act.\textsuperscript{27} This is government action, with a private party exercising its expertise in return for a very small minority interest. Accordingly, this is not the type of activity that would trigger a reversion of the Exterior Post to the Commonwealth. Indeed, it is merely an instrumentality of the federal government, and as such, the military housing project is entitled to intergovernmental tax immunity.\textsuperscript{28}

Inasmuch as the federal government retains exclusive jurisdiction over the Exterior Post for most purposes, including its immunity from state or local taxation, and in the absence of express congressional consent therefor, neither the Commonwealth nor the City of Virginia Beach has taxing jurisdiction.

\textbf{C. LEASEHOLD TAXES UNDER § 58.1-3203 OR § 58.1-3603}

Assuming exclusive jurisdiction in A and B above, you ask whether any portion of the property or leasehold interest is taxable under § 58.1-3203 or § 58.1-3603.

Finally, even assuming that the military housing project and GMH Family Housing’s leasehold interest may not be exempt from state and local taxation due to the exclusive federal jurisdiction exercised over the Interior Post and the Exterior Post resulting in intergovernmental tax immunity, neither the Commonwealth nor its political subdivisions would be able to impose property taxes on the project under the express terms of the Military Housing Privatization Initiative. This prohibition is sufficient to encompass both §§ 58.1-3203 and 58.1-3603, which provide for taxation of leasehold interests. Consistent with the governmental nature and purposes of the project, Congress specifically has provided that the government’s conveyance or lease of property or facilities under the Initiative shall not be subject to the federal government’s waiver of sovereign immunity to allow state and local taxation of “non-excess property” of the Department of Defense.\textsuperscript{29} Accordingly, the Ground Lease interests to be created by the project are not subject to local taxation under either § 58.1-3203 or § 58.1-3603.\textsuperscript{30}
CONCLUSION

Accordingly, it is my opinion that the United States government, through the Army, has exclusive jurisdiction over the Interior and Exterior Posts of Fort Story. Therefore, neither the Commonwealth nor any of its political subdivisions may impose property taxes on the portion of the military housing project to be built on the leasehold interest or on the Ground Lease interest located thereon.

I am also of the opinion that due to the exclusive jurisdiction of the United States government over Fort Story, and in the absence of an applicable waiver from the federal government, the described military housing project is not subject to taxation under § 58.1-3203 or § 58.1-3603. Moreover, even in the absence of such exclusive jurisdiction by the United States government, the operation of these local taxing provisions to the project’s Ground Lease interests is specifically precluded by § 2878(d)(1) of the Military Housing Privatization Initiative.

1. Assume, for the purposes of this opinion, that the following documents are the only ones pertinent to the use of Fort Story by the United States government, except as otherwise noted in this opinion: (1) The Army’s Residential Communities Initiatives under the 1996 Defense Authorization Act, setting forth the Military Housing Privatization Initiative, marked Exhibit 1; (2) two draft documents dated May 10, 2004: (a) Limited Liability Company Operating Agreement for Hampton Roads Family Housing LLC, marked Exhibit 2 [hereinafter LLC Operating Agreement]; and (b) Department of the Army Ground Lease, Fort Eustis and Fort Story, Virginia Beach and Newport News, Virginia, marked Exhibit 3; and (3) letter from Colonel Robin N. Swope to Ms. Stephanie L. Hamlett regarding jurisdiction at Fort Story under Residential Communities Initiative (June 16, 2004), marked Exhibit 4, enclosing (a) February 1, 1982, map of Fort Story showing areas subject to concurrent and exclusive jurisdiction; (b) two Corps of Engineers’ maps showing eastern and western portions of Fort Story; (c) Deed of Cession, dated May 11, 1978, from the Commonwealth of Virginia to the United States, and recorded in the Clerk’s Office of the Circuit Court of Virginia Beach, in Deed Book 1826, at 13; and (d) memorandum from Susan A. Bivins regarding jurisdiction at Fort Story under Residential Communities Initiative (June 16, 2004).

2. 1901 Va. Acts ch. 482, at 565; see id. ch. 55, at 49, 49 (“An Act inviting the government of the United States to establish a military post in Virginia, and giving the consent of the State to the purchase of land for the same.”); see also 1918 Va. Acts ch. 382; 1922 Va. Acts ch. 390, at 657.

3. 1940 Va. Acts ch. 422, § 19-c-(6), at 761, 762 (creating certain reversionary provisions to Virginia for conduct of private industry or business on lands acquired by United States for purposes of national defense); cf. id. ch. 110, at 161 (authorizing Virginia Conservation Commission to transfer to United States certain portion of Virginia Sea Shore State Park adjoining Fort Story Military Reservation); id. ch. 417, at 754, 754 (“For all purposes of taxation and of the jurisdiction of the courts of Virginia over persons, transactions, matters and property on said lands, the said lands shall be deemed to be a part of the county or city in which they are situated.”). Virginia’s current laws pertaining to the jurisdiction of lands acquired by the United States are contained in Chapter 3 of Title 7.1, §§ 7.1-12, §§ 7.1-18.1 through 7.1-24, and § 7.1-25.1 (Michie Repl. Vol. 1999).

4. It appears from the terms of the LLC Operating Agreement (see supra note 1) that GMH Family Housing is to be operated as a for-profit entity, at least with respect to the Agreement’s nongovernment members. Accordingly, for purposes of this opinion, I assume that GMH Family Housing will not qualify as tax exempt within the purview of § 58.1-3203 or § 58.1-3603. See Mariner’s Museum v. City of Newport News, 255 Va. 40, 495 S.E.2d 251 (1998) (affirming lower court’s judgment that charitable corporation forfeits its tax-exempt status when its realty is leased for substantial revenue or profit under § 58.1-3603(A)); see also 2002 Op. Va. Att’y Gen. 331 (concluding that rent paid by using entity to Christian Aid Mission is source of revenue or profit and therefore taxable).
Initially, the government member will have only an 80% membership interest. See LLC Operating Agreement, supra note 1, Ex. “C,” “Initial Capital Contributions,” at 43.

Under certain circumstances, the Army may transfer its membership interest to (1) an agency or subdivision of the federal government; (2) an agency or subdivision of any state or local government; or (3) any other direct or indirect holder of membership interest in GMH Family Housing, or an affiliate of the holder. See LLC Operating Agreement, supra note 1, § 9.1(a)-(c), at 28-29. For the purposes of this opinion, I assume that at all times relevant to the questions posed in your request, the government member’s interest will be held by the Army or the Department of Defense.

For purposes of this opinion, “government member” means the United States Army.

See supra note 1. The Ground Lease referenced in this opinion will be entered into between the United States, by the Secretary of the Army, and GMH Family Housing, as lessee, for the lease of the proposed military housing project at Fort Eustis and Fort Story. See id.

The construction of roads, infrastructure, housing units and other buildings related to the proposed project are collectively referred to as “improvements.”


The language in the United States Constitution granting exclusive federal jurisdiction “exclude[s] all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals.” Foley v. Shriver, 81 Va. 568, 571-72 (1886) (citation omitted); see, e.g., Offutt Housing Co. v. County of Sarpy, 351 U.S. 253, 256 (1956) (citing Surplus Trading Co. v. Cook, 281 U.S. 647 (1930)) (noting that power of “exclusive legislation” has been held to prohibit state taxation of private property located on military base acquired pursuant to U.S. Constitution).

See 1901-2 Va. Acts ch. 482, supra note 2, at 566 (citing § 2).

Id. at 565, 566 (emphasis added).


The doctrine of federal immunity from state taxation originally was espoused by the Supreme Court in the case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that State of Maryland, within which branch bank of United States was established, cannot tax branch, without violating Constitution).


See, e.g., Harper v. Va. Dep’t of Tax’n, 509 U.S. 86 (1993) (applying rule announced in Davis v Michigan Dep’t of Treasury, 489 U.S. 803 (1989), that state violates constitutional doctrine of intergovernmental tax immunity when state taxes retirement benefits received from United States by military retirees but does not tax benefits received by retired state and local government employees); see also Bd. of Supvrs. v. Stanley Bender & Assoc., 201 F. Supp. 839, 842 (E.D. Va. 1961) (“Plaintiff overlooks the basic fact that no tax may be levied upon property owned by the United States in the absence of Congressional consent.”); County of Prince William v. Thomason Park, Inc., 197 Va. 861, 864, 91 S.E.2d 441, 444 (1956) (“The parties agree that upon ceding to the United States exclusive jurisdiction over the land here involved, Virginia gave up the power to impose the [real estate] taxes herein assessed…. It is a fundamental principle that a state and its [political] subdivisions are without power, in the absence of express consent of Congress, to tax property owned by the United States. Such consent, being in derogation of the sovereign power of the federal government, is found only where Congress has spoken in the clearest language.”).

It might be argued that the federal government may have waived its sovereign immunity over certain interests of lessees in non-excess military property. See 10 U.S.C.A. § 2667(e) (West 1998) (“The interest of a lessee of property leased under this section may be taxed by State or local governments.”); see also Thomason Park, Inc., 197 Va. at 862 n.1, 91 S.E.2d at 443 n.1 (“The lessee’s interest, made or created pursuant to the provisions of [the Military Leasing] Act, shall be made subject to State or local taxation.”) (quoting § 522e, predecessor to § 2667(e)). The question whether the Ground Lease at the Interior Post or the Exterior Post at Fort Story constitutes non-excess military property is irrelevant. The federal government’s conveyance or lease of property or facilities under the Military Housing Privatization Initiative would not be subject to the waiver contained in § 2667(e). See 10 U.S.C.A. § 2878(d)(1) (West Supp. 2004).
See U.S. Const. art. I, § 8, cl. 17.

See 1940 Va. Acts, supra note 3, at 762 (citing § 19-c-(6)).

Id. (emphasis added). The May 11, 1978, Deed of Cession contains similar language as the 1940 Act.

Id. (quoting § 19-c-(6)).

See Thomason Park, Inc., 197 Va. at 867, 91 S.E.2d at 445-46 ("In the instant case, no right of removal was reserved to the lessee, but to the contrary . . . , the lease contract expressly provides that the improvements shall remain on the land and be the property of the federal government without compensation. Hence, title to the improvements vested upon their erection in the United States in fee simple, and therefore the only property owned by lessee is a leasehold interest in the land and buildings for a fixed period of years."). At the time in question, neither the state nor its subdivisions were authorized to tax a leasehold. Cf. 2000 Op. Va. Att’y Gen. 211, 213 ("The provisions of [§ 58.1-3203] shall not apply to any leasehold interests exempted or partially exempted by other provisions of law."). Cf. Sheridanville, Inc., 125 F. Supp. at 743 (holding that lands within exclusive jurisdiction of United States, as well as private property located on such lands, are not subject to state taxation).

See Harrison v. Day, 202 Va. 967, 972, 121 S.E.2d 615, 618 (1961) ("If it is a governmental function and a public purpose that is to be carried out by the [Virginia State Ports] Authority, it does not become a private function and a public purpose by being let by the Authority to another to do the work."). For an example of privatization resulting in a "private" entity, see Varicon Int’l v. Office of Personnel Mgmt., 934 F. Supp. 440, 446-47 (D.D.C. 1996) (bringing action against Office of Personnel Management for awarding government contract for services to U.S. Investigations Services).


See, e.g., Harrison, 202 Va. at 969, 121 S.E.2d at 616 ("Since the acquisition, development and operation of port and harbor facilities contemplated at Hampton Roads is a proper governmental function, our conclusion is that the statutes involved are not violative of § 185 of the Constitution of Virginia. It being a governmental function, the appropriation is for a public purpose and not a private purpose."). (Emphasis added.) (Citation omitted.).

See, e.g Stanley Bender & Assoc., 201 F. Supp. at 843 (stating that "‘public purpose’ of Wherry Act housing projects . . . is to provide housing accommodations in critical defense housing areas for the military and such civilians as may be related to military activities. The fact that these housing projects are operated and maintained by quasi-private corporations under long-term lease agreements with the United States does not, in any degree, lessen the ‘public purpose.’"); Thomason Park, Inc., 197 Va. at 867, 91 S.E.2d at 443 n.2 (noting section of Wherry Military Housing Act that permitted state and local taxation of private lessee’s interest).

1940 Va. Acts, supra note 3, at 762 (quoting § 19-c-(6)).

While GMH Family Housing may be considered an instrumentality of the federal government for purposes of local property taxation, no opinion is expressed concerning its status for any other purpose, including, but not limited to, purposes of federal and state income taxation.

See 10 U.S.C.A. § 2878(d)(1). In this regard, Congress has “express[ed] itself unequivocally.” Offutt Housing Co., 351 U.S. at 260 (noting that Congress used general language in Military Leasing Act of 1947 and Wherry Military Housing Act of 1949, regarding taxation of leasehold interests); see also supra note 11.

If landowner has recorded perpetual easement held by locality devoted to open-space use, locality has no discretion and must grant open-space tax assessment to parcel so encumbered. If landowner proffers agreement not to change use of land, locality has discretion to accept, reject, or negotiate modification of agreement with landowner. Wetlands mitigation banks not otherwise wholly exempt from local real estate taxation must be assessed in same manner as similarly situated and classified property. Local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses attributable to such property.

THE HONORABLE RONALD S. HALLMAN
CITY ATTORNEY FOR THE CITY OF CHESAPEAKE
DECEMBER 14, 2004

ISSUES PRESENTED

You pose several questions concerning the establishment and taxation of certain wetlands mitigation banks within the City of Chesapeake.¹ You ask whether, assuming all qualifications are met,² a landowner may insist on enrolling in the city’s land use assessment program, a wetlands mitigation bank as “real estate devoted to open-space use.” You next ask whether wetlands mitigation banks may be classified and assessed for local taxation like other commercial properties in the city. Finally, you ask whether the city may request income and expense information from the owners of wetlands mitigation banks.

RESPONSE

It is my opinion that if a landowner has a recorded perpetual easement that qualifies as such under § 58.1-3233(3)(ii), the locality has no discretion in the matter and must grant open-space tax assessment to the parcel so encumbered. If, however, the landowner elects to proceed under § 58.1-3233(3)(iii), the locality has discretion to accept, reject, or negotiate modification of the proffered agreement with the landowner. It is also my opinion that wetlands mitigation banks not otherwise wholly exempt from local real estate taxation, must be assessed in the same manner as similarly situated and classified property. Finally, it is my opinion that the local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses pursuant to § 58.1-3294.

BACKGROUND

You relate that in recent years, private landowners in the City of Chesapeake have purchased wetlands or prior converted agricultural land in order to establish wetlands mitigation banks in the city. These banks sell wetlands mitigation credits³ to landowners who are required by the United States Army Corps of Engineers or the Virginia Department of Environmental Quality to mitigate the impact on jurisdictional wetlands as a condition of a fill permit. The wetlands mitigation banks must be restored, maintained, and preserved in accordance with the requirements of the Army Corps of Engineers. You state many landowners operate private wetlands mitigation banks as a for-profit “business enterprise.”⁴

You relate that since the establishment of these mitigation banks in Chesapeake, the local assessor has questioned the proper classification and lawful assessment of these banks. You advise that the city assessor typically will reduce the assessment
of “delineated” wetlands to a nominal amount per acre. For wetlands without a
delineation, the landowners have the option of enrolling the property in the city’s
land use assessment program as real property devoted to open-space use, provided
that all applicable qualifications are met.

Finally, you represent that these wetlands mitigation banks are similar to other wet-
lands in Chesapeake, in that they may not be intended or be suitable for development
in the near future. They differ from other wetlands, however, as they are a source of
income to their owners.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3666 declares that wetlands

that are subject to a perpetual easement permitting inundation by
water … are … a separate class of property and shall constitute a
classification for local taxation separate from other classifications of
real property. The governing body of any county, city or town may,
by ordinance, exempt or partially exempt such property from local
taxation. [Emphasis added.]

Section 58.1-3666 defines “wetlands” as areas that are “inundated or saturated by
surface or ground water at a frequency or duration sufficient to support, and that under
normal conditions does support, a prevalence of vegetation typically adapted for life
in saturated soil conditions, and that are subject to a perpetual easement permitting
inundation by water.” (Emphasis added.) These types of wetlands have a perpetual
easement and are not the subject of your first inquiry. Your inquiry specifically
concerns certain similarly situated real property that is not subject to a perpetual
easement and, thus, is ineligible for the classification expressed in § 58.1-3666.

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244, sets forth the
statutory framework authorizing localities to provide special tax assessments for land
preservation activities and uses. Specifically, this statutory scheme provides that real
estate classified for agricultural, horticultural, forest, and open-space use is eligible
for special tax treatment as established in § 58.1-3233. Owners of the parcels of real
estate described in your request may elect to participate in such a program. Some of
the parcels may be eligible to serve as wetlands mitigation banks, from which the
Commonwealth Transportation Commissioner may purchase compensatory credits to
mitigate “adverse impacts to wetlands” caused by certain development projects. These
purchases result in revenue or income to the owners of wetlands mitigation banks.

Section 58.1-3231 permits a locality to adopt an ordinance providing for special
classifications of real estate devoted to open-space use. Section 58.1-3230 defines
“real estate devoted to open-space use” as

real estate used as, or preserved for, (i) park or recreational purposes,
(ii) conservation of land or other natural resources, (iii) floodways,
[or] (iv) wetlands as defined in § 58.1-3666, … and consistent with
the local land-use plan under uniform standards prescribed by the Director of the Department of Conservation and Recreation pursuant to the authority set out in § 58.1-3240, and in accordance with the Administrative Process Act. [Emphasis added.]

Section 58.1-3233 requires that prior to assessing any real estate under an ordinance adopted pursuant to Article 4, the local assessing office must make certain determinations regarding the use of the subject real estate. This determination is to insure compliance with the requirements of the ordinance and state law in order to receive the tax benefit. It is my understanding that the City of Chesapeake has adopted a program allowing for use-value assessment and taxation of real estate devoted to open-space use. You state that the described wetlands mitigation banks meet the requirements for classification as real estate devoted to open-space use, except with regard to compliance with § 58.1-3233(3)(ii) or (iii). This is the essence of your question.

Pursuant to § 58.1-3233(3)(ii), one of the criteria for a local assessing officer to determine is that real estate devoted to open-space use is “subject to a recorded perpetual easement that is held by a public body, and promotes the open-space use classification, as defined in § 58.1-3230.” If a wetlands mitigation bank is subject to a recorded perpetual easement under § 58.1-3233(3)(ii), then it would qualify for the tax treatment afforded to property generally classified for open-space use. In such instances, the plain and unambiguous language of the statute dictates that a perpetual easement is sufficient to qualify the property.

In the case of something less than a perpetual easement, § 58.1-3233(3)(iii) provides that landowners shall enter into a recorded commitment

with the local governing body, or its authorized designee, not to change the use to a nonqualifying use for a time period stated in the commitment of not less than four years nor more than ten years. Such commitment shall be subject to uniform standards prescribed by the Director of the Department of Conservation and Recreation pursuant to the authority set out in § 58.1-3240.

The agreement entered into pursuant to § 58.1-3233(3)(iii) requires the “mutual assent” of the parties, as with any other contractual agreement. This interpretation is based on the applicable standards promulgated by the Department of Conservation and Recreation and the model Open-Space Use Agreement furnished as part of the standards. Such an agreement is in the nature of a contract, and the local governing body has discretion to accept or reject it. In addition, the local governing body may propose to modify the tendered agreement and negotiate with the landowner.

Accordingly, I am of the opinion that if the locality is presented with a perpetual wetlands easement qualifying as such under § 58.1-3233(3)(ii), it must be accepted, whereas if the locality is presented with an agreement proffered pursuant to § 58.1-3233(3)(iii), the locality may, in its discretion, accept, reject, or negotiate a modification of the tendered agreement.
Turning to your other questions, as a threshold matter, if the wetlands mitigation bank has met the requirements of § 58.1-3233(3), and the locality has provided for a complete exemption from local taxation, your questions concerning valuation and the ability of the local tax assessor to secure financial information would seem moot. The question remains, however, for nonqualifying wetlands mitigation banks that are not accepted in a locality’s open-space land use program or are partially exempt from local taxation.

The answer to these questions is controlled by Article X of the Constitution of Virginia. Article X, § 1 stipulates that “[a]ll property, except as hereinafter provided, shall be taxed.” Thus, taxation is the rule, and exemption from taxation is the exception. Section 1 also provides that “[a]ll taxes … shall be uniform upon the same class of subjects.” Article X, § 2 provides that “[a]ll assessments of real estate … shall be at their fair market value, to be ascertained as prescribed by law.” (Emphasis added.) Section 58.1-3201 prescribes that “[a]ll real estate, except that exempted by law, shall be subject to such annual taxation as may be prescribed by law.” The described wetlands mitigation banks are not exempted by law.

Clearly, wetlands mitigation banks, which are not wholly exempt from local taxation or otherwise eligible to be included in the special land use classification program, and which are a source of revenue to their owners, are not accorded special protection. Accordingly, a locality must consider and assess them for real property taxation in the same manner as similarly situated and classified property.

You also ask if the local tax assessor may request income and expense information from the owners of wetlands mitigation banks. Section 58.1-3294 provides that a “duly authorized real estate assessor” may require owners of certain “income-producing real estate” to furnish certified statements of income and expenses attributable to such property. I find no specific definition of “income-producing real estate” in either that statute or in Virginia case law. Generally, the term “income” means “money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts, and the like.” Similarly, “producing” means to “bring into existence; to create.”

The described wetlands mitigation banks meet the definition of “income-producing.” Although § 58.1-3294 does not speak directly to wetlands mitigation banks, the statute applies to them. Moreover, there is no exclusion in § 58.1-3294 for wetlands mitigation banks or any other special classification of land use. In fact, local appraisers need financial and income information to adequately evaluate any proposed assessments. Therefore, it is also my opinion that the local assessing officer may request such information from owners of such property. Indeed, it may be in the best interests of the landowners to provide such information, as actual revenue may be lower than an assessment based on a projection of potential “economic rent.” Section 58.1-3294 provides that failure to provide the requested financial information prevents the owners of the subject property from introducing such information at a subsequent judicial proceeding for correction of an alleged excessive assessment.
CONCLUSION

Accordingly, it is my opinion that if a landowner has a recorded perpetual easement that qualifies as such under § 58.1-3233(3)(ii), the locality has no discretion in the matter and must grant open-space tax assessment to the parcel so encumbered. If, however, the landowner elects to proceed under § 58.1-3233(3)(iii), the locality has discretion to accept, reject, or negotiate modification of the proffered agreement with the landowner. It is also my opinion that wetlands mitigation banks not otherwise wholly exempt from local real estate taxation, must be assessed in the same manner as similarly situated and classified property. Finally, it is my opinion that the local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses pursuant to § 58.1-3294.

1 Although you represent that the city’s land use ordinance mirrors § 58.1-3231, I assume for purposes of this opinion that you request an interpretation of state law only, and not a review of the operation of the city’s applicable ordinance. The Attorney General renders opinions only on questions requiring an interpretation of state or federal law, rule or regulation, and not on local ordinances. See 1976-1977 Op. Va. Att’y Gen. 17, 17.

2 For the purposes of this opinion, I assume that this is a reference to all applicable statutory and regulatory qualifications except those specified in § 58.1-3233(3)(ii) and (iii).


4 As such, it is my understanding that these owners do not qualify as “organization[s] exempt from taxation.” Section 58.1-3603(A) (LexisNexis Repl. Vol. 2004).

5 You consider wetlands to be delineated if they are shown as such on applicable plats approved by the U.S. Army Corps of Engineers. For the purposes of this opinion, I assume that such wetlands are not the subject of your inquiry, as they are “subject to a perpetual easement,” and are to be declared separate from other classes of real property for purposes of local taxation. Section 58.1-3666 (LexisNexis Repl. Vol. 2004).


9 See id. 5-20-30 (Law. Co-op. 1996).

10 See Va. Code Ann. § 10.1-104(B) (LexisNexis Supp. 2004) (authoring Department of Conservation and Recreations to promulgate regulations necessary to carry out activities administered by Department); see also § 58.1-3230 (LexisNexis Repl. Vol. 2004) (requiring that classification of real estate devoted to open-space use shall be consistent with local land-use plan under uniform standards prescribed by Director of Department); § 58.1-3240 (LexisNexis Repl. Vol. 2004) (requiring local assessor to apply Department’s standards uniformly throughout Commonwealth in determining whether real estate may be devoted to open-space use).

11 See Augustine, 40 Va. Cir. at 310 (“A review of the agreement tendered by Augustine, which is in substantial conformity with the form promulgated by the Secretary [of the Department of Conservation and Recreation], is replete with language traditionally associated with contracts.”).

12 Id.

13 See, e.g., Washington County v. Sullivan Coll. Corp., 211 Va. 591, 596, 179 S.E.2d 630, 633 (1971) (holding that since property in question was otherwise exempt from real estate taxation, fact that property may have generated profit is irrelevant. This decision was rendered under former liberal interpretation of constitutional exemptions from taxation).
ITEM 4


BLACK’S LAW DICTIONARY 766 (7th ed. 1999).

Id. at 1225 (defining verb “produce”).

Section 58.1-3294 sets forth a requirement for response. The fact that a local tax assessor actually may have the requested information does not excuse the taxpayer from providing it. See Sterling Park Shopping Ctr., L.P. v. Loudoun County Bd. of Suprs., 50 Va. Cir. 196, 198 (1999) (noting that question is not whether county had information, but whether petitioner complied with § 58.1-3294, and petitioner did not).


You ask for clarification of the term “date of the assessment,” for purposes of § 58.1-3980, in a situation where a taxpayer is assessed and billed in November 1999 for 1998 taxes, which are reduced in November 2002 and subsequently paid in March 2003. You further ask what remedy is available to the commissioner of the revenue to refund amounts erroneously collected from a taxpayer.

RESPONSE

I am of the opinion that, for purposes of § 58.1-3980, the “date of the assessment” under the circumstances you describe is November 1999. Section 58.1-3984(A) authorizes the taxpayer to seek judicial correction of the 1998 tax assessment until March 2004, i.e., one year after the March 20, 2003, final determination letter. It is further my opinion that a commissioner of the revenue has a duty to initiate judicial correction pursuant to § 58.1-3984(B) when the commissioner has determined that a tax assessment is improper or is an obvious error and should be corrected in order to serve the ends of justice.

BACKGROUND

You describe a situation in which a taxpayer is assessed and billed for tangible personal property taxes in November 1999 for docking his boat in the City of Hampton during
tax year 1998. You note that the taxpayer appealed the assessment, and in November 2002, the 1998 taxes were partially reduced. In March 2003, the taxpayer paid the 1998 taxes after receiving a determination by the local commissioner of the revenue on March 20, 2003, as to taxes, penalty and interest due on the boat for tax year 1998. In June 2003, the taxpayer requested full exoneration and refund of the 1998 taxes based on information that the 1998 taxes were erroneously assessed.

APPLICABLE LAW AND DISCUSSION

A. ‘DATE OF THE ASSESSMENT’

The remedies available to a taxpayer aggrieved by a local assessment are limited by §§ 58.1-3980 and 58.1-3984. Sections 58.1-3980 and 58.1-3984 have as their object the setting of a time limitation for correction of local tax assessments. Erroneous local tax assessments may be appealed administratively to the commissioner of the revenue, pursuant to § 58.1-3980, or to the circuit court for the county or city in which the assessment is made, pursuant to § 58.1-3984. Section 58.1-3980(A) authorizes a taxpayer aggrieved by an assessment of taxes on tangible personal property to apply to the commissioner of the revenue for relief “within three years from the last day of the tax year for which such assessment is made, or within one year from the date of the assessment”; § 58.1-3984(A) provides the same remedies with respect to application for correction to the appropriate circuit court and further authorizes an applicant to apply “within one year from the date of the final determination under § 58.1-3981.”

In the situation you describe, “the last day of the tax year for which such assessment is made” is clear. The taxpayer was assessed tangible personal property taxes in 1998 for docking his boat in the City of Hampton during that year. Therefore, the last day of tax year 1998 is the date for which the assessment was made. Pursuant to § 58.1-3980(A), the taxpayer could have applied to you, in your capacity as the city’s commissioner of the revenue, for correction of the assessment at any time within three years of the last day of tax year 1998. There appears to be no contention as to that date for purposes of your inquiry.

The “date of the assessment,” about which you inquire, is less clear, but its determination may be decisive as to whether a taxpayer may file an application for correction with a local taxing official. Section 58.1-3980(A) provides that a taxpayer aggrieved by any such assessment, may, within three years from the last day of the tax year for which such assessment is made, or within one year from the date of the assessment, whichever is later, apply to the commissioner of the revenue or such other official who made the assessment for a correction thereof. [Emphasis added.]

Therefore, a taxpayer’s right to initiate a local administrative appeal is available until the end of the time period which is the later to occur. It should be noted that § 58.1-3980 does not provide a time limit within which a refund of erroneous taxes may be paid pursuant to a timely filed application for correction, but only when such application may be filed.
Generally, for tax purposes, “date of the assessment” means the “tax day” and is a specific date. The Supreme Court of Virginia, however, recognizes that the term “assessment” has two distinct meanings in Virginia tax law. The Court noted that the first sentence of the predecessor statute to § 58.1-3984(A) authorized “[a]ny person assessed ... [to] apply for relief to the circuit court ... wherein such assessment was made,” and that the second sentence placed on the taxpayer the burden of proving “that the assessment is ... invalid or illegal.” Thus, the Court held that,

in the first sentence, “assessment” means the amount of the tax imposed and, in the second sentence, the evaluation of the property, and that the General Assembly intended that “the remedy provided by [the predecessor statute] shall be available to a landowner to attack an assessment in whichever of its two meanings the word is employed.”

In an earlier case, the Court was required to decide whether the predecessor statutory time limitation began to run on the date the landowner’s property was assessed (evaluated) for taxation or the date on which the tax was assessed (levied). We decided that the period of limitation began to run when the assessment process was completed, that is, when the tax was levied.

Therefore, to determine the commencement of the time limitation for appeal under §§ 58.1-3980, 58.1-3981, and 58.1-3984, it is essential to know “when the assessment process was completed, that is, when the tax was levied.” The test for determining the completion of that process may be found by analyzing the definitions of the term “assessment” in other local tax statutes. For instance, Chapter 37 of Title 58.1, which governs local license taxes, defines “assessment” as

a determination as to the proper rate of tax, the measure to which the tax is applied, and ultimately the amount of tax, including additional or omitted tax, that is due. An assessment shall include a written assessment made pursuant to notice by the assessing official or a self-assessment made by a taxpayer upon the filing of a return or otherwise not pursuant to notice. Assessments shall be deemed made by an assessing official when a written notice of assessment is delivered to the taxpayer by the assessing official or an employee of the assessing official, or mailed to the taxpayer at his last known address.

Based on your inquiry, it appears that a notice qualifying as an “assessment” was mailed on or about November 2, 1999. No dispute has been mentioned as to whether this written notice was sent to the taxpayer’s last known address. Therefore, for purposes of this opinion, I assume that there was compliance with this requirement. Accordingly, in the circumstances presented, it appears that the “date of the assessment” is November 1999.
B. OTHER APPLICABLE STATUTES

You relate that the taxpayer filed an application for correction of the 1998 assessment. Specifically, you concluded in a letter dated November 4, 2002, that the boat was subject to tax by the city for the time period it was docked in the City of Hampton, and you prorated the original tax to reflect the time period the boat was docked in the city rather than located elsewhere. I assume for purposes of this opinion that the letter is intended to constitute a final determination by your office of the taxpayer’s ongoing application to correct the 1998 taxes under § 58.1-3980. It also recites reasons for the denial. Moreover, from the wording itself, it appears that you remained receptive to receiving additional documentation until March 31, 2003, after which time you would advise the local treasurer’s office that your review was complete and collection efforts may be initiated or resumed. It is apparent that collection efforts had been stayed prior to this time, which indicates the ongoing pendency of an administrative appeal under § 58.1-3980. Your decision to institute or resume collection efforts is further evidence that your March 20, 2003, letter was intended to be your final determination.

Unless you now have reason to conclude that the 1998 assessment is erroneous, your office no longer may correct the 1998 assessment, as a final determination under § 58.1-3981 has been made that the taxes are due and owing, and you have authorized the local treasurer to collect the taxes due the city. The 1998 taxes have been paid. Accordingly, if you are of the opinion that the assessment is not erroneous, the statutory procedure prescribed now requires that redress, if any, is through the courts. The question may not be returned to the local assessing official once a final determination has been made.

Moreover, if your March 2003 letter was not intended to constitute a final determination, as commissioner of the revenue, you no longer are able to correct the assessment under § 58.1-3981, even if you believe the assessment to have been erroneous. While you may have had a duty to correct an assessment you believe to have been erroneous, prior opinions of the Attorney General conclude that § 58.1-3980(A) places a time limitation on the ability of a commissioner of the revenue, or other official performing the duties of a commissioner, to correct erroneous assessments. The time limitation in § 58.1-3980(A), within which an aggrieved taxpayer may file an application for correction, runs from the last day of the tax year or the date of assessment, whichever is later.

Notwithstanding these limitations, there are two remedies available in the situation you describe. First, the taxpayer may be able to apply for relief to the Circuit Court of the City of Hampton. Section 58.1-3984(A) specifies the time during which such application may be made to the court:

Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specifically provided by law, ... (a) within three years from the last day of the tax year for which any such assessment is made, (b) within one year from the date of the assessment, ... or (d) within one year from the date of the final
determination under § 58.1-3981, whichever is later, apply for relief to the circuit court of the county or city wherein such assessment was made. [Emphasis added.]

Accordingly, the taxpayer has until March 2004 to file his action in that court.23

Section 58.1-3984(B) provides that when a commissioner of the revenue is unable to correct an erroneous tax assessment pursuant to § 58.1-3981, the commissioner “shall apply to the appropriate court … for relief of the taxpayer.”24 Thus, § 58.1-3984(B) requires you, as commissioner of the revenue, to apply to the Circuit Court of the City of Hampton on behalf of the taxpayer for exoneration or relief, if it comes to your attention or you believe that the 1998 tax assessment “is improper or is based on obvious error and should be corrected in order that the ends of justice may be served.”25 Such is a question of fact for resolution by the commissioner of the revenue.26

CONCLUSION

Accordingly, I am of the opinion that, for purposes of § 58.1-3980, the “date of the assessment” under the circumstances you describe is November 1999. Section 58.1-3984(A) authorizes the taxpayer to seek judicial correction of the 1998 tax assessment until March 2004, i.e., one year after the March 20, 2003, final determination letter. It is further my opinion that a commissioner of the revenue has a duty to initiate judicial correction pursuant to § 58.1-3984(B) when the commissioner has determined that the tax assessment is improper or is an obvious error and should be corrected in order to serve the ends of justice.

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1Section 58.1-3981 pertains to correction of an erroneous local tax assessment by the commissioner of the revenue or other tax official performing the commissioner’s duties.


4“Tax day” or “date of assessment,” except as otherwise specifically provided, is January 1 of each year.” Section 58.1-1 (Michie Repl. Vol. 2000).


6R.R. Co., 223 Va. at 297, 288 S.E.2d at 459-60. The language quoted from the second sentence of former § 58-1145 is recodified in the third sentence of § 58.1-3984(A).

7Id. at 297, 288 S.E.2d at 460 (quoting Hoffman, 206 Va. at 802, 145 S.E.2d at 251).

8Id. at 298, 288 S.E.2d at 460 (emphasis added) (interpreting Hoffman, 206 Va. at 799, 146 S.E.2d at 249).


10R.R. Co., 223 Va. at 298, 288 S.E.2d at 460.


There is no mention of any dispute as to the taxpayer’s timely filing of his application for correction of the 1998 tax assessment. For purposes of this opinion, I assume that the taxpayer’s application was timely filed.

Pursuant to § 58.1-3701, the Department of Taxation has issued Guidelines for the Business, Professional, and Occupational License Tax [hereinafter 2000 BPOL GUIDELINES], which define the term “Final Local Determination” as “a writing setting out the local assessing officer’s final determination on a taxpayer’s Application for Review, including facts and legal authority in support of the local assessing officer’s position on each issue raised by the taxpayer.” 2000 BPOL GUIDELINES § 7.4 (Jan. 1, 2000), available at http://www.tax.state.va.us/Web_PDFS/2000bpol-sectl.pdf.

The taxpayer could have requested that the commissioner state in writing the facts and law supporting the action taken on the application for correction under § 58.1-3980. See § 58.1-3981(F) (Michie Repl. Vol. 2000).

Because you were receptive to receiving additional information until March 31, 2003, it reasonably may be argued that March 31, 2003, was the date of your final determination.


The city itself could not voluntarily decide to refund the paid 1998 taxes. Section 58.1-3990 does not permit the locality to refund erroneous taxes paid “when application therefor was made more than three years after the last day of the tax year for which such taxes were assessed.” See 1990 Op. Va. Att’y Gen. 251, 252.

See Smith v. Bd. of Supvrs., 234 Va. 250, 255, 361 S.E.2d 351, 353 (1987) (“The procedure for correction of erroneous assessments is entirely statutory. It contains no provision for remand to the executive branch of government. When the statutory procedure is invoked, the determination of the correctness of a challenged assessment, as well as any grant of appropriate relief, become matters exclusively of judicial concern.”).


See, e.g., 1985-1986 Op. Va. Att’y Gen., supra note 9, at 257 n.1 (noting that legislative impact of statute reenacted as § 58.1-3981 was to provide “the same constraints for the correction of erroneous assessments resulting from clerical or calculation errors as is provided for other erroneous assessments,”) thereby removing “the indefinite time allowed for the correction of [such] assessments” (citation omitted); see also 1984-1985 Op. Va. Att’y Gen., supra note 20.

Section 58.1-3983 provides that the remedy granted by §§ 58.1-3980 through 58.1-3982 “shall be in addition to the right of any taxpayer to apply within the time prescribed by law to the proper court... for the correction of erroneous assessments.”

Although there appears to have been some difficulty in obtaining necessary information and documentation, I assume that the taxpayer is not precluded from a judicial remedy “caused by the wilful failure or refusal of the applicant to furnish the tax-assessing authority with the necessary information, as required by law.” Section 58.1-3987 (Michie Repl. Vol. 2000).


Section 58.1-3984(B) provides that an application by a commissioner of the revenue be brought “in the manner herein provided for relief of the taxpayer,” i.e., within the time frame provided under subsection A. See 1998 Op. Va. Att’y Gen., supra note 24, at 130.

OP. NO. 04-019
TAXATION: TAX EXEMPT PROPERTY.
CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).
COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING — GOVERNING BODIES OF LOCALITIES — ORDINANCES AND OTHER ACTIONS BY THE LOCAL GOVERNING BODY.
Amendment by county board of supervisors of zoning designation of property rezoned by prior board to more intensive use; repeal of ordinance adopted by prior board authorizing tax exemption by designation. Vested rights of property owner in prior zoning.

MR. JOHN R. ROBERTS
COUNTY ATTORNEY FOR LOUDOUN COUNTY
MAY 10, 2004

ISSUES PRESENTED
You inquire regarding actions by the Loudoun County Board of Supervisors. First, you ask whether the newly elected county board ("current board") may, on its own initiative, amend the zoning designation of property rezoned to a more intensive use by the prior board; if so, you inquire whether the property owner would have a vested right in the uses designated under the prior zoning. Next, you ask whether the current board may repeal an ordinance adopted by the prior board pursuant to § 58.1-3651 exempting property from taxation by designation.

RESPONSE
It is my opinion that the current board of supervisors may, on its own initiative, amend the zoning designation of property rezoned by the prior board, provided the subsequent rezoning does not constitute piecemeal downzoning without adequate justification. If the current board rezones the property, the property owner would have a vested right in the uses permitted under the prior zoning designation if the owner satisfies the elements of the test set forth in the first paragraph of § 15.2-2307. It is further my opinion that the current board of supervisors may repeal, through proper procedures, the ordinance adopted by the prior board pursuant to § 58.1-3651 exempting property from taxation by designation.

BACKGROUND
You relate that the current members of the Loudoun County Board of Supervisors began serving their terms of office on January 1, 2004. The current board of supervisors is planning to rescind certain actions taken by the prior board. The prior board, at its last regular meeting, granted a landowner's request to rezone property to a more intensive use. As part of the rezoning, the prior board accepted certain proffered conditions offered by the landowner. The current board desires to rezone the property to its prior classification.

At the same meeting, the prior board also adopted an ordinance exempting from taxation property owned by a nonprofit organization and designated for the uses prescribed by § 58.1-3651(A). The current board seeks to repeal this ordinance.


APPLICABLE LAW AND DISCUSSION

1. REZONING

A. MAY THE CURRENT BOARD OF SUPERVISORS REZONE THE PROPERTY?

A board of supervisors may, upon its own initiative, rezone property by amendment of the county’s district maps. Section 15.2-2286(A)(7) authorizes the governing body to amend district boundaries by ordinance whenever required by “the public necessity, convenience, general welfare, or good zoning practice.”

Typically, zoning decisions by a governing body are considered legislative actions, and are, therefore, presumed to be reasonable. When challenging a zoning decision, the challenger must produce sufficient evidence of unreasonableness to overcome this presumption of reasonableness. A zoning decision will be found reasonable if the matter is fairly debatable. “An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.”

A local governing body, however, may be held to a higher standard if a rezoning is found to constitute piecemeal downzoning. Among the factors that may be considered when determining whether a rezoning is piecemeal are whether the new zoning ordinance (i) is initiated by the zoning authority on its own motion, (ii) affects a single or two adjacent parcels, and (iii) reduces the allowable residential density below that prescribed by the locality’s master plan.

If the zoning amendment is found to be a piecemeal downzoning, the test for assessing the validity of the ordinance favors the landowner more so than the test typically applied to zoning challenges. The Supreme Court of Virginia has articulated the following test for assessing the validity of a piecemeal downzoning:

[W]hen an aggrieved landowner makes a prima facie showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward with evidence of such mistake, fraud, or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is unreasonable and void.

This rule promotes the policy and purposes of the zoning statutes. While the landowner is always faced with the possibility of comprehensive rezoning, [this] rule ... assures him that, barring mistake or fraud in the prior zoning ordinance, his legitimate profit prospects will not be reduced by a piecemeal zoning ordinance reducing permissible
Based on the limited facts you present, the situation you describe, i.e., adoption of a new zoning ordinance by the current board of supervisors, may contribute to a finding of piecemeal zoning. You have not, however, provided sufficient information for me to analyze this issue fully. Furthermore, I would need additional information to determine whether there has been sufficient mistake, fraud, or changed circumstances since the prior ordinance to validate the downzoning, if it is, in fact, piecemeal.

B. DOES THE PROPERTY OWNER HAVE ANY VESTED RIGHTS IN THE PRIOR ZONING?

Generally, a landowner has no property right in an anticipated use of land, because an owner has no vested property rights in the continuation of a parcel’s zoning status. In certain circumstances, however, a landowner may acquire vested rights in a particular use of land that may not subsequently be abrogated by a change in the land’s zoning. Section 15.2-2307 sets forth criteria which, when met, “conclusively vest property rights in a landowner regardless of changes in an otherwise applicable zoning ordinance.” Specifically, the first paragraph of § 15.2-2307 provides:

\[A\] landowner’s rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Thus, the first step in establishing a vested right is to show that the landowner has obtained or is the beneficiary of a significant affirmative governmental act. Section 15.2-2307 further provides:

\[T\]he following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner’s property and the applicant diligently pursues approval of the final plat or
plan within a reasonable period of time under the circumstances; or (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner’s property. [Emphasis added.]

In the situation you present, it appears that the landowner could show that the governing body has taken significant governmental action in two of the ways set forth in § 15.2-2307. Based on the facts you relay, the prior board of supervisors accepted proffers related to the initial zoning amendment. The prior board, furthermore, approved the owner’s application for rezoning for the more intensive use. It appears, therefore, that in the situation you present, the landowner likely would be able to show that it was the beneficiary of significant affirmative governmental acts. You have not provided information sufficient for me to determine whether the owner has relied on the locality’s acts, or whether it has incurred extensive obligations or substantial expenses in pursuit of the project.

2. TAX EXEMPTION

The 2001 and 2002 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 and subject to such restrictions and conditions as may be prescribed 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 does not affect the validity of designation exemptions granted by the General Assembly prior to January 1, 2003.21

You ask whether an ordinance adopted pursuant to § 58.1-3651 subsequently may be repealed. Section 58.1-3651(A) provides that property is exempt from taxation by designation “by ordinance adopted by the local governing body.”22 Section 15.2-1427(D) provides that a local “ordinance may be amended or repealed in the same manner, or by the same procedure, in which, or by which, ordinances are adopted.” “Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.”23 The General Assembly has placed no restriction on the repeal of ordinances adopted pursuant to § 58.1-3651. Therefore, it is clear that ordinances adopted pursuant to § 58.1-3651 are subject to amendment or repeal in the same manner as the ordinance was adopted.

CONCLUSION

Accordingly, it is my opinion that the current board of supervisors may, on its own initiative, amend the zoning designation of property rezoned by the prior board, provided the subsequent rezoning does not constitute piecemeal downzoning without adequate justification. If the current board rezones the property, the property owner would have a vested right in the uses permitted under the prior zoning designation if the owner satisfies the elements of the test set forth in the first paragraph of § 15.2-2307. It is further my opinion that the current board of supervisors may repeal, through proper procedures, the ordinance adopted by the prior board pursuant to § 58.1-3651 exempting property from taxation by designation.


3Wendy's, 252 Va. at 14-15, 471 S.E.2d at 470; Int'l Funeral Servs., 221 Va. at 843, 275 S.E.2d at 588; Bd. of Sup'rs v. Lerner, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980).

4Wendy's, 252 Va. at 15, 471 S.E.2d at 470; Int'l Funeral Servs., 221 Va. at 843, 275 S.E.2d at 588; Lerner, 221 Va. at 34, 267 S.E.2d at 102.

5Lerner, 221 Va. at 34, 267 S.E.2d at 102; see also Wendy's, 252 Va. at 15, 471 S.E.2d at 470-71; Bd. of Sup'rs v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975).


8Id.

1Id.

1See Herbert, 266 Va. at 143, 580 S.E.2d at 798; see also Moore v. Zoning Appeals Bd., 49 Va. Cir. 428, 429 (1999).

1See Herbert, 266 Va. at 146, 580 S.E.2d at 800 (Rezoning “specifically directed to an identifiable property and project,” as opposed to general rezoning, constitutes “a significant affirmative governmental act creating a deemed vesting of land use rights.”).

1Article XII, § 1 authorizes the General Assembly to submit any proposed constitutional amendment(s) to “the voters qualified to vote in elections by the people … not sooner than ninety days after final passage by the General Assembly.”

12001 Va. Acts ch. 786, at 1074, 1075; 2002 Va. Acts ch. 825, at 1999, 2000 (proposing amendment to Article X, § 6, relating to tax-exempt property); id. ch. 630, at 895, 896 (providing for submission to voters of proposed amendment to § 6).


1A “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 Repl. Vol. 2003).

1See 2002 Va. Acts ch. 630, § 1, supra note 14, 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).

12002 Va. Acts, supra note 14, at 2000, 896; 2001 Va. Acts, supra note 14, at 1075 (replacing language in Article X, § 6(a)(6), 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 and subject to such restrictions and conditions as … provided by general law”).


12003 Va. Acts ch. 1032, at 1696, 1696-97 (declaring in § 3 that “emergency exists and this act is in force on and after January 1, 2003”).

1See 2004 Va. Acts ch. 557, available at http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+CHAP0557 (amending § 58.1-3651 by deleting subsection D and adding subsection E, providing that “[n]othing in this section or in any ordinance adopted pursuant to this section shall affect the validity of … a designation exemption granted by the General Assembly; prior to January 1, 2003”). The 2004 amendments to § 58.1-3651 are retroactive to January 1, 2003. See id. § 2 (declaring that act “is in force beginning January 1, 2003,” and that ordinances adopted pursuant to act are effective on same date).

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.” City of Chesapeake v. Gardner Enters., Inc., 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997). 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. The General Assembly is vested with the power to repeal any law that it previously has passed. See Op. Va. Att’y Gen.: 2003 at 32, 32, 35, available at http://www.vaag.com/mediacenters/Opinions/2003opns/03-049.htm (concluding that only General Assembly has authority to repeal classification or designation tax exemptions granted before January 1, 2003); 1980-1981 at 70, 71 (noting that General Assembly has plenary power to enact, amend, and repeal legislation). After January 1, 2003, the General Assembly no longer enacts certain property tax exemptions.

TRADE AND COMMERCE: VIRGINIA TELEPHONE PRIVACY PROTECTION ACT.

Telephone calls made by foundation to general public for sole purpose of requesting donations of used clothing, or other items such as household goods, for subsequent sale by foundation to public to raise funds for foundation are not 'telephone solicitation call[s]' as defined by Act.

THE HONORABLE H. MORGAN GRIFFITH
MAJORITY LEADER, HOUSE OF DELEGATES
DECEMBER 29, 2004

ISSUE PRESENTED

You ask whether telephone calls made by a foundation to the general public solely for the purpose of requesting donations of used clothing, or other items such as household goods, for subsequent sale to the public, to raise funds for the foundation, are “telephone solicitation call[s]” as defined in § 59.1-510 of the Virginia Telephone Privacy Protection Act.

RESPONSE

It is my opinion that telephone calls made by a foundation to the general public, solely for the purpose of requesting donations of used clothing, or other items such as household goods, for subsequent sale by the foundation to the public in order to raise funds for the foundation, are not “telephone solicitation call[s]” as defined in § 59.1-510 of the Virginia Telephone Privacy Protection Act.

BACKGROUND

You describe a foundation that makes telephone calls to members of the public solely for the purpose of requesting donations of used clothing, or other items such as household goods, so that the foundation subsequently may sell the donated items to the public to raise funds for the foundation. You state that the foundation does not use the telephone calls to offer or advertise to the persons called the donated items or any other property, goods or services for sale. The telephone calls are made only to request the donations.

APPLICABLE LAW AND DISCUSSION

Sections 59.1-510 through 59.1-518 comprise the Virginia Telephone Privacy Protection Act. Section 59.1-510 defines “telephone solicitation call” as “any telephone call made to any natural person’s residence in the Commonwealth, or to any wireless telephone with a Virginia area code, for the purpose of offering or advertising any property, goods or services for sale, lease, license or investment, including offering or advertising an extension of credit.” Thus, for a call to be considered a “telephone solicitation call” under § 59.1-510, the call must be “for the purpose of offering or advertising ... property, goods or services for sale, lease, license or investment.” A call that is made for the sole purpose of requesting a donation of used clothing, or other items such as household goods, is not a call made for the purpose of offering or advertising property, goods or services for sale, lease, license or investment.
You relate that, while the foundation you describe requests the donated items so that they subsequently may be sold to the public to raise funds for the foundation, the foundation does not use the telephone calls to offer or advertise the donated items or any other property, goods or services for sale to the persons called. The telephone calls are made only to request donations. Therefore, the telephone calls do not involve “offering or advertising any property, goods or services for sale, lease, license or investment.” Consequently, it is my opinion that the telephone calls are not “telephone solicitation call[s]” as defined in § 59.1-510 of the Virginia Telephone Privacy Protection Act.

CONCLUSION

Accordingly, it is my opinion that telephone calls made by a foundation to the general public, solely for the purpose of requesting donations of used clothing, or other items such as household goods, for subsequent sale by the foundation to the public in order to raise funds for the foundation, are not “telephone solicitation call[s]” as defined in § 59.1-510 of the Virginia Telephone Privacy Protection Act.


OP. NO. 04-008

WELFARE (SOCIAL SERVICES): ADOPTION.

No authority for circuit court to waive order of reference with respect to children from foreign country involved in agency placement adoption proceeding.

THE HONORABLE ROSSIE D. ALSTON, JR.
JUDGE, THIRTY-FIRST JUDICIAL CIRCUIT OF VIRGINIA
MAY 19, 2004

ISSUE PRESENTED

You ask whether a circuit court may waive the order of reference mentioned in § 63.2-1208(A) in an international adoption.

RESPONSE

It is my opinion that a circuit court may not waive the order of reference mentioned in § 63.2-1208 with respect to children from a foreign country involved in an agency placement adoption proceeding.

BACKGROUND

You advise that a married couple has filed a pro se petition for the adoption of two Ukranian children. You indicate that all the documents from the Ukraine are in order and that the children legally entered the United States on June 28, 2002. You further indicate that this adoption is an agency placement adoption. The petition for adoption requests a waiver of the order of reference required by § 63.2-1208. You question whether the circuit court has the authority to waive the order of reference.
Legal adoption in the United States is a creature of statute. Chapter 12 of Title 63.2 comprises Virginia’s adoption laws governing agency placement adoptions, parental placement adoptions, stepparent adoptions, and adult adoptions. Section 63.2-1201 provides that “[p]roceedings for the adoption of a minor child … shall be instituted only by petition” filed in the appropriate circuit court. Section 63.2-1228 provides that the circuit court, in agency placement adoptions, “shall forward a copy of the petition and all exhibits thereto to the Commissioner [of the State Department of Social Services] and to the agency that placed the child.” (Emphasis added.) Such referral is accomplished through an order of reference. There is a similar provision for parental placement adoptions. Section 63.2-1208(A) provides that, “[u]pon receiving a petition and order of reference from the circuit court, the applicable agency shall make a thorough investigation of the matter and report thereon in writing.”

Section 63.2-1238(B), however, states that, in parental placement adoptions, “where consent has been properly executed, no investigation and report pursuant to § 63.2-1208 is required.” Section 63.2-1238(B) further provides that “the circuit court may order a thorough investigation of the matter and report in which case the provisions of § 63.2-1208 shall apply.” Similarly, § 63.2-1242 states that, for stepparent adoptions, “an investigation and report shall be undertaken only if the circuit court in its discretion determines that there should be an investigation before the entry of a final order of adoption is entered.” If certain conditions exist in a stepparent adoption, § 63.2-1241(C) authorizes the circuit court to order the proposed adoption without referring the matter to the local director of social services for investigation. The circuit court also has the discretion to waive the investigation and report in adult adoption cases. In each of these instances, there is statutory authority to not conduct an investigation. There is no statutory provision that explicitly excepts or waives the requirement of § 63.2-1208(A) or the mandatory provisions of § 63.2-1228 in the situation you describe. Consequently, an order of reference from the circuit court is required in agency placement adoptions.

CONCLUSION

Therefore, it is my opinion that a circuit court may not waive the order of reference mentioned in § 63.2-1208 with respect to children from a foreign country involved in an agency placement adoption proceeding.
You ask whether benefits under a Virginia Retirement System retirement plan and insurance policy ("VRS benefits"), which are payable to a third party but are claimed by the surviving spouse when claiming an elective share of the augmented estate under § 64.1-16.1, are subject to probate tax.

RESPONSE

The VRS benefits do not comprise any part of the amount of the probate estate itself, but are added to that amount for purposes of calculating the amount of the augmented estate. Therefore, it is my opinion that the VRS benefits are not part of the probate estate and are not subject to probate tax, even if the VRS benefits are included in the calculation of an augmented estate under § 64.1-16.1.

BACKGROUND

You relate that the VRS benefits were payable to a third party other than the decedent’s estate or the surviving spouse. The surviving spouse exercised a personal right to claim an elective share of the augmented estate. If the surviving spouse’s elective share must be satisfied from the VRS benefits, you inquiere whether that portion of the benefits is subject to probate tax.

APPLICABLE LAW AND DISCUSSION

Section 64.1-16 allows a surviving spouse to claim an elective share in the decedent’s augmented estate. The percentage of the elective share is one-third of the decedent’s augmented estate if the decedent is survived by children or their descendants, and one-half of the decedent’s augmented estate if there are no surviving children. Section 64.1-16.1 defines “augmented estate” as “the estate passing by testate or intestate succession, real and personal, ... and to which is added the sum of” the value of
certain properties, and from which is deducted the values of certain other properties, to arrive at the final amount of the augmented estate from which an elective share may be drawn.

By the very definition of "augmented estate," the base of the calculation is the probate estate, or the estate that passes by will or intestate succession. The purpose of § 64.1-16.1 is "to prevent one spouse from disinheriting the other by transferring property prior to the transferor's death and thereby diminishing the transferor's estate." This purpose is achieved by imputing the value of certain transfers made by the decedent, during the marriage, to the decedent's probate estate to arrive at the decedent's augmented estate. Nevertheless, any funds transferred to a surviving spouse as part of an elective share do not pass by will or intestate succession.

The Virginia Tax on Wills and Administrations Act, §§ 58.1-1711 through 58.1-1718, governs the "probate tax." Section 58.1-1712 imposes a tax "on the probate of every will or grant of administration not exempt by law." The probate tax is based on "the value of all property, real and personal, within the jurisdiction of the Commonwealth, which shall pass from the decedent to each beneficiary by will or intestacy." The tax imposed on the probate of wills and the grants of administration is a tax on the privilege of qualifying as the personal representative of a decedent, the measure of which is the gross estate left by the decedent passing by his will or intestacy. It is a tax which purports to be levied on probate, but is based on the value of property. Fundamentally, however, the property which serves as the basis for valuation purposes must pass by will or intestacy.

Previous opinions of the Office provide that other types of property that do not pass by will or intestacy are not subject to the probate tax. Such property may consist of: assets that pass under a trust agreement, when a special power of appointment created in the trust agreement is exercised in a will; property that is jointly held, with the right of survivorship; and property that passes, at death, under the terms of a trust agreement.

Similarly, VRS benefits, which do not pass by will or intestacy, do not alter their status into elements of the probate estate by their inclusion in the decedent’s augmented estate. Elements of the augmented estate that did not pass upon the decedent’s death by will or intestacy are not part of the value of the property that is subject to the probate tax.

CONCLUSION

The VRS benefits do not comprise any part of the amount of the probate estate itself, but are added to that amount for purposes of calculating the amount of the augmented estate. Accordingly, it is my opinion that the VRS benefits are not part of the probate estate and are not subject to probate tax, even if the VRS benefits are included in the calculation of an augmented estate under § 64.1-16.1.

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1Section 64.1-13(A) authorizes a surviving husband or wife, for whom no provision is made in the spouse’s will or whose resident spouse has died intestate, to “claim an elective share in the spouse’s augmented estate” within the time period specified in the statute.

Chappell, 266 Va. at 421, 587 S.E.2d at 588.

The value of the augmented estate is decreased by payments made for allowances and exemptions elected under Article 5.1, Chapter 6 of Title 64.1; funeral expenses; administrative charges, exclusive of federal or state transfer taxes; and debts. Section 64.1-16.1(A).

The tax imposed on the probate of wills generally is known as the “probate tax,” because the term “probate estate” is the general term for the property that passes from the decedent by will or intestacy. See Va. Code Ann. § 51.1-164 (LexisNexis Repl. Vol. 2002) (providing for payment of VRS benefits to decedent’s successor upon presentation of affidavit certifying that will was duly probated and that probate estate did not exceed $10,000 in value); Va. Code Ann. § 58.1-3(A)(5) (LexisNexis Supp. 2003) (providing that information contained in estate’s probate tax return may be disclosed, when such information is requested by beneficiary or decedent’s lawful heir); § 64.1-132.2(A)(1) (LexisNexis Repl. Vol. 2002) (providing for collection by decedent’s successor of indebtedness due estate, upon presentation of affidavit stating that value of personal probate estate does not exceed $15,000); Probate Tax Return, Va. Cir. Ct. Form CC-1651, available at http://www.courts.state.va.us/forms/circuit/cc1651-0798.pdf (providing instructions on payment of probate tax imposed on probate estate).


1997 Op. Va. Att’y Gen., supra note 12, at 190; cf. 1984-1985 Op. Va. Att’y Gen. 319, 320 (concluding that, although property jointly held with right of survivorship may be listed as part of inventory filed by commissioner of accounts, probate tax is not applicable to such property because it passes by survivorship and not by will or intestacy).


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## CORPORATIONS

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No requirement that governing body of locality provide local sheriff with unmarked vehicle for official use. 2004 Senate Bill 592, if enacted, will not change conclusion. May require service as agent for purchase or lease of marked or unmarked motor vehicle for sheriff.  

Local Constitutional Officers, Courthouses and Supplies – Sheriff. Ability to easily and quickly identify legitimate peace officers by their uniforms is vital to public safety.  

No requirement that governing body of locality provide local sheriff with unmarked vehicle for official use. 2004 Senate Bill 592, if enacted, will not change conclusion. May require service as agent for purchase or lease of marked or unmarked motor vehicle for sheriff.  

Sheriff and his deputy must wear statutorily prescribed standard uniform, except where alternate clothing is necessary to enhance effectiveness of discharge of their prescribed duties.  

Sheriff has option not to use marked motor vehicles in his department; it is his prerogative to prescribe color of unmarked cars.  

Sheriff may not modify statutorily prescribed standard uniform specifications, unless alternate clothing exception applies. Exception allows sheriff or deputy sheriff to wear alternate clothing when duties of such officer would be adversely affected by wearing of standard uniform; does not allow for uniform variation based on intangible factors. No financial impediment to sheriff’s compliance with standard uniform specifications. Question whether sheriff’s office is complying with standard uniform specifications would be determined by appropriate civil
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If landowner has recorded perpetual easement held by locality devoted to open-space use, locality has no discretion and must grant open-space tax assessment to parcel so encumbered. If landowner proffers agreement not to change use of land, locality has discretion to accept, reject, or negotiate modification of agreement with landowner. Wetlands mitigation banks not otherwise wholly exempt from local real estate taxation must be assessed in same manner as similarly situated and classified property. Local tax assessor may require owners of wetlands mitigation banks to furnish certified statements of income and expenses attributable to such property.

Income generated from cemetery owned by organization exempt from federal income tax must be used for cemetery purposes for land not being used for burial purposes to be exempt from property taxation.

No particular form or ceremony is necessary to dedicate land to public use as cemetery. Intent of owner and fact that land is being used for cemetery purposes are all that is required. Should there be any uncertainty in reservation of land for cemetery usage, grantor may act within reasonable period to cure it.

Ordinance adopted pursuant to § 58.1-3651 is subject to amendment or repeal in same manner as ordinance was adopted.

Question whether family cemetery is being operated for profit, for purposes of tax exemption, is determination of fact to be made by local taxing official. Land dedicated for family cemetery is limited to 300 acres.

Taxation is rule; exemption from taxation is exception.

**Tax laws.** Laws imposing taxes are to be strictly construed, and when uncertainty arises as to scope or meaning of such laws, they are construed more strongly against government and in favor of citizen.

Statutes that impose taxes are not to be interpreted to include within subjects taxed anything which is not clearly intended by legislature to be so included.

**Virginia Tax on Wills and Administrations Act.** Assets not part of probate estate are not subject to probate tax, even if assets are included in calculation of augmented estate.
ELEMENTS OF AUGMENTED ESTATE THAT DO NOT PASS BY WILL OR INTESTACY ARE NOT SUBJECT TO PROBATE TAX

PROPERTY THAT DOES NOT PASS BY WILL OR INTESTACY IS NOT SUBJECT TO PROBATE TAX

VIRGINIA TELEPHONE PRIVACY PROTECTION ACT. Telephone call made for sole purpose of requesting donation of used clothing, or other items such as household goods, is not call made for purpose of offering or advertising property, goods or services for sale, lease, license, or investment.

Telephone calls made by foundation to general public for sole purpose of requesting donations of used clothing, or other items such as household goods, for subsequent sale by foundation to public to raise funds for foundation are not ‘telephone solicitation call[s]’ as defined by Act.

TREASURERS

 Responsibility for treasurer of locality that created community services board, or treasurer of locality of fiscal agent of multi-jurisdictional board, to deposit all state and federal funds. Treasurer must maintain and control funds in accordance with statutes. Direct control over such funds by a community services board requires compliance with statutes governing treasurers and regulations promulgated by locality governing such boards.

UNIFORM COMMERCIAL CODE-SECURED TRANSACTIONS

PERFECTION AND PRIORITY. Foreign corporation authorized to transact business in Virginia, with principal place of business outside Commonwealth and no assets in Virginia, is not ‘resident in this Commonwealth’.

UNIFORM MACHINE GUN ACT

UNIFORM STATEWIDE BUILDING CODE

VIRGINIA COMMONWEALTH UNIVERSITY HEALTH SYSTEM AUTHORITY ACT

VIRGINIA FREEDOM OF INFORMATION ACT

VIRGINIA NONSTOCK CORPORATION ACT
VIRGINIA PROPERTY OWNERS’ ASSOCIATION ACT (See PROPERTY AND CONVEYANCES: Property Owners’ Association Act)

VIRGINIA REGISTER ACT (See ADMINISTRATION OF GOVERNMENT)

VIRGINIA TAX ON WILLS AND ADMINISTRATIONS ACT (See TAXATION)

VIRGINIA WATER AND WASTE AUTHORITIES ACT (See COUNTIES, CITIES AND TOWNS: Virginia Water and Waste Authorities Act)

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