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May 1, 2017

The Honorable Terence R. McAuliffe
Governor of Virginia

Dear Governor McAuliffe:

I am pleased to present to you the Annual Report of the Attorney General for 2016. The citizens of the Commonwealth of Virginia can be proud of the dedicated public servants who work for the Office of the Attorney General. I have enjoyed working with them and you over the past year. I look forward to continuing to ensure that the Commonwealth has the finest lawyers and staff at the Department of Law to represent the interests of all Virginians. It is with great pride that I present to you a portion of the accomplishments of this Office from the past year.

STATE SOLICITOR GENERAL

The Solicitor General of Virginia represents the Commonwealth in litigation before the Supreme Court of the United States and in lower court appeals, except capital cases, that call into question the constitutionality of a Virginia statute or touch upon sensitive policies of the Commonwealth. The Solicitor General’s Office (or “Office”) also assists all Divisions of the Attorney General’s Office with constitutional and appellate issues.

In 2016, the Solicitor General’s Office represented the State Board of Elections in two redistricting cases before the Supreme Court of the United States, Wittman v. Personhuballah and Bethune-Hill v. Virginia State Board of Elections. Different three-judge panels reached different conclusions in these cases about the legality of the districts in question. The Supreme Court declined to reach the merits of the former case. The latter case was still pending as of the end of 2016.

The Office was involved in numerous matters in the U.S. Court of Appeals for the Fourth Circuit. It received favorable decisions in two cases: Colon Health Centers of America v. Hazel, a dormant-commerce-clause challenge to Virginia’s certificate-of-public-need program for certain medical equipment and services, and Sarvis v. Judd, concerning the constitutionality of Virginia’s
method of ordering candidates on ballots. Sarvis’s petition for certiorari remained pending before the Supreme Court at the end of 2016. The Office briefed and argued other cases in the Fourth Circuit as well, including several filed by prisoners alleging violations of the Eighth Amendment, and one involving whether restrictions on tourism literature available to travelers at VDOT rest-area facilities violate the First Amendment.

The Office also handled numerous matters in the Supreme Court of Virginia. In *Howell v. McAuliffe*, it defended Governor McAuliffe and other executive-branch officials in a case involving restoration of voting rights to convicted felons. The Supreme Court held that the Governor’s initial en masse restoration order was invalid, but it turned away a challenge to the individualized restoration orders that the Governor subsequently issued on a case-by-case basis.

The Solicitor General’s Office obtained favorable decisions from the Supreme Court of Virginia in a variety of other matters in 2016. *Blount v. Clarke* involved certified questions from the U.S. District Court for the Eastern District of Virginia concerning the scope of the Governor’s authority to commute a life sentence to a term-of-years sentence. The Supreme Court ruled that the Governor’s act of clemency should be treated as a partial pardon, for which petitioner’s consent was not required. In *Clark v. Virginia Department of State Police*, the Office successfully argued that Clark’s suit under the Uniformed Services Employment and Reemployment Rights Act was barred by sovereign immunity. And in two related cases, *Valentin v. Commonwealth* and *Vasquez v. Commonwealth*, the Supreme Court held that the prohibition of life-without-parole sentences for juvenile non-homicide offenders, recognized by the U.S. Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), does not apply to aggregate sentences that exceed a person’s life expectancy. The Supreme Court of the United States denied certiorari in Valentin/Vasquez in December 2016.

Several cases remained pending before the Supreme Court of Virginia at the end of 2016. *Daily Press, LLC v. Office of the Executive Secretary of the Supreme Court of Virginia* concerns whether, under FOIA, OES must release felony-related case information maintained in the Circuit Court Case Management System operated on behalf of circuit court clerks. The Office successfully represented OES at trial in the Circuit Court of Newport News. Three related appeals—*Old Dominion Committee for Fair Utility Rates v. State*
Corporation Commission, Karen E. Torrent, Esq. v. State Corporation Commission, and VML/VACo APCo Steering Committee v. State Corporation Commission—concern whether legislation enacted by the General Assembly in 2015, imposing a temporary moratorium on biennial rate reviews of certain electric companies, violates Article IX, § 2 of the Constitution of Virginia. The Attorney General appeared to defend the constitutionality, not the wisdom, of the legislation. And in Palmer v. Atlantic Coast Pipeline, the Solicitor General’s Office filed an amicus brief defending the constitutionality of § 56-49.01 of the Code of Virginia.

CRIMINAL JUSTICE AND PUBLIC SAFETY DIVISION

The Criminal Justice and Public Safety Division includes the following sections: Computer Crime, Correctional Litigation, Criminal Appeals, Major Crimes and Emerging Threats, and the Sexually Violent Predators Section. It also includes the Medicaid Fraud Control Unit and the Tobacco Enforcement Unit. The Division handles computer crimes and cyber-security issues, cases brought by inmates, criminal appeals, and prosecutions relating to child pornography, gangs, money laundering, fraud, and patient abuse. It also represents various Commonwealth agencies, petitions for the civil commitment of sexually violent predators, pursues Medicaid fraud cases, and administers the 1998 Tobacco Master Settlement Agreement.

Computer Crime Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crime Section within the Attorney General’s Office. The long-term vision for the Section was to spearhead Virginia’s computer-related law enforcement in the 21st century. In accord with the conditions established in § 2.2-511 of the Code of Virginia, the Attorney General may investigate and prosecute crimes under the Virginia Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft.

Investigations and Prosecutions

During the year, members of the Computer Crime Section continued to travel extensively throughout the Commonwealth to investigate and prosecute computer-related crimes, which often involve large volumes of evidence and extensive analysis. Jurisdictions in which the Section handled cases include the counties of Amherst, Arlington, Bedford, Campbell, Chesterfield, Fairfax,
Frederick, Greensville, Hanover, Loudoun, Lunen burg, Madison, Prince William, and Spotsylvania, and the cities of Colonial Heights, Danville, Hopewell, Newport News, Richmond, and Virginia Beach, among others.

The four attorneys of the Section are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal as well as state courts. They handled seventy-eight cases during the year, obtaining thirty-three convictions (with the remainder of cases ongoing) for crimes of production of child pornography, distribution of child pornography, receipt of child pornography, internet solicitation of children, and identity theft. Defendants in these cases were sentenced to an aggregate of 106 years and one month of active imprisonment. A few of the Section’s significant cases are summarized below:

*United States v. Zebulon Resolve Wendt* (E.D. Va.) – Wendt pleaded guilty to one count of production of child pornography, and the court sentenced him to fifteen years of imprisonment followed by a lifetime term of supervised release. Wendt was identified after Department of Homeland Security agents received information from Canadian law enforcement that an internet user located in Chesterfield County (Virginia) had uploaded several sexually explicit images of a minor female to a photo-sharing website. Internet Protocol records indicated that the computer used to upload the images was located at Wendt’s residence in Chesterfield County. Agents conducted a search of the residence and seized a number of computers, hard drives, and a digital camera. A subsequent forensic analysis revealed thousands of sexually explicit videos and images of the same minor female, later identified as Wendt’s neighbor, which Wendt had taken himself using the digital camera and then saved to his computer. The forensic examination also recovered several thousand images and videos of child pornography that Wendt had downloaded from the internet.

*Commonwealth v. Jude Geist* (Greensville Cir. Ct.) – Geist pleaded guilty to five counts of solicitation of a minor through use of a communications system, and was sentenced to twenty-five years with twenty years and six months suspended for a period of twenty years. He was also ordered to pay $5,400 in restitution to the victim. He was identified in March 2015 after investigators with the Southern Virginia Internet Crimes Against Children Task Force received a tip from their West Virginia counterparts that a resident of Greensville County, later identified as Geist, was soliciting an eleven-year-old West Virginia girl over the internet. The girl’s mother found several months’

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1 Dollar amounts in this Letter of Transmittal have been rounded to the nearest dollar.
worth of sexually explicit text messages between her daughter and Geist on her daughter’s cell phone. Investigators executed a search warrant at Geist’s residence and seized his computer equipment. Forensic analysis of his personal laptop and work-issued cell phone recovered the text messages that he had exchanged with the victim in which he had requested naked pictures of the girl, as well as several sexually explicit videos and images that the girl had sent. Geist admitted in a voluntary interview with law enforcement that he had believed the girl to be approximately fifteen or sixteen years old, and that he had sent the sexually explicit texts to the girl.

Commonwealth v. Xavier Lopez (Amelia Cir. Ct.) – Lopez was identified by Hanover, Amelia, and Bedford County investigators working with the Southern Virginia Internet Crimes Against Children Task Force after all three county law-enforcement agencies had downloaded child pornography from Lopez over peer-to-peer file sharing networks. A search warrant was executed on Lopez’s home and several items were seized. A subsequent forensic examination of his equipment revealed hundreds of saved child pornography videos. A video detailing how to sexually abuse one’s infant or toddler daughter was also recovered. Lopez was found guilty after a two-day jury trial on twelve counts of possession of child pornography and received a sentence of eight years of active incarceration.

Commonwealth v. Ronald Ridout, Jr. (Chesterfield Cir. Ct.) – Ridout pleaded guilty to three counts of distribution of child pornography and was sentenced to fifty years of imprisonment with thirty-eight years suspended. Ridout was identified after Microsoft alerted the National Center for Missing and Exploited Children that one of its users in Chesterfield County had uploaded images of child pornography to a Microsoft cloud account. The tip was routed to the Chesterfield County Police Department, which, through further investigation, confirmed that the upload had originated at Ridout’s residence. During execution of a search warrant at Ridout’s residence, he admitted downloading images of child pornography from the internet and saving them to his Microsoft cloud storage account. Notably, Ridout was a convicted sex offender, having convictions for aggravated sexual battery, taking indecent liberties with a minor, and failing to register properly as a sex offender.

Computer Forensic Unit

Throughout the year, the Computer Crime Section’s Computer Forensic Unit continued to make extensive progress towards alleviating Virginia law-
enforcement agencies’ computer forensic backlog. The Unit handled 135 total cases from twenty-eight separate jurisdictions across the Commonwealth. As part of those cases, examiners forensically analyzed computer hard drives, cell phones, and various storage devices.

The Computer Forensic Unit also obtained a Mobile Computer Forensic Lab during the year. This RV-style mobile unit allows computer forensic examiners to analyze seized evidence on-site at search warrant executions to determine which items are of evidentiary value and thereby assist the investigation on scene. The lab, one of only three in Virginia, already has been deployed very effectively in dozens of criminal investigations.

Collaborative Efforts, Training, and Service Activities

The Section continued to be an active member of the Southern Virginia and Northern Virginia Internet Crimes Against Children Task Forces as well as the Richmond-based Virginia Cyber Crime Strike Force, dedicating its three computer forensic examiners and providing four prosecutors to pursue the resulting cases in both state and federal courts. The task forces handle crimes committed via computer and the internet, including child exploitation and solicitation, internet fraud, computer intrusion, computer harassment, and identity theft. These partnerships between federal, state, and local law enforcement were created to coordinate the prosecution of computer crimes and to provide Virginia with centralized locations to report such crimes.

During the year, the Section’s team of prosecutors and investigators provided training to members of law enforcement, including school resource officers and prosecutors, at various conferences and police training academies throughout the state. Training locations included Chesterfield County, Pulaski County, and the cities of Fredericksburg and Richmond. These trainings focused on the legal issues surrounding computer crime, including methods of obtaining search warrants to gather digital evidence and the use of other procedural tools to investigate computer crimes and identity theft.

The Section also continued to serve as a clearinghouse for information concerning criminal and civil misuses of computers and the internet. During 2016, the Section’s investigators handled over 100 investigatory leads and citizen complaints funneled through the Section’s email inbox and the FBI’s Internet Crime Complaint Center, which is the primary resource nationwide for computer crime complaints. Section attorneys also review notifications from
companies and organizations that experience database breaches to ensure compliance with Virginia’s database breach notification law found in § 18.2-186.6 of the Code of Virginia. The Section received 566 such notices in 2016. Section attorneys were asked to speak as experts on data breach law and computer crime law at various national conferences in 2016, including conferences in Chicago, New York, Philadelphia, and San Francisco.

During 2016, as in past years, members of the Section traveled frequently throughout Virginia to speak to students for the Attorney General’s Virginia Rules “Safety Net” Program. “Safety Net” is an interactive presentation that addresses issues of cyberbullying and “sexting,” and utilizes an actual case study to demonstrate how easy it is for a predator using very little personal information to track down a child victim over the internet. This presentation continues to be in high demand among middle schools, high schools, and parent groups across the Commonwealth. Section members delivered the presentation numerous times to schools in Chesterfield County, Henrico County, the City of Richmond, the City of Suffolk, and many other locations throughout the Commonwealth.

Finally, Section members were active participants in the Virginia Cyber Security Commission, which completed its tenure in 2016. The Commission, established by Governor McAuliffe in 2014, was comprised of tech industry leaders, public officials and educators, and sought ways to improve Virginia’s overall cyber security through advancements in economic development, education, and law enforcement. Members of the Section drafted several pieces of cyber-crime legislation adopted by the Commission and put forward in the General Assembly.

**Correctional Litigation**

The Correctional Litigation Section represents the Department of Corrections, the Parole Board, the Department of Juvenile Justice, and the Board of Juvenile Justice. Additionally, the Section represents the Secretary of Public Safety and the Governor on extradition matters and Commonwealth’s Attorneys on detainer matters. During the year, the Section was responsible for handling 185 advice matters for client agencies, 159 cases arising under Section 1983, 129 habeas corpus cases, 73 mandamus petitions, 42 inmate tort claims, 3 warrants in debt, 4 injunctions, and 3 declaratory judgments.

Several significant cases handled by the Section are described below:
Blount v. Adams, Blount v. Farmer, Blount v. Messer, and Blount v. Miller (W.D. Va.) – In a series of lawsuits, an inmate claimed that various correctional officers had assaulted him, retaliated against him, and had been deliberately indifferent to his injuries. Following court-facilitated mediation, the parties settled all pending matters for $5,000 and agreed that the inmate be transferred out of state. The inmate later moved to vacate the dismissal of his cases, alleging that he had been coerced into the settlement agreement. Following another evidentiary hearing, the court dismissed his motion to vacate and finalized the dismissal of the cases.

Keystone v. Hinkle (W.D. Va.) – This case involved an inmate who brought a Section 1983 action challenging the air quality at Red Onion State Prison, claiming that it exacerbated several of his pre-existing medical conditions. After an evidentiary hearing on the inmate’s motion for a preliminary injunction, the defendants moved for summary judgment. The court denied the motion for a preliminary injunction and granted the defendants’ motion for summary judgment.

Obataiye-Allah v. Clarke (W.D. Va.) – This case involved an inmate who claimed that the step-down program implemented at Red Onion State Prison violated various constitutional provisions, including the Due Process Clause, the Equal Protection Clause, the First Amendment, and the Eighth Amendment. The step-down program was designed to permit inmates assigned to the most restrictive incarceration to work their way into a general population setting. The court granted the defendant’s motion for summary judgment. The inmate appealed to the Fourth Circuit, and his appeal remained pending at the end of 2016.

Porter v. Clarke (E.D. Va.) – This case involved four death-row inmates who alleged that the conditions of confinement on death row violated their Eighth Amendment right to be free of cruel and unusual punishment. The Department of Corrections had been developing plans to modify the conditions of death row and had implemented some of those changes during the pendency of the litigation. After extensive discovery and cross-motions for summary judgment, the court granted summary judgment for the defendants on the basis of the voluntary changes that were made. At the end of 2016, the plaintiffs’ appeal remained pending before the Fourth Circuit.

Scott v. Clarke (W.D. Va.) – This case was certified as a class action challenging the administration of medical care afforded to inmates at Fluvanna
Correctional Center. The case was settled with, among other things, the appointment of a Compliance Monitor to work with the parties to better ensure the administration of adequate medical care. The Compliance Monitor started work during the year. The Monitor visits Fluvanna Correctional Center quarterly, maintains an active communication with the inmates, evaluates the systems in place, and works closely with the plaintiffs’ counsel and prison officials to respond to concerns.

Shabazz v. Lokey (W.D. Va.) – After an inmate’s literature was confiscated as gang-related “Five Percenter” paraphernalia, the inmate brought suit, claiming that because he used the literature to practice his religion, he should be exempted from the Department of Correction’s zero-tolerance policy. A multi-day bench trial followed. At the end of 2016, a ruling from the court was pending.

Verdier-Logarides, Administrator of the Estate of Craig Edmond Verdier-Logarides v. Commonwealth (W.D. Va.) – In an action brought on behalf of the estate of an inmate who had committed suicide while incarcerated at Red Onion State Prison, the plaintiff alleged gross negligence on the part of supervising correctional officers. After extensive discovery, the case was settled for $45,000.

Worsley, Administratrix of the Estate of Samah Yellardy v. Dillman (E.D. Va.) – This was a wrongful-death case brought on behalf of the estate of an inmate who had died from a heart attack while incarcerated. After extensive discovery and arguments on the pleadings, the Section obtained dismissal of the allegations against all Department of Corrections defendants.

Criminal Appeals

The Criminal Appeals Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions, including criminal appeals, state and federal habeas corpus proceedings, petitions for writs of actual innocence, and other extraordinary writs. The Section’s Actual Innocence and Capital Litigation Unit reviews and coordinates petitions for writs of actual innocence, and defends against appellate and collateral challenges to all cases in which a death sentence is imposed. In addition, Section attorneys review wiretap applications and provide advice and assistance to prosecutors statewide. The Section responded to several hundred such
requests for assistance in 2016. Finally, the Section represents the Capitol Police, state magistrates, and the Commonwealth’s Attorneys’ Services Council.

In 2016, the Section defended against 883 petitions for writs of habeas corpus and represented the Commonwealth in 340 appeals in state and federal courts. The Section received thirty-two petitions for writs of actual innocence, which is an ever-increasing area of responsibility. The Section also handled twenty-two matters involving magistrates, including one Section 1983 case in federal district court that concluded after extensive motions hearings. Section attorneys are frequently assigned to assist on matters in other Sections and provided advice and assistance in several elected official investigations throughout the year.

The Section’s Actual Innocence and Capital Litigation Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. In Porter v. Zook, the U.S. District Court for the Eastern District of Virginia dismissed the inmate’s habeas corpus petition. This action followed a remand by the Fourth Circuit holding that the district court had failed to rule on a claim of a juror’s actual bias. Three cases remained pending in the Fourth Circuit at the end of 2016: Juniper v. Zook, Porter v. Zook, and Teleguz v. Zook. On April 7, 2016, the Supreme Court of Virginia granted a writ of actual innocence to Keith Harward based on biological evidence, just one day after the Section filed its answer agreeing to relief.

During the year, the Section handled the following significant cases:

Edmond v. Commonwealth (Va. Ct. App.) – Here, the court affirmed the appellant’s conviction for murder, robbery, conspiracy to commit robbery, and two counts of the use of a firearm in the commission of a felony. In doing so, the court explicitly endorsed the collective knowledge doctrine, finding that the knowledge of the instructing law-enforcement officer, who directed the traffic stop of the vehicle in which the appellant traveled, supplied the necessary level of suspicion to constitutionally authorize the defendant’s seizure. Edmond’s petition for appeal was pending with the Supreme Court of Virginia as of the end of 2016.

Nimety v. Commonwealth (Va. Ct. App.) – In this case, the court held that the specific language in § 19.2-270.1:1 of the Code of Virginia governed discovery requests for copies of the Commonwealth’s evidence in child
pornography cases, rather than the general standard in Rule 3A:11(b)(2) of the Supreme Court of Virginia.

*Turner v. Commonwealth* (Va. Ct. App.) – Rejecting a First Amendment challenge brought by the appellant, the court here affirmed his conviction for hanging a noose in a public place. The court held that displaying a noose in the manner proscribed by § 18.2-423.2 of the *Code of Virginia* constitutes a “true threat,” and therefore the appellant’s conviction did not violate his First Amendment right to free speech. The court further held that the evidence was sufficient to prove the defendant had displayed the noose in a “public place” because he displayed it in his front yard where it was clearly visible from the street. Turner’s petition for appeal was pending with the Supreme Court of Virginia as of the end of 2016.

**Major Crimes and Emerging Threats**

The Major Crimes & Emerging Threats Section (“MC&ET” or “Section”) is the primary criminal prosecution section of the Attorney General’s Office. It is responsible for prosecuting various crimes, either pursuant to the Attorney General’s jurisdiction under law or by request of local Commonwealth’s Attorneys. MC&ET also is responsible for representing criminal justice and public safety agencies and implementing public safety initiatives set forth by the Attorney General. Additionally, MC&ET handles public-safety related matters that are outside the confines of the Criminal Appeals, Correctional Litigation, Computer Crime, or Medicaid Fraud Control subdivisions.

MC&ET accomplishes its goals through multiple endeavors, including continued implementation of a major initiative to combat the heroin/opioid epidemic in Virginia; prosecution of major homicide and violent crime cases; prosecution of firearms-related crimes; the prevention, intervention, and suppression of criminal street gang activity; participation in major financial crime investigations; and the apprehension and prosecution of violators of Virginia’s RICO Act.

**Prosecutions Overview and Special Accomplishments**

The Section has eleven Assistant Attorneys General who serve as prosecutors and are located throughout the Commonwealth. Two of the prosecutors are new hires placed at the U.S. Attorney’s Office in Alexandria through a grant with the Washington/Baltimore High Intensity Drug Trafficking
Area program. These two attorneys are responsible for prosecuting significant federal drug-trafficking related cases, with an emphasis on heroin trafficking.

In 2016, six of the Section’s prosecutors were sworn in as Special Assistant United States Attorneys in the Eastern or Western Districts of Virginia. This will further enhance the valuable working relationship that exists between the Section and the U.S. Attorneys’ offices.

During the year, MC&ET was instrumental in the formation of two new multi-jurisdiction grand juries: one in South Hampton Roads and another in Central Virginia. The multi-jurisdiction grand jury in South Hampton Roads includes the cities of Chesapeake, Norfolk, Portsmouth, and Suffolk within its purview. The Central Virginia Multi-Jurisdiction Grand Jury includes the counties of Albemarle, Culpeper, Fluvanna, Louisa, Madison, and Spotsylvania within its scope. MC&ET prosecutors serve as special counsel to these grand juries and others throughout the Commonwealth.2

In July, MC&ET chaired an intelligence-sharing conference for law-enforcement officials in southwest Virginia. The conference was co-hosted by the Attorney General’s Office and the Southwest Virginia Criminal Justice Training Academy and was held at the Virginia Highlands Community College. The free event included several hours of training on the prosecution and investigation of controlled substances cases, Brady/Giglio issues, and emerging drug issues. In-service credits and continuing legal education credits were provided to those in attendance. The event was a great success, with approximately fifty law-enforcement officers and prosecutors present, representing fourteen law-enforcement departments and fifteen prosecutorial agencies. Overall, the event was considered very informative and beneficial to the law-enforcement community. Plans are underway for it to be held again in 2017.

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2 In particular, one MC&ET prosecutor serves as special counsel to the new multi-jurisdiction grand juries in South Hampton Roads and Central Virginia, as well as the Peninsula Multi-Jurisdiction Grand Jury in Newport News and the Shenandoah Valley Multi-Jurisdiction Grand Jury. (Work with the Shenandoah Valley Multi-Jurisdiction Grand Jury involves investigation of gang-related and cold-case homicides in that region.) Another MC&ET prosecutor serves as special counsel to the Northern Virginia Multi-Jurisdiction Grand Jury.
Heroin/Opioid Agenda and Prosecutions

Members of MC&ET have established a major multifaceted initiative aimed at using education, prosecution, and legislation to combat the heroin and opioid epidemic in Virginia. Section prosecutors have consistently sought ways to combat the epidemic by facilitating consensus among law-enforcement officials, medical personnel, and other community stakeholders, in part through the use of task forces and working groups.

During the year, one MC&ET prosecutor, with the cooperation of the U.S. Attorney’s Office for the Eastern District of Virginia, created the Hampton Roads Heroin Working Group. The mission of the group is to aggressively target heroin dealers and dismantle supply organizations while reducing demand through community awareness, medical community leadership, and the support of service-based organizations and treatment facilities. Additionally, another MC&ET prosecutor helped lead the Northern Virginia Regional Heroin Task Force.

Throughout the year, MC&ET worked with local and federal partners to prosecute more than twenty-eight cases against dealers and traffickers involving more than ninety-five kilograms of heroin with an estimated street value of more than $19 million, which equates to about 238,500 daily doses of heroin. In an effort to strategically combat heroin and opioid overdose, MC&ET prosecutors have successfully utilized federal forums and statutes to prosecute drug traffickers for drug distributions that result in death.

Summaries of some of the significant heroin/opioid cases that MC&ET prosecuted during the year are as follows:

United States v. Carlos Brown (E.D. Va.) – Brown was sentenced to 360 months (30 years) of imprisonment for distribution of heroin resulting in death. From June 2015 to February 2016, Brown sold heroin from his Portsmouth residence or other locations. On November 18, 2015, he contacted one buyer and described the potency of his heroin as a “missile.” He was aware that several of his customers had overdosed, yet they sought to obtain more of the same batch of heroin. Shortly thereafter, Brown distributed that heroin to a Chesapeake man, who was found dead on November 21, 2015, after using the heroin from Brown. Even after learning of the death of the man, Brown continued to sell heroin. The law-enforcement team in the case made four
controlled purchases of heroin and fentanyl from Brown before arresting him on April 21, 2016.

*Commonwealth v. Kosrat Nuri* (Fairfax Cir. Ct.) – The defendant distributed heroin in the City of Fairfax. He pleaded guilty to three counts of distribution of heroin and was sentenced to serve six years and six months of active imprisonment.

*Commonwealth v. David Whirley* (Fairfax Cir. Ct.) – Between November 2014 and June 2015, the defendant sold heroin to users in Lorton. He had obtained this heroin from a supplier in Baltimore, whom he had met while imprisoned for armed robbery. Several of the defendant’s customers traded firearms for heroin. Investigators recovered three such firearms during a lawful search of the defendant’s residence. Whirley pleaded guilty to two counts of conspiracy to distribute heroin and possession of a firearm after a violent felony conviction. He was sentenced to serve nine years’ active imprisonment.

*Commonwealth v. Justin Wolfe* (Fairfax Cir. Ct.) – The defendant invited an individual to his house and provided her with heroin and ketamine. She died of an overdose from the heroin that Wolfe had provided to her. A search of Wolfe’s residence located more narcotics and two firearms. Wolfe pleaded guilty to distribution of heroin and possession of a firearm while in possession of heroin. Wolfe was sentenced to serve eight years’ active imprisonment.

**Prosecution of Violent and Firearms-Related Crimes**

MC&ET continues to make the prosecution of violent and firearms-related crimes a priority. During the year, MC&ET attorneys assisted Commonwealth’s Attorneys throughout Virginia in the prosecution of such crimes in state court, in addition to handling these cases in federal court. Section attorneys handled cases in state and federal courts located in Alexandria, Fairfax, Prince William, Frederick, Buchanan, Norfolk, Newport News, and Richmond, as well as the Shenandoah Valley and Southwest Virginia regions. Specific offenses prosecuted included murder, malicious wounding, criminal street gang participation, use of a firearm during the commission of a felony, and possession of a firearm by a felon.

Some of the significant cases handled during the year include the following:
Commonwealth v. Charles Lindberg Almond (Augusta Cir. Ct.) – In this case, the defendant was charged with first-degree murder. In 2014, the victim’s father asked the Attorney General’s Office to review the case. Following a yearlong investigation by the Shenandoah Valley Multi-Jurisdiction Grand Jury, the defendant was indicted in 2015 for the murder of Richard Miller, Jr. In March 2016, following a two-day trial, a jury convicted Almond of first-degree murder and recommended a life sentence. In July 2016, Almond was sentenced to life in prison. This appears to be the first cold-case murder with no body and no physical evidence ever successfully prosecuted in Virginia.

Commonwealth v. Jamal Askew (Norfolk Cir. Ct.) – The defendant was sentenced to eleven years of active imprisonment after pleading guilty to two counts of robbery and one count of use of a firearm in the commission of a felony for his role in the armed robbery of a couple in the Ghent section of Norfolk. The young couple, both Navy pilots, were walking home at night from a restaurant when they were approached from behind by Askew, who produced a gun and ordered the couple to relinquish their property.

Commonwealth v. Tyrone Batten, et al. (Newport News Cir. Ct.) – This case involved a gang-related double murder that occurred in 2008. Batten, along with two accomplices, murdered two Newport News teens in front of the Huntington Middle School. Following a complex, three-year investigation led by a MC&ET prosecutor, the Peninsula Multi-Jurisdiction Grand Jury returned indictments against the three gang members for their roles in the murders. Batten’s two accomplices were tried and convicted in 2014. In January 2016, following a four-day jury trial, Batten was convicted of two counts of second-degree murder, use of a firearm during the commission of a felony, discharging a firearm within 1000 feet of a school zone, and felony gang participation. In March 2016, he was sentenced to ninety-six years of imprisonment. Batten’s two accomplices were previously tried and convicted in 2014.

Commonwealth v. Demarcus Sutton (Norfolk Cir. Ct.) – The defendant was charged with robbery. The victim, a bartender, had just gotten off from work and was going into the 7-11 when the defendant approached him, asking for a cigarette and some money. The victim was in the process of obliging when Sutton assaulted him and deprived him of approximately $375 in cash. Sutton was found guilty and sentenced to five years of active incarceration. The court also revoked a previously suspended four-year sentence for unauthorized use of
an automobile, but re-suspended two of those years. In total, the defendant received seven years of active incarceration.

Other significant cases prosecuted

United States v. Vernon Norvell (E.D. Va.) – Norvell was sentenced to sixteen years in prison for one count each of conspiracy to distribute narcotics and conspiracy to commit money laundering and was ordered to forfeit $690,000. Norvell distributed in excess of 126 pounds (57 kilograms) of cocaine and regularly conducted transactions at his home in the Crystal Lake neighborhood of Portsmouth, at his cake business in Virginia Beach (“G’s Cake Shop – Cakes For All Occasions”), and at a Food Lion parking lot off Airline Boulevard in Portsmouth. One confidential source regularly purchased quantities of cocaine for $1,350 to $1,500 per ounce over the course of several years. Another confidential source purchased in excess of five kilograms over the course of several months. (At times, Norvell was accepting between $60,000 and $70,000 from this source a week for cocaine.) On five occasions from October 2014 to July 2015, the Drug Enforcement Administration, in partnership with the Chesapeake and Portsmouth Police Departments, conducted controlled purchases of powder and crack cocaine from Norvell.

Norvell and his wife used the proceeds of his cocaine distribution to purchase a home in the Crystal Lake neighborhood of Portsmouth, several automobiles, expensive clothing, and other material items. The real estate purchase was one method the couple used to conceal the cocaine proceeds. In addition to the drug and money laundering crimes, Norvell and Johnson reported a combined adjusted gross income of just $157,916 from 2012 to 2014, according to court documents. During that same period they deposited $926,854, including $338,860 in cash, into nearly a dozen bank accounts, including one offshore account located in Curacao. From January 2011 through August 2015, the couple deposited $468,500 in cash into their accounts.

United States v. Richard Pearson (E.D. Va.) – From June 2014 to February 2016, Pearson sold 579 grams (approximately 20 ounces) of cocaine to a confidential source under police surveillance. Pearson pleaded guilty to conspiracy to distribute 500 grams or more of cocaine and was sentenced to serve thirty-seven months in prison.

United States v. Dana Vanmeter, et al. (W.D. Va.) – In this case, four defendants were involved in a conspiracy to manufacture methamphetamine.
Two children were present on the premises when some of the drug manufacturing activity took place. All four defendants received sentences for their respective convictions ranging from two years of probation to sixty months of imprisonment.

*Commonwealth v. Amanuel Hagos* (Alexandria Cir. Ct.) – Hagos was convicted of four felonies, including racketeering (RICO), conspiracy to commit money laundering, and two counts of conspiracy to distribute marijuana. He was sentenced to seven years of active imprisonment. His sentencing concluded a fifteen-month long investigation and prosecution. The investigation began with the discovery of approximately ninety pounds of high-grade marijuana in an apartment in Alexandria in 2015. The prosecution involved Hagos and five co-defendants, who were collectively responsible for importing thousands of pounds of high-grade marijuana from Oakland, California, into the metropolitan Washington, D.C., area between January 2014 and September 2015, and then laundering the resulting sale proceeds through bank accounts and casino transactions. During its existence, Hagos’ racketeering organization was responsible for distributing approximately 1,900 pounds of marijuana and laundering nearly $1 million worth of illegal drug sale proceeds in the metropolitan Washington, D.C. area. Firearms connected to the criminal organization were seized during the investigation in various locations, including Oakland, California, and Washington, D.C. Hagos’s five co-defendants also received convictions and sentences for their various roles in the criminal enterprise.

**MC&ET Financial Crimes Team**

The Financial Crimes team is made up of two investigators (one of whom is also a computer forensic examiner) and a criminal analyst. The mission of this team is to identify, target, and disrupt financial crimes and the financial aspects of other types of crime in the Commonwealth. The team assists Commonwealth’s Attorneys and law-enforcement officials by identifying targets for investigations, providing on-site financial investigative and analytical support, sharing timely intelligence on money laundering and other financial crimes, providing financial-crime investigative training, and assisting in asset identification and forfeiture actions. The Financial Crimes team also provides assistance to prosecutors in the trial of financial crime cases. Over the course of the year, the team assisted local and federal law-enforcement agencies in the
Examples of investigations during the year include the following:

**Bradley Albrite and Juan P. Flores, Jr. (W.D. Va.)** – This was a joint investigation with the United States Postal Service Office of Inspector General involving Albrite, a rural mail carrier in Frederick County identified as a suspect in a marijuana distribution operation. Albrite agreed to assist Flores in diverting packages that contained marijuana. Using delivery addresses that Albrite had supplied from his mail carrier route, Flores arranged for packages containing marijuana to be shipped from California to Virginia. Albrite, in turn, would divert the packages from their shipping addresses and deliver them to Flores, their true intended target.

Albrite and Flores each pleaded guilty to conspiracy to distribute marijuana, distribution of marijuana, and bribery of a public official. Flores was sentenced to two years of incarceration followed by three years’ probation. Albrite was sentenced to three years of probation and charged with a $3,000 fine in addition to court assessments and costs.

**Sandra and Donnie Marks (W.D. Va.)** – This was a joint investigation with several entities including the U.S. Immigration and Customs Enforcement’s Homeland Security Investigations Office in Harrisonburg, the U.S. Postal Inspection Service, and the U.S. Attorney’s Office for the Western District of Virginia. The investigation involved a multimillion-dollar fraudulent fortune-telling business ran by Sandra Marks and based in Charlottesville. The Financial Crimes team participated in all facets of the investigation, which included executing the search warrant, reviewing seized items, interviewing victims, analyzing financial records, and determining the final loss figures. Sandra Marks was indicted in April 2015 on two counts of mail fraud, thirty-one counts of wire fraud, and one count of promotional money laundering. In May 2016, she pleaded guilty to one count of mail fraud and one count of money laundering. In November 2016, she was sentenced to thirty months of imprisonment with credit for time served, and was ordered to pay more than $5.4 million in restitution to victims of the scheme.

Sandra Marks’s husband, Donnie Marks, pleaded guilty in November 2016 to one count of mail fraud and one count of money laundering for his role in the scheme. Sentencing for Donnie Marks remained pending at the end of 2016.
Buruk Sebhatu, et al. (Alexandria Cir. Ct.) – This was a joint investigation with the Alexandria Police Department and the Alexandria Commonwealth’s Attorney Office involving a marijuana distribution organization that stretched from California to the Alexandria, Virginia area. The Financial Crimes team was tasked with the identification, tracing, securing, and analyzing of all related bank accounts used to facilitate the movement and laundering of the drug proceeds, as well as review of the data from seized cell phones and computers to determine which individuals were involved with the laundering of the illegal proceeds. Six members of the organization were indicted and pleaded guilty to charges of racketeering, conspiracy to commit money laundering, and conspiracy to distribute more than five pounds of marijuana. Sentencing for the crimes ranged from eight and a half years to twenty-five years of imprisonment.

Elected Official Investigations

Because sheriffs and chiefs of police are invariably conflicted out of investigating alleged criminal activity of local elected officials within their jurisdictions, the vast majority of elected official investigations are conducted by the Virginia State Police (“VSP”). Pursuant to § 52-8.2 of the Code of Virginia, however, VSP may conduct a criminal investigation of a state or local elected official only when requested to do so by the Governor, the Attorney General, or a grand jury. When VSP seeks the Attorney General’s authorization to conduct an investigation of an elected official, it is MC&ET’s responsibility to review the allegations to determine what, if any, criminal violations may have occurred. In 2016, attorneys from MC&ET processed more than twenty of these requests from VSP.

Agency Representation

MC&ET also serves as agency counsel to VSP, the Department of Criminal Justice Services, the Board of Corrections, the Department of Forensic Science, the Office of the State Inspector General, the Department of Emergency Management, the Department of Fire Programs/State Fire Marshal’s Office/Virginia Fire Services Board; and the Department of Military Affairs/Virginia National Guard/Virginia Defense Force. The Section also advises the Secretary of Public Safety and Homeland Security upon request. In addition, an MC&ET attorney participates as the Attorney General’s designee on the Secure Commonwealth Panel, and another MC&ET attorney serves as the Attorney General’s designee on the Department of Forensic Science Board.
Legal services provided by MC&ET includes, but is not limited to, the following: reviewing legislation proposed by agencies, reviewing proposed regulations and amendments to regulations, representing agencies in federal and state courts, and providing advice on a wide range of subjects such as Freedom of Information Act ("FOIA") requests, contracts, and personnel issues. The Section also is responsible for representing the Department of Criminal Justice Services in administrative hearings involving individuals licensed by the agency such as bail bondsmen, bail enforcement agents, and private security guards.

During the year, MC&ET attorneys represented VSP in various courts around the Commonwealth in cases involving motions to vacate improperly granted expungements, and motions to quash subpoenas duces tecum where attorneys have attempted to subpoena VSP’s criminal investigative files in civil cases. Attorneys from the Section also represented VSP in several cases filed by registered sex offenders petitioning the court to be relieved of their registration requirements.

In addition, MC&ET attorneys worked with the Department of Military Affairs to assist with preparation for the 2016 National Guard Cyber Shield exercise in June and also worked closely with the State Fire Marshal to address ongoing jurisdictional issues at public institutions of higher education.

MC&ET devotes substantial resources to its service as counsel for the Department of Emergency Management ("DEM"). It advises DEM on its daily operations, as well as on the legality of emergency response actions during declared states of emergency. MC&ET continues to advise DEM on the Access and Functional Needs Advisory Committee to ensure inclusive emergency preparedness, and it serves on the Virginia Mass Care Task Force to assist in the development and implementation of a statewide sheltering strategy to effectively augment and support local and regional disaster sheltering. Finally, MC&ET attorneys participate in regional and national emergency management legal workgroups such as the National Capital Region Attorneys Group and the National Emergency Management Association Legal Counsel Workgroup. This service provides an opportunity for the attorneys to collaborate on legal issues specific to the emergency preparedness community and to develop regional and national contacts in the field.
Since the Commonwealth’s Sexually Violent Predators Act became effective in 2003, the Commitment Review Committee and the courts have referred a total of 1,516 cases to the SVP Section, as of the end of 2016. To date, the Section has filed approximately 800 petitions for civil commitment or conditional release and reviewed approximately 700 other cases where it was determined that offenders did not meet the statutory criteria to be declared a SVP.

In 2016, 102 cases were referred to the Office of the Attorney General and the Section filed approximately 42 petitions, made 409 court appearances, and traveled approximately 62,451 miles. Since 2003, 687 persons have been determined to be sexually violent predators, and 556 have been civilly committed to the Department of Behavioral Health and Developmental Services. The majority of those offenders are male and at the Virginia Center for Behavioral Rehabilitation, and female offenders are placed at Central State Hospital. Since 2003, approximately 300 offenders determined to be sexually violent predators have been placed on conditional release. At the end of 2016, 393 offenders were civilly committed and 190 offenders were on conditional release.

In 2016, the Section argued the following case in the Supreme Court of Virginia:

*Commonwealth v. Proffitt* – This case arose out of a trial in which the jury found that the respondent did not meet the SVP criteria. During the trial, the respondent made a motion to exclude two of the Commonwealth’s witnesses, both of whom were victims of the defendant’s sexual offenses, and the trial court granted the motion. On appeal by the Commonwealth, the court found that the trial court had abused its discretion in finding that the victims’ testimony would not be relevant. The court also found that the proffered testimony was neither unduly prejudicial, nor cumulative of the testimony provided by the Commonwealth’s expert witness. The Supreme Court reversed the trial court’s decision and remanded the case for a new trial, which is scheduled to take place in April 2017.
Medicaid Fraud Control Unit

The Health Care Fraud and Elder Abuse Section’s Medicaid Fraud Control Unit (“MFCU”) investigates and prosecutes allegations of Medicaid fraud as well as elder abuse and neglect in health care facilities. MFCU is comprised of investigators, auditors, analysts, computer specialists, attorneys, outreach workers and administrative staff. Over the past thirty-four years, MFCU has successfully prosecuted more than 279 providers in cases involving patient abuse and neglect or fraudulent acts committed against the Virginia Medicaid program, and has secured over $1,957,481,992 in criminal and civil recoveries. In addition to prosecuting those responsible for health care fraud or abuse, MFCU recovered $38,781,038 last year in court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements. MFCU has seen an increase in referrals as it continues to work with local jurisdictions and agencies throughout the Commonwealth.

MFCU has expanded its outreach efforts to seniors, law enforcement, and senior citizen service providers. For instance, MFCU is now helping to inform the community regarding the latest methods to effectively prevent and report elder abuse and is providing an additional resource for investigative referrals. MFCU has designated Community Outreach Coordinators located in Richmond, Tidewater, Roanoke, Abingdon, and Northern Virginia and is establishing and strengthening programmatic partnerships with the community organizations, government agencies, academic institutions, and law-enforcement personnel that assist Virginia’s senior population. MFCU publishes an Annual Report and a quarterly newsletter, in addition to maintaining a Twitter account and an active Facebook page.

MFCU had a successful year in 2016. By the end of the year, MFCU had obtained forty-one convictions and had ninety-six active criminal investigations pending. In addition, the MFCU Civil Investigations Squad opened eighty-eight new civil cases in 2016.

A few notable matters handled by the Unit in 2016 include the following:

_In re: Agape_ – In May 2016, MFCU worked with the U.S. Attorney’s Office for the Eastern District of Virginia and the Department of Health and Human Services Office of the Inspector General (“HHS-OIG”) to reach an agreement with Agape Health Management, Inc. d/b/a Agape Adult Day Healthcare Center (“Agape”). The negotiated agreement resolved allegations
that Agape had, on certain dates between June 15, 2009 and September 30, 2011, knowingly presented or caused to be presented false and/or fraudulent claims to the Virginia Medicaid Program for adult day health care (“ADHC”) and transportation services. Specifically, allegations were made that Agape knowingly presented or caused to be presented false and/or fraudulent claims for ADHC and transportation services that were purportedly provided to Virginia Medicaid recipients that were not present at or transported to the ADHC facility on the claimed dates of service. Further, the settlement addressed allegations that Agape knowingly presented or caused to be presented false and/or fraudulent claims for ADHC and transportation services purportedly provided to Virginia Medicaid recipients that were not present at or transported to the ADHC facility on March 4, 2011, a date when the facility was closed. In addition, the settlement resolved allegations that Agape knowingly made, used, or caused to be made or used false or fraudulent DMAS 302 forms for ADHC services purportedly provided to Medicaid recipients that were not present at or transported to the ADHC facility on the claimed dates of service. After several months of investigation and negotiation, Agape agreed to pay a total settlement amount of $385,917 to the United States and the Commonwealth of Virginia. The Commonwealth’s share of the settlement was $194,811.


According to the complaints, Wyeth sold Protonix Oral and Protonix IV through a bundle of sale arrangements in which a hospital could earn deep discounts on both drugs if it placed them on formulary and made them “available” within the hospital. Through this bundled arrangement, Wyeth sought to induce hospitals to buy and use Protonix Oral, which hospitals otherwise would have had little incentive to use, because other pre-existing oral proton-pump inhibitor (“PPI”) drugs were priced competitively and were considered to be as safe and effective. Wyeth wanted to control the hospital market because patients discharged from the hospital on Protonix Oral were likely to stay on the drug for long periods of time, rather than switch to
competing PPIs, during which time payers, including Medicaid, would pay nearly full price for the drug.

Under the Medicaid program, drug companies must report to the government the best prices they offer other customers for their brand name drugs. Based on these reported best prices, the drug companies pay rebates to the state Medicaid programs so that Medicaid, a large purchaser of drugs, receives the benefit of the same discounts drug companies offer to other large customers in the marketplace.

The government alleged that Wyeth hid from Medicaid the bundled discounts Wyeth gave to hospitals on Protonix Oral and Protonix IV. This settlement resolved allegations that Wyeth knowingly submitted false quarterly statements to the Centers for Medicare and Medicaid Services (“CMS”) of its Best Prices, as defined in 42 U.S.C. § 1396r-8(c)(1)(C), for Protonix Oral tablets and Protonix IV, from the third quarter of 2001 through the fourth quarter of 2006. Wyeth’s false statements to CMS resulted in significant underpayment of Wyeth’s Medicaid Drug Rebates to states for Protonix Oral tablets and Protonix IV. Relying on Wyeth’s Best Prices, CMS calculated and sent incorrect unit rebate amounts (“URAs”) to the State Medicaid programs that the states used to determine the quarterly federal rebate Wyeth owed to them for the drugs at issue. Thus, the incorrect URAs—based on Wyeth’s false Best Price reports—triggered significant state losses.

After significant active litigation and discovery, Wyeth agreed to pay $784.6 million to resolve the allegations. Of the total settlement amount, $21,683,328 was attributed to the United States and the Commonwealth of Virginia from claims submitted to the Virginia Department of Medical Assistance Services. The Commonwealth’s state share of the settlement was $12,557,592, plus interest.

Commonwealth v. Rachel Zacarias, and Commonwealth v. Arlene White (both in Russell Cir. Ct.) – On July 12, 2016, each defendant pleaded guilty to one count of abuse and neglect of an incapacitated adult resulting in serious bodily injury (felony). They were each sentenced to three years with all time suspended and two years of active probation. White was a medication aide and Zacarias was an administrator for a rest home. Neither White, Zacharias, nor the facility was certified to provide wound care to residents in the facility. Despite this, White and Zacarias provided wound care to a resident for a number of months. The resident ultimately was taken to a hospital because she was
having difficulty breathing. The resident displayed an extremely poor physical condition, and the attending physician diagnosed severe sepsis and severe malnutrition. The resident was admitted to the Intensive Care Unit the day of her transport and was pronounced dead later that day. The abuse and neglect caused serious bodily injury; however, the Medical Examiner found the cause of death was undiagnosed bladder cancer.

United States v. Beth Palin and Joseph Webb (W.D. Va.) – The defendants in this case ran a substance abuse treatment program, prescribing Suboxone, Subutex and generic buprenorphine for the treatment of opioid addiction. The defendants treated insured patients with two different expensive automated urine drug screens. Uninsured patients were treated using one, much cheaper non-automated test, referred to as a “point of care” or “quick cup” drug screen. The defendants billed for urine drug screens that were not medically necessary, upcoded the procedure, and/or the results of which were not used in directing the care of the patient. During the course of the scheme, the defendants caused fraudulent billing in the amount of $12,474,147 to be submitted to Virginia Medicaid, TennCare, Medicare and private insurance companies, and received over $1,142,942 in payments to which they were not entitled. The defendants also paid kickbacks to various individuals for referring Medicaid and Medicare eligible patients to the clinic for treatment. In addition, the defendants received kickbacks for referring Medicaid and Medicare eligible patients to other clinics for similar fraudulent treatment.

The defendants were indicted on September 23, 2014, upon the following charges: one count of healthcare fraud, one count of conspiracy to commit healthcare fraud, one count of offering a kickback, and one count of paying a kickback. On April 7, 2016, following a bench trial, the defendants were found guilty of health care fraud and conspiracy to commit health care fraud. On August 16, 2016, the defendants were sentenced to thirty-six months in federal prison and ordered to pay $1,436,887 in restitution.

Commonwealth v. Samantha Hart (Norfolk Cir. Ct.) – On November 2, 2016, the defendant pleaded guilty to two counts of Medicaid fraud and three counts of obtaining money by false pretenses. On one Medicaid fraud charge, the defendant was sentenced to ten years with ten years suspended for fifteen years. On the remaining Medicaid fraud charge, the defendant was sentenced to one year with one year suspended for 15 years. On the first count of obtaining money by false pretenses, the defendant was sentenced to ten months’ active
incarceration. On the remaining two counts of obtaining money by false pretenses, the defendant was sentenced to two years with two years suspended for fifteen years. In addition, she was ordered to pay $64,887 in restitution and barred from participating as a provider in Medicaid programs for ten years. The defendant, a Medicaid recipient, received attendant care and respite care services under a consumer directed waiver program. She fired her aide in late 2009. Following the aide’s termination, the defendant continued to submit timesheets in the former aide’s name for two years. When interviewed, the defendant admitted that she had submitted timesheets in the aide’s name without the aide’s permission. In total, the defendant submitted fifty-eight timesheets on which she claimed that her former aide had provided 7,291.5 hours of attendant and respite care. As a result of these falsified timesheets, Medicaid was overbilled by an amount of $64,887.

**Tobacco Enforcement Unit**

The Tobacco Enforcement Unit administers and enforces the Tobacco Master Settlement Agreement (“MSA”), a 1998 agreement between forty-six states and the leading cigarette manufacturers. In that effort, the Unit works with the National Association of Attorneys General Center for Tobacco and Public Health as well as other MSA states. During 2016, the Commonwealth received more than $113 million in payments from the participating manufacturers. MSA settlement funds are used to fund medical treatment for low-income Virginians, to stimulate economic development in former tobacco growing areas, and to establish programs to deter youth smoking and prevent childhood obesity.

The Unit’s enforcement efforts also include maintaining the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, and collecting information on cigarette stamping activity throughout the Commonwealth. The Unit enforces the MSA’s implementing and complimentary legislation through review, analysis, and investigation of manufacturer applications to sell cigarettes in the Commonwealth, investigation of alleged violations of law, representation of the Commonwealth in actions under the Virginia Tobacco Escrow Statute, audits of Tax Stamping Agents, retail inspections, seizures of contraband products, and participation on law-enforcement task forces with federal, state, and local agencies to combat cigarette trafficking. Specifically, in 2016 the Unit conducted 1,685 retail inspections, seized 715 packs of contraband cigarettes,
filed 14 civil cases involving the destruction of seized contraband, investigated more than 140 potentially false businesses involved in cigarette trafficking, conducted 5 stamping agent facility inspections, performed 12 stamping agent field audits as well as additional desk audits, testified in cigarette trafficking cases, assisted the Tax Department and/or law-enforcement agencies with more than 30 investigations and background checks, assisted with 14 search warrants, presented 6 training classes on cigarette trafficking to law enforcement, and certified 32 cigarette manufacturers as compliant with Virginia law. Pursuant to legislative authority, the Unit also maintained a list on the Attorney General’s website of persons who, because of certain criminal convictions involving cigarette trafficking, can no longer be authorized holders of cigarettes in Virginia. Members of the Unit also followed tobacco legislation in the General Assembly and provided information to the Virginia State Crime Commission for their study of cigarette trafficking in the Commonwealth.

**COMMERCE, ENVIRONMENT, AND TECHNOLOGY DIVISION**

The Commerce, Environment, and Technology ("CET") Division provides comprehensive legal services to secretariats, executive agencies, state boards, and commissions for much of the Commonwealth’s government. Composed of three Sections—Environmental; Financial Law and Government Support; and Technology and Procurement—the Division provides legal advice across a wide range of substantive areas, including guidance on matters of employment, contracts, technology, purchasing, environment, and the regulatory process. The Division’s attorneys regularly assist state agencies with complex and sophisticated transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

**Financial Law and Government Support Section**

The Financial Law and Government Support Section ("FLAGS") provides legal counsel to a wide variety of agencies, boards, and commissions, including those reporting to the Secretaries of Administration, Agriculture and Forestry, Commerce and Trade, Commonwealth, Finance, Public Safety and Homeland Security, and Veterans and Defense Affairs, as well as to the Secretariats. FLAGS attorneys provide representation and advice on regulatory enforcement, administrative appeals, litigation, employment matters, FOIA matters, and contract negotiations.
FLAGS continues to represent the Commonwealth on state and federal elections matters through its representation of the State Board of Elections and the Department of Elections. The 2016 presidential primaries and general election brought a surge of emergency litigation in federal court alleging the unconstitutionality of various Virginia election laws. The subject matter of these suits included—among other things—a challenge to Virginia’s party primary process; the contesting of ballot access standards applicable to presidential candidates; a request for a preliminary injunction to extend the voter registration deadline; and a challenge to Virginia’s method of allocating presidential electors. Additionally, redistricting litigation continued in state and federal courts during the year.

The Attorney General enjoys qualified beneficiary status with respect to charitable trusts and also works with charitable institutions to ensure compliance with the terms of charitable gifts. In this role, the Attorney General continues to work with Sweet Briar College following its 2015 closure attempt and the subsequent mediation that brokered an agreement to save the College. Section attorneys are in regular communication with College administrators to release restrictions on charitable gifts when appropriate.

The Section represents the Virginia Department of Agriculture and Consumer Services (“VDACS”) and the boards and commissions concerned with agriculture, commodities, and charitable gaming, including the Milk Commission, the Wine Board, and the Charitable Gaming Board. In 2016, FLAGS attorneys were instrumental in advising VDACS as it entered into memoranda of understanding with the Virginia Department of Health related to farmers markets. The MOUs allow the agencies to work collaboratively to eliminate unnecessary overlapping inspection authority. VDACS also oversaw the launch of the Virginia Industrial Hemp Research Program in 2016. FLAGS attorneys helped VDACS obtain the necessary licenses to import hemp seed and launch the program. As part of this program, VDACS partnered with Virginia Tech, James Madison University, and Virginia State University to research optimal growing conditions and economic viability of industrial hemp as a crop in Virginia.

The FLAGS Section also advises the Virginia Racing Commission (“VRC”). The VRC made various licensing decisions in 2016 concerning the new alliance horsemen’s group—the Virginia Equine Alliance—created by 2015 amendments to the Code of Virginia. FLAGS advised the VRC concerning
these license applications as well as a number of financial decisions made by the Virginia Horsemens’s Benevolent and Protective Association in support of these efforts. FLAGS also assisted the VRC with review and renewal of advance deposit wagering licenses in Virginia. These licenses, together with the activities of the Virginia Equine Alliance, will provide meaningful financial support to the Virginia horse racing industry in 2017 and beyond.

FLAGS serves as agency counsel to the Department of Veterans Services (“DVS”). A point of focus this year was in collaborating with DVS to improve its policies and procedures for the administration of veterans’ benefits for higher education. Also during 2016, DVS learned that veterans’ disability benefits claims files were discovered in an abandoned public storage unit rented by a former DVS employee. Hundreds of the claims were never filed with the Veterans Administration resulting in a delay of disability benefits to these veterans. FLAGS worked closely with DVS to develop an action plan to provide identity theft protection and compensate these veterans for their loss.

As part of an initiative of the Attorney General to directly benefit veterans, FLAGS attorneys established a legal clinic to offer basic estate planning services to Virginia veterans and their spouses. Six clinics were held in different locations throughout Virginia over the course of the year, providing services to more than 180 veterans and spouses. Plans are underway to schedule additional clinics in 2017. These clinics are the result of a partnership with DVS and the Virginia State Bar.

During the year, FLAGS also collaborated with other Divisions in the Attorney General’s Office to draft outreach materials about legal resources and benefits for military families and veterans. In addition, FLAGS attorneys are currently working with the Programs and Community Outreach Section to plan a clinic in a federal penitentiary to assist the incarcerated veteran population.

FLAGS represents the Department of Labor and Industry (“DOLI”) and the Virginia Employment Commission (“VEC”). The number of VEC unemployment benefit appeals to Virginia Circuit Courts handled by FLAGS continued to decrease from prior years. The number of appeals declined in 2016 to 61 petitions for judicial review, compared to 75 petitions in 2015, and 91 petitions in 2014.

A number of attorneys in the FLAGS Section provide advice to the agencies and boards directly concerned with the finances of the Commonwealth,
including the Departments of Planning and Budget, Taxation, Treasury, and Accounts; the Comptroller; and the Auditor of Public Accounts. For the Department of Taxation ("TAX"), the FLAGS Section serves as litigation counsel in matters challenging the assessment and collection of state taxes, including retail sales and use taxes and corporate and individual income taxes.

FLAGS defended a number of significant litigation matters for TAX during 2016. One ongoing grouping of cases concerns the requirement that corporate taxpayers add back royalty expenses subject to § 58.1-402(B)(8) of the Code of Virginia to their federal taxable income. Four Virginia corporate taxpayers continued to prosecute their individual suits in circuit courts against TAX. Their complaints allege that the royalties paid to their related members were subject to an exception and thus not required to be added back to their federal taxable income. In one of these suits, Kohl’s Department Stores, Inc. v. Virginia Department of Taxation (Richmond Cir. Court), the court granted summary judgment in favor of TAX. The Supreme Court of Virginia granted an appeal of this judgment.

The FLAGS Section successfully defended a claim—The Corporate Executive Board Company v. Virginia Department of Taxation (Arlington Cir. Ct.)—by a corporate taxpayer alleging that the Commonwealth’s corporate income tax statutes unfairly attribute too large a portion of the taxpayer’s nationwide income to Virginia and that it should be allowed an alternative method of apportionment. In 2016, the Supreme Court of Virginia denied the taxpayer’s appeal of the circuit court’s decision to grant summary judgment in favor of TAX. A similar case contesting different tax years remains pending in the Arlington Circuit Court. The Section also defended a challenge to TAX’s interpretation of the collection statute of limitations and the applicable statute of limitations for overpayment credits. Both matters remain pending.

Finally, FLAGS also worked closely with TAX in challenges to its determinations of the amount of tax credits allocated to taxpayers who donated conservation easements in accordance with the Virginia Land Conservation Incentives Act (the “Act”). The Section continued representing TAX in a number of litigated claims under the Act in 2016, including: James K. Woolford v. Virginia Department of Taxation (King William Cir. Ct.); Valley Medical Center, LLC v. Virginia Department of Taxation (Loudoun Cir. Ct.); Cook v. Department of Taxation (Lynchburg Cir. Ct.); and Bluff Point Holdings, LLC v. Department of Taxation (Albemarle Cir. Ct.). In these cases, TAX determined
that the value of the donated easement was not properly supported, as required by the *Code*, to receive the claimed tax credits. In the *Woolford* matter, summary judgment was granted to TAX by the trial court, based on the failure of the taxpayers to support their claim for tax incentives with a qualified appraisal offered by a qualified appraiser. At the end of 2016, an appeal was pending before the Supreme Court of Virginia. TAX settled the Valley Medical Center matter with the easement donor prior to trial.

The Department of the Treasury, Division of Risk Management administers the Commonwealth’s plans for management of financial risks associated with public liability and property damage exposures of state agencies and institutions, constitutional officers, political subdivisions and certain persons and organizations providing services to the public. Following a review of the risk management plans, the FLAGS Section recommended to the Treasurer that the plans be revised. Certain events, court decisions, litigation, and legislation had changed the scope and focus of the Commonwealth’s risk management programs and the plans since they had last been signed in 2005 by Governor Warner. Following extensive revisions by FLAGS attorneys and outside counsel, the Treasurer and the Secretary of Finance recommended that the Governor sign the updated, revised plans.

The FLAGS attorneys who work with the Commonwealth’s financial agencies also advise a number of authorities who issue bonds for educational and revenue-producing capital projects such as the Virginia Public Building Authority, the Virginia College Building Authority, the Virginia Public School Authority, and the Virginia Small Business Financing Authority.

In addition to representation of agencies directly concerned with the finances of the Commonwealth, FLAGS attorneys advise a number of boards and agencies whose mission is to foster increased expansion of the Commonwealth’s economy including the Virginia Economic Development Partnership, the Virginia Tourism Authority, and the Virginia Film Office. The Section also represents the Tobacco Region Revitalization Commission (“TRRC”). Section attorneys provided TRRC with legal guidance in enacting policy changes which will significantly increase the efficacy of TRRC and stability of its funds for future years.

The FLAGS Section represents the Department of Alcoholic Beverage Control (“ABC”). FLAGS attorneys litigated a number of appeals of administrative agency decisions in Virginia circuit courts, the Court of Appeals
of Virginia, and the Supreme Court of Virginia. Favorable decisions were rendered in every case, including one published opinion from the Court of Appeals. The Section continues to serve as general counsel to ABC, advising the agency on licensing, employment disputes, marketing efforts, regulatory action, and law-enforcement operations. FLAGS attorneys provided extensive guidance and advice during the year related to the complex transition of the agency to the Alcoholic Beverage Control Authority in 2018. Aside from agency representation in alcohol law matters, FLAGS attorneys represented the Attorney General as Intervenor on behalf of the Commonwealth in the U.S. District Court for the District of Massachusetts in a case challenging the constitutionality of provisions of the Virginia Beer Franchise Act.

This FLAGS Section also provides legal advice to certain independent agencies including the Virginia Retirement System (“VRS”) and the Virginia Workers’ Compensation Commission.

**Environmental Section**

The nine attorneys of the Environmental Section represent agencies reporting to the Secretary of Natural Resources, the Secretary of Agriculture and Forestry, the Secretary of Health and Human Resources, the Secretary of Finance, and the Secretary of Commerce and Trade. Its clients include the Department of Environmental Quality (“DEQ”); the Department of Conservation and Recreation; Soil and Water Conservation Districts; the Department of Taxation; the Department of Forestry; the Division of Consolidated Laboratory Services of the Department of General Services; the Department of Game and Inland Fisheries; the Marine Resources Commission; the Environmental Health Division of the Virginia Department of Health; the State Veterinarian’s Office and Consumer Protection Division of the Department of Agriculture and Consumer Services; and the Department of Mines, Minerals, and Energy. The attorneys in this Section provide a wide range of legal services, including litigation, regulatory and legislative review, counseling, transactional work, representation in personnel issues, responses to subpoenas issued to agency personnel, real estate work, and related matters.

The Environmental Section represents DEQ’s Air; Renewables; Water; Land Protection and Revitalization (Waste); and Enforcement divisions.

The Section represented the DEQ’s Air Pollution Control Board in an ongoing case in the Circuit Court for the City of Richmond challenging the
issuance of a permit to Dominion to construct and operate the Greensville power plant. It also represented the Commonwealth in cases involving challenges to EPA rulemakings for carbon dioxide under Clean Air Act Sections 111(d) and 111(b) (i.e., Clean Power Plan litigation), as well as the appeal of the Mercury Air Toxics Standard (“MATS”) before the D.C. Circuit. Throughout the year, the Section advised the Air Division on a variety of legal matters including rulemakings and permits.

In its representation of the DEQ Renewables program, the Section prevailed in the Court of Appeals of Virginia in Karr v. DEQ, an APA challenge to DEQ’s renewable energy permit for wind projects. The Section continues to advise the Renewables program on permits for renewable facilities.

The Section successfully represented DEQ’s Water Division in Potomac Riverkeeper v. State Water Control Board (City of Richmond Cir. Ct.), an administrative appeal of a permit issued by the State Water Control Board to Virginia Electric and Power Company to discharge treated coal-ash wastewater in conjunction with the closure of the utility’s coal-ash storage facility at its Possum Point Power Station. The court entered an order in favor of the State Water Control Board finding that the permit was in accordance with law and regulation and that the permit protects instream water uses. The Section also defended three other challenges to the Possum Point Power Station permit and to a Bremo Power Station permit: all were voluntarily withdrawn by the respective petitioners.

The Section also successfully represented the Water Division in Kelble v. State Water Control Board (City of Richmond Cir. Ct.), an administrative appeal of regulations pertaining to the land application, marketing, and distribution of Biosolids. The court entered an order in favor of the State Water Control Board in the case.

During 2016, the Section brought enforcement actions against an individual in Greene County for the mismanagement of poultry waste which posed a threat to nearby surface waters and against a group of responsible parties in Hanover County for the unlawful destruction of a wetlands mitigation site. The first matter resulted in cessation of the environmental harm. The second matter is still pending. There, the Section is seeking restoration of the wetlands and a civil penalty.
The Section also has filed suit on behalf of DEQ against Belvedere IIA, LLC and Stonehaus, LLC, who have longstanding and ongoing violations of the State Water Control Law at their construction site. The violations include a six-month period where the companies were operating without a permit, and two occasions where the companies discharged sediment into a nearby tributary without a permit. The most recent inspection revealed that the companies were still failing to properly install measures for stormwater and erosion and sediment control. The Section seeks an injunction to halt the ongoing issues and the imposition of civil penalties to address the past issues.

The Section advised the DEQ Land Protection and Revitalization Division on a number of matters in 2016.

The Section successfully finalized a proposed consent decree with DuPont for the largest natural resource damages claim in Virginia history, and the eighth largest ever in the United States, associated with mercury contamination from its former facility in Waynesboro. The Section continues to work with DEQ concerning a large Superfund remediation project on the Atlantic Wood Industries property in Portsmouth. It was able to obtain a settlement offer from the U.S. Navy for its contribution to the site, and it will continue settlement negotiations in 2017.

The Section represented the Land Protection and Revitalization Division in an APA appeal brought by Hampton Roads Sanitation District (Hampton Roads Sanitation District v. DEQ). HRSD argued that the Department erred in deciding that HRSD’s use of biosolids ash as fill to raise the level of a farm near Back Bay was not exempt from the Virginia Solid Waste Management Regulations. HRSD has appealed the circuit court’s decision in favor of DEQ to the Court of Appeals of Virginia. The Section is handling the appeal.

During the year, the Section advised the Department of Forestry on multiple real estate matters (easements, acquisition of additional property, land swaps), as well as matters related to the Commonwealth’s Conflict of Interests Act, FOIA, and administrative enforcement actions. The Section continued the positive momentum created in 2015 concerning real estate transactions and conservation easement donations to the agency, with the agency completing a record number of these transactions in 2016.

The Section represented the Virginia Department of Health (“VDH”) in multiple litigation and non-litigation matters in 2016. On the litigation side, it
represented the Commissioner of Health in a civil action seeking injunctive relief to stop a hotel owner from continuing to operate the hotel without a permit. Shortly after the suit was filed, the hotel owner applied for and obtained a permit from VDH. With regard to non-litigation matters, the Section continued to assist VDH in developing strategies regarding the regulation of hotels that accommodate long-term residents. The Section also reviewed and provided suggested revisions to proposed amendments to the Campground Regulations.

During the year, the Section worked with VDH on the best way to ensure continued legal authority for its beach advisory and harmful algal bloom program. It also provided advice to the Office of Drinking Water regarding its legal authority to enact a lead service line replacement grant program for localities and waterworks. In addition, the Section provided guidance to VDH’s Office of Environmental Health Services and Office of Drinking Water on issues regarding hearing officer disqualification raised by § 2.2-4024.1 of the Code of Virginia.

The Section continues to advise VDH regarding an ongoing dispute, which began in 2014, between two homeowners regarding a shared septic system and the system’s performance. This has included assisting the agency at a formal hearing before the Sewage Handling and Disposal Appeal Review Board, as well as ongoing efforts to assist the agency in pursuing enforcement measures to ensure compliance with the law by the homeowners.

During 2016, the Section also reviewed and provided fast-track amendments to the Alternative Onsite Sewage Regulations, and repeal of regulations concerning authorized onsite soil evaluators.

The Section participated in the Zika Task Force during 2016 and, along with an attorney with the Health Section of HESS, took the lead in revising a template emergency order by the Commissioner of Health for mosquito surveillance and control activities.

The Section provided advice to VDH during 2016 on several issues regarding the APA, FOIA, requests for variances from regulations enforced by VDH, revising permits for waterworks, the regulation of farmer’s markets, and other matters concerning interpretation of the law as it relates to VDH’s Office of Environmental Health Services and Office of Drinking Water.
The Section represented the Department of Game and Inland Fisheries in various litigation and non-litigation related matters in 2016. Perhaps most significantly, it assisted the Department in negotiating a settlement of a long-running dispute over its management of public hunting and fishing rights on private land over which it holds a hunting and fishing easement. It also offered assistance to the Department in conducting an informal fact-finding conference that ended with the permanent revocation of a permit to operate a fox pen in Carroll County.

The Section represented the Marine Resources Commission in multiple administrative appeals. It secured rulings affirming the Commission’s decisions to revoke a number of commercial fishermen’s licenses and fishing privileges for serious violations of the law. It also obtained a Virginia circuit court ruling affirming the Commission’s decision to lease certain parcels of general oyster planting grounds, and it currently represents the Commission in an appeal of that matter. Finally, it obtained a judgment in favor of a marine police officer who was accused of using excessive force in arresting a suspect for minor fisheries violations.

The Section continues to represent the Department of Mines, Minerals and Energy by defending the moratorium on uranium mining found in § 45.1-283 of the Code of Virginia. In the fall of 2015, it successfully prosecuted a motion to dismiss before the U.S. District Court (W.D. Va.) in Virginia Uranium, Inc. v. McAuliffe (now on appeal to the Fourth Circuit). Virginia Uranium, Inc. filed a companion suit in the Wise County Circuit Court challenging the moratorium on the grounds that § 45.1-283 is a taking for private use. This matter is currently in the discovery phase.

Through the fall of 2016, the Section actively supported the Department of Mines, Minerals and Energy throughout the serial Chapter 11 bankruptcy filings of major coal mining companies, including advising DMME on the issue of insufficient bonding to cover reclamation liabilities. In coordination with the federal government and certain other states, the Section also represented DMME in several matters against coal companies that had been repeated violators of state and federal environmental laws, resulting in agreed dispositions involving the payment of penalties, agreements on future penalties, and mechanisms for maintaining compliance with applicable environmental laws. With the exception of working with the Department to monitor these matters for compliance, these matters are concluded.
The Section had an active year in its representation of Virginia’s Soil and Water Conservation Districts. It advised numerous Districts on achieving compliance with the Conflict of Interest Act, and Section staff traveled to four locations within the Commonwealth to educate the Districts on these matters. It negotiated a favorable settlement for the Mountain Castles Soil and Water Conservation District of a claim by Getty Images of improper use of a copyrighted image in one of the District’s newsletters. It obtained judgment in Charlotte County General District Court to recover a three-year-old unpaid rental fee for the Southside Soil and Water Conservation District. It also assisted the Loudoun, Holston River, and Big Sandy Soil and Water Conservation Districts in resolving cost-share violations without litigation. The Section also advised numerous other Soil and Water Conservation Districts on how to properly respond to FOIA requests and on other matters.

The Section assisted the Department of Conservation and Recreation (“DCR”) with a unique agreement allowing it to assume operation of the Natural Bridge of Virginia as a state park, saving the property owner from imminent foreclosure on the iconic property. It also assisted DCR (as well as the local Soil and Water Conservation District) in successfully resolving a dispute with a neighboring property owner concerning a district dam rehabilitation project in Shenandoah County. In addition, it assisted DCR in completing numerous property transactions, including donation of conservation easements, acquisition of additional properties for natural area preserves and state parks, and utility and right of way transactions necessary to support expansion of the state park system.

The Animal Law Unit handled more than 160 criminal, civil, regulatory, training, and other animal-related matters, including assisting multiple localities with animal cruelty, seizure, neglect, and animal fighting prosecutions. The Animal Law Unit was appointed as special prosecutor for fourteen animal cruelty cases. It advised the Department of Agriculture and Consumer Services on multiple animal-related matters, including enforcement actions against private and public animal shelters. It continued work with the U.S. Attorney’s Office for the Western District of Virginia to prosecute the operators of one of the largest cock fighting rings in the region. Four individuals were indicted. In addition, one of the defendants was sentenced to twenty-four months’ incarceration for his role in the conspiracy to fight animals and allowing his minor son to fight animals.
Technology and Procurement Law Section

The Technology and Procurement Law Section provides legal counsel to the Virginia Information Technologies Agency, the Department of General Services, the Information Technology Advisory Council, the Secretary of Technology, the 9-1-1 Services Board, the Virginia Geographic Information Network Advisory Board, the Innovation and Entrepreneurship Investment Authority, the Secretary of Administration (for intellectual property, procurement, and supplier diversity issues), the State Corporation Commission (for procurement matters), the Department of Small Business and Supplier Diversity (for procurement and supplier diversity issues), and the Identity Management Standards Advisory Council, as well as dozens of other agencies and institutions in areas involving contracts, technology issues, intellectual property, procurement, and ethics rules.

In 2016, the Section provided legal assistance needed for Commonwealth initiatives such as transitioning the Commonwealth’s information technology infrastructure to a modernized, multi-supplier environment, ensuring equal opportunity and access in state contracting and public service, establishing a Commonwealth intellectual property policy, and other areas.

The Section provided all necessary legal support for the Commonwealth’s central procurement agencies, the Department of General Services and Virginia Information Technologies Agency, including legal review or drafting of revisions to procurement regulations, a comprehensive legal review of their centrally-recommended standard terms and conditions, and legal assistance regarding procurements, contracts, and associated disputes, participation in joint procurements with other states, and employment disputes.

The Section continued providing legal assistance needed by VITA in its management of the Commonwealth’s Comprehensive Infrastructure Agreement, and, as expiration of this critical agreement approaches, disentanglement from the current contractor and a transition to replacement providers. The Section is providing all necessary legal service to transition the Commonwealth’s information technology infrastructure from the current, single-supplier model to a multi-supplier structure to afford the Commonwealth greater flexibility in responding to any performance shortcomings and replacing and upgrading key components without jeopardizing the entire infrastructure. This assistance will continue for the next two years and, during 2016, it included developing updated contracts, advising about numerous legal issues related to the complex, phased
procurements, and negotiating on behalf of VITA to secure new contracts for the Commonwealth’s email and mainframe services. The Section also drafted a memorandum on data-sharing laws to help VITA prepare its report on this topic in response to Executive Directive 7.

The Section assisted the Department of Small Business and Supplier Diversity with revising and updating its regulations for the certification of small, women-, and minority-owned businesses in order to improve administrative efficiency, provide greater consistency in the agency’s certification decisions, and afford more clarity to applicant businesses regarding certification processes and requirements. The Section also helped the 9-1-1 Services Board develop and negotiate data sharing agreements with Virginia localities, to enable new 9-1-1 data analysis.

Additionally, the Section provided educational services, such as procurement law training for public procurement professionals at the Department of General Services’ annual Public Procurement Forum, and a presentation on contract law for the Capital Area Purchasing Association.

The Section continued providing conflict-of-interest support on a Commonwealth-wide basis, including assisting the Attorney General’s Opinions Counsel with analysis and drafting of formal and informal opinions requested by Commonwealth officers, employees, and legislators on conflict of interests and public access to records, providing conflict-of-interest and procurement ethics orientation for senior government officials, and providing informal coordination assistance to the Virginia Conflict of Interest and Ethics Advisory Council.

The Section also assisted regular counsel for dozens of other Commonwealth agencies, institutions, and boards, or the client agencies directly, in regard to procurement and contract problems, technology acquisitions, data breach, electronic transactions, conflict-of-interest issues, and intellectual property matters. These included providing necessary legal support for: the Department of Medical Assistance Services’ procurement of a multicomponent, federally-mandated Medicaid Enterprise System; the Virginia Department of Health’s negotiation to take over the lead role in a multistate contract for the development and maintenance of the federally funded software to manage key aspects of the Virginia Special Supplemental Nutrition Program for Women, Infants and Children; the Virginia Department of Health’s statewide infant formula procurement, including response to protests and successful defense of a losing offeror’s lawsuit seeking to shut down the procurement; a
procurement for the Department for the Blind and Visually Impaired to obtain vending services at highway rest stops, including defense against the incumbent vendor’s lawsuit that sought an injunction to stop the Department from moving forward with a new provider; the Department of Corrections’ television services contract dispute, which was ultimately settled to the Department’s satisfaction; and successfully resolving the action the Section filed for injunction on behalf of the Virginia Department of Health against a private contractor in a manner that returned to the Commonwealth all of the data in a registry of citizen advance health care directives to enable continued access to this by citizens and their health care providers. Intellectual property services for other state agencies or their counsel included advice and filing of a provisional patent application in the U.S. Patent and Trademark Office on a device invented by a Virginia Department of Transportation employee, guidance to help agencies respond to and resolve allegations of copyright infringement, and helping several agencies with filings necessary in the U.S. Patent and Trademark Office to acquire or maintain trademark rights in their respective marks.

CIVIL LITIGATION DIVISION

The Civil Litigation Division of the Attorney General’s Office advances the rights of consumers, victims of discrimination and malpractice, utility ratepayers, and taxpayers. It also defends the interests of the Commonwealth, its agencies, institutions, and officials in civil matters. It handles civil enforcement actions pursuant to Virginia’s consumer protection and antitrust laws, advises consumers with questions and complaints, and mediates disputes between consumers and businesses. It also prosecutes licensed medical professionals who have acted contrary to law, investigates civil rights and fair housing claims, pursues debts owed Commonwealth agencies, and serves as consumer counsel in regulatory matters before the State Corporation Commission.

The Division consists of six sections: Trial, Consumer Protection, Insurance and Utilities Regulatory, Debt Collection, Health Professions, and Human Rights and Fair Housing. Two of the sections—Trial and Consumer Protection—are divided into separate internal working units.

**Trial Section**

The Trial Section consists of the General Civil, Employment Law, and Workers’ Compensation Units. It manages most of the civil litigation filed
against the Commonwealth, including tort claims, civil rights issues, contract issues, denial of due process claims, employment law matters, election law issues, Birth Injury Fund claims, FOIA challenges, contested workers’ compensation claims, Title IX claims, and constitutional challenges to state laws. The Section also supports the Solicitor General’s Office and represents the Commonwealth in matters involving Uninsured Motorists/Underinsured Motorists and the Birth-Related Neurological Injury Compensation Program.

General Civil Unit

The General Civil Unit provides legal advice to the Virginia State Bar, the Virginia Board of Bar Examiners, the Birth Injury Fund Board, and the Commonwealth Health Research Board. The Unit also advises state courts and judges. In 2016, it represented the Virginia State Bar in eleven new matters, including four attorney disciplinary appeals before the Supreme Court of Virginia and two unauthorized practice of law prosecutions. In addition to the matters continued from prior years, in 2016 the Unit received 226 new matters, including eighteen new matters for the Birth Injury Fund Board.

The Unit’s significant cases during the year included several civil rights lawsuits. In *Roxanne Adams, Administrator of the Estate of Jamycheal M. Mitchell v. Naphcare, Inc.* (E.D. Va.), the estate of an individual brought suit alleging that his death, which occurred while he was incarcerated in a regional jail, was due to the mistreatment and neglect of jail officials. This civil rights action was brought for $60,000,000 against more than forty defendants. The Unit entered a motion to dismiss on behalf of the two court clerk defendants, which remained pending at the end of 2016.

*Latson v. Clarke* (W.D. Va.) involved an inmate who was conditionally pardoned by the Governor and transferred to a hospital in Florida for mental health care treatment. The plaintiff claims that during his incarceration in Virginia, he was unconstitutionally placed in solitary confinement and denied care. The Unit’s motion to dismiss remained pending at the end of 2016.

Certain civil rights cases handled by the Unit during the year challenged law-enforcement response to suspected criminal activity. In *Johnson v. Virginia Department of Alcoholic Beverage Control* (W.D. Va.), the plaintiff brought false arrest and excessive force claims against the Virginia Department of Alcoholic Beverage Control (“ABC”) in connection with his arrest outside a bar near the University of Virginia. The court granted the Unit’s motion to dismiss
in part, ruling that the plaintiff’s arrest was arguably supported by probable cause, that the agents were nonetheless entitled to qualified immunity, and that ABC was immune from liability under the Eleventh Amendment. At the end of 2016, the action was in the discovery phase on the remaining claims with a trial date scheduled for July 25, 2017 through July 28, 2017.

Simpson v. Commonwealth (E.D. Va.), a wrongful death case, and Wells v. McAuliffe (E.D. Va.), a personal injury case, also involved allegations of excessive force. In each of those matters, the suspect opened fire before law enforcement employed force. The court granted the Unit’s motion to dismiss in Simpson, and the plaintiff voluntarily dismissed Wells.

In other law-enforcement-related litigation, Patterson v. Lawhorn (E.D. Va.), the plaintiff claimed that a Virginia Department of Taxation agent maliciously prosecuted her for tax evasion. The court ordered summary judgment in favor of the defendant, finding, inter alia, a lack of malice and ruling that probable cause existed for the prosecution. At the end of 2016 the matter was on appeal in the Fourth Circuit.

Robinson v. Davis (W.D. Va.) was another malicious prosecution action in which the plaintiff alleged he was subjected to discrimination, falsely imprisoned, and maliciously prosecuted by a coach at a Virginia community college. The Unit obtained a defense verdict in a federal jury trial in Danville. No appeal followed.

The Unit also obtained successful outcomes in two federal lawsuits alleging violations of Title IX and related statutes prohibiting discrimination in education. Those cases were Butters v. James Madison University (W.D. Va.), and Altschuler v. Longwood University (E.D. Va.).

The Unit remains engaged in two significant Title IX claims. Howard v. University of Virginia (W.D. Pa.) asserts violations of Title IX, the Rehabilitation Act, the Americans with Disabilities Act, Section 1983, and common law tort claims. The plaintiff alleges that members of the University of Virginia football team discriminated against him and subjected him to an environment of hazing and harassment that culminated in his being coerced into a harmful physical altercation. At the end of the year, the matter was pending but had not been served. In Orsted v. the University of Mary Washington (E.D. Va.), a student claims gender and racial discrimination motivated the university’s alleged refusal to permit the student to try out for the basketball
team. At the end of the year, the parties were engaging in dispositive motions practice.

Other federal litigation involved defending against alleged First Amendment violations. The Unit recently argued and is awaiting a ruling on its motion to dismiss in *Deegan v. Moore* (W.D. Va.). Deegan involves an alleged violation of a student’s right to free speech. The student claims that her community college unconstitutionally subjected her to misconduct proceedings after she spoke out and interrupted a class lecture to complain about the nature of the program’s curriculum. The case remained pending at the end of 2016.

In addition to its federal cases, the Unit handled several significant state court cases. In *Deeds v. Commonwealth*, pending in Bath County Circuit Court, State Senator Creigh Deeds brought an action for damages against the Commonwealth. He alleges that his son’s suicide was the result of the Commonwealth’s negligent failure to provide adequate mental health care. The Unit’s court filings seek the Commonwealth’s dismissal.

In a separate wrongful death case, *Gaines v. Commonwealth* (City of Richmond Cir. Ct.), the court dismissed the Commonwealth as a defendant because the plaintiff’s notice of claim was defective under the Virginia Tort Claims Act. In *Talley v. Dominion* (City of Richmond Cir. Ct.), the plaintiff claimed negligence in the maintenance of a foot-bridge over Lake Anna after a young child drowned after falling from it. A successful resolution was reached in the case. In *Stanley v. Virginia Commonwealth University Health System Authority* (City of Richmond Cir. Ct.), a decedent’s estate filed suit in connection with a death which had resulted from an altercation with a security guard at a VCU pharmacy. The court dismissed the case with prejudice, ruling that the plaintiff’s negligence claim was barred by sovereign immunity. In *Godshall v. Ferguson* (Williamsburg/James City Cty. Cir. Ct.), a nonsuit was obtained in a malpractice claim against the College of William and Mary alleging negligent care in connection with the suicide of an undergraduate student.

The Unit also was involved in a significant personal injury case during the year. In this case, *Marshall v. Old Dominion University* (Norfolk Cir. Ct.), a former wrestling student alleges that coaches at the university negligently allowed or caused him to sustain concussive injuries. The case remains ongoing.
In another significant state court case, *Commonwealth v. Virginia Association of Counties Group Self Insurance Risk Pool f/k/a Virginia Association of Counties Risk Pool*, (New Kent Cir. Ct.) the parties sought a declaration of liability coverage, priorities, and limitations between the Commonwealth’s Risk Management Plan and a risk pool established by an association of Virginia counties. The Commonwealth prevailed after an appeal to the Supreme Court of Virginia, obtaining a $1.1 million settlement from the county association risk pool to reimburse the Commonwealth for funds expended that should have been paid by the county risk pool’s coverage.

The Unit represented the Virginia State Bar (“VSB”) in various appeals of right in the Supreme Court of Virginia. Two are significant here. In *Robinson v. Virginia State Bar*, the Supreme Court of Virginia affirmed a public reprimand against a lawyer for violating Disciplinary Rule 1.4(a) in connection with his representation of a client in marital settlement proceedings. In *Ekwalla v. Virginia State Bar*, the Supreme Court of Virginia affirmed the VSB Disciplinary Board’s decision to revoke an attorney’s license to practice law based on numerous violations of Disciplinary Rules.

Additionally, the Unit successfully resolved the case of *Manning v. Virginia Board of Bar Examiners* (E.D. Va.), a claim that the Virginia Board of Bar Examiners had violated Title II of the Americans with Disabilities Act regarding a matter of accommodation in the administration of the Virginia Bar Exam.

In representing the Birth-Related Neurological Injury Compensation Program (the “Program”), the Unit provides legal advice to the Birth Injury Fund Board and its Executive Director, defends appeals of Board decisions regarding specific claims for benefits to the Workers’ Compensation Commission, and represents the Program in eligibility determination cases from the Commission through the Court of Appeals of Virginia.

Five eligibility petitions were pending at the end of 2015, including one that was appealed to the Virginia Court of Appeals after information was provided for inclusion in the previous *Annual Report*. During the year, the Unit resolved four post-admission reimbursement claims, 14 fees and costs petitions, two van claims, a medical equipment claim, and an attendant care claim. The Unit also litigated eight eligibility cases to conclusion and saved the Program $78,047 through negotiations regarding attorney fee petitions and $1,339 through negotiations regarding pre-petition compensation requests. One of the
eligibility cases was dismissed, potentially saving the Program $2 million. At the end of 2016, eight eligibility cases remained pending.

In representing the Commonwealth Health Research Board (“CHRB”), the Unit provides legal advice to the CHRB and its Administrator. During 2016, the Unit reviewed and revised the documents governing the CHRB’s policies, procedures, and administration. It also drafted grant agreement amendments and addenda, reviewed and revised various contracts and memoranda of understanding, and provided advice concerning revisions to the CHRB’s governing law. The Unit also provided assistance in responding to inquiries from grant-funded project participants and potential grant applicants.

Employment Law Unit

The Employment Law Unit provided employment law advice to, or represented in litigation, many state entities, including the Central Virginia Training Center, the College of William and Mary, Department of Alcoholic Beverage Control, Department of Behavioral Health and Developmental Services, Department of Conservation and Recreation, Department of Corrections, Department of Health, Department of Human Resource Management, Department of Juvenile Justice, Department of Labor and Industry, Department of Criminal Justice Services, Department of Motor Vehicles, Department of Social Services, Department of Transportation, Department of Veterans’ Services, Indigent Defense Commission, George Mason University, Mary Washington University, Longwood University, Norfolk State University, Northern Virginia Training Center, Office of the Executive Secretary of the Supreme Court of Virginia, Old Dominion University, State Corporation Commission, Virginia Commonwealth University, Virginia Community College System, Southern Virginia Mental Health Institute, Virginia State Bar, Virginia State Police, Virginia State University, Virginia Workers’ Compensation Commission, Virginia Department of Aging and Rehabilitative Services, Virginia Department of Game and Inland Fisheries, Western State Hospital, and the Office of the Attorney General’s Division of Human Rights. The Unit also represented several state employee/officer defendants in employment-related litigation.

The Unit provided training to management and human resources personnel from various state agencies, including several of the Commonwealth’s public institutions of higher education. It also provided testimony in closed administrative sessions at the Supreme Court of Virginia. In addition to matters
continued from prior years, the Unit received thirty-six new lawsuits and reviewed and approved recommendations for fifty-four cases from the Division of Human Rights.

The Unit handled several significant employment law cases during the year. In *Saracini v. Department of Behavioral Health and Developmental Services* (Fairfax Cir. Ct.), the court ruled that the plaintiff’s brief was essentially an argument on the sufficiency of evidence and an attack on the reasonableness of agency policy, neither of which are reviewable by the court under the state grievance appeal procedure. The court denied the appeal from the bench. The plaintiff filed an appeal but failed to perfect it, and the Court of Appeals of Virginia dismissed the appeal.

In *Arceo v. Department of Social Services* (City of Richmond Cir. Ct.), a grievance appeal, the plaintiff was terminated from employment due to multiple disciplinary actions. The court denied his notice of appeal/petition for review, finding that he did not cite a legal basis in support of his claim that the decision of the hearing officer was contrary to law. The Court of Appeals of Virginia affirmed the decision of the circuit court.

Some of the other significant employment cases handled by the Unit involved defense of public institutions of higher education and the Virginia State Police. The Unit successfully defended *Earl v. Norfolk State University* (E.D. Va.), a case involving a male faculty member over age forty who alleged salary disparity and sued under the Equal Pay Act, Title VII, and the Age Discrimination in Employment Act. The suit was filed in 2013 as a class action. Only the Equal Pay Act claims of three plaintiffs survived the university’s motion for summary judgment. After a four-day jury trial, the court entered a verdict in favor of the university. The Fourth Circuit later affirmed the decision.

The Unit obtained a favorable outcome in *Ramsey v. Virginia Department of State Police* (E.D. Va.), in which a former state trooper alleged that she was discriminated against on the basis of sexual preference in violation of Title VII and that her termination violated Virginia’s public policy exception to the doctrine of at-will employment. The State Police had terminated the plaintiff for misusing the Virginia Criminal Information Network, and she was subsequently tried and convicted of thirteen misdemeanors of computer invasion of privacy. The Court of Appeals of Virginia affirmed her convictions, and the Supreme Court of Virginia denied a writ. After discussions between the parties, the civil suit was dismissed with prejudice.
In another significant case, Clark v. Virginia Department of State Police (Chesterfield Cir. Ct.), the plaintiff was a Virginia State Trooper. He was also a member of the U.S. Army Reserve who had reported for reserve duty for several years. The plaintiff claimed his supervisors had discriminated against him under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”). Specifically, he alleged that his superiors had made it difficult for him to report and participate in his reserve duty and had retaliated against him by failing to promote him. The court dismissed the case based on the Commonwealth’s sovereign immunity to USERRA claims. The plaintiff appealed to the Supreme Court of Virginia, which unanimously affirmed the decision of the trial court.

Workers’ Compensation Unit

The Workers’ Compensation Unit defends workers’ compensation cases filed by employees of state agencies. Because hearings are held throughout the Commonwealth, cases are assigned to attorneys in Richmond and also to attorneys working in Abingdon. The Unit handles claims brought by injured workers, as well as employer’s applications. Claims include initial compensability and change-in-condition claims, and may be handled for the life of the matter (including the initial hearing before a Deputy Commissioner, review by the Full Commission, and appeals to the Court of Appeals of Virginia and the Supreme Court of Virginia). In 2016, the Unit handled 432 new cases.

The Unit also pursues subrogation claims in order to recover funds for the Department of Human Resource Management’s Workers’ Compensation Services. Subrogation issues arise when a state employee is injured by a third party. The Unit assists Workers’ Compensation Services in recovering from negligent parties, and through restitution, what it has paid to, or on behalf of, the employee in workers’ compensation benefits. During the year, the Unit assisted Workers’ Compensation Services and its third-party administrator with subrogation recoveries exceeding $694,000.

Two cases were appealed to the Supreme Court of Virginia. In Rush v. University of Virginia Health System, the Court of Appeals held that for the presumption created in § 65.2-105 of the Code of Virginia to apply, the injured worker must be physically or mentally unable to testify. The Supreme Court of Virginia refused the petition for appeal. In Boukhira v. George Mason University, the Court of Appeals held that res judicata barred a subsequent claim for permanency benefits after an initial permanency claim was denied on the
merits. The Supreme Court of Virginia also refused the petition for appeal in this case.

The Unit was active before the Court of Appeals of Virginia. In *Burney-Divens v. Community Corrections Administration*, the Court of Appeals affirmed the Workers’ Compensation Commission’s holding that the injured worker’s motor vehicle accident was unexplained. In *Virginia Commonwealth University Health Systems v. George*, the Court of Appeals affirmed the Workers’ Compensation Commission’s denial of an evidentiary hearing and its findings regarding the authorized treating physician.

The Unit continued to develop important case law before the full Commission. In *Trani v. Virginia Commonwealth University*, the Commission upheld the denial of a claim alleging mold exposure. In *Dowdell v. Christopher Newport University*, the Commission upheld the denial of permanent total disability benefits. In *George v. Virginia Commonwealth University Health Systems*, the Commission affirmed the denial of an expedited hearing.

**Consumer Protection Section**

During the year, the Consumer Protection Section completed an expansion and reorganization to better protect Virginia consumers from deceptive and illegal business practices. The Section was reorganized into five units: the Counseling, Intake and Referral Unit (“CIRU”), the Dispute Resolution Unit (“DRU”), the Antitrust Unit (“AU”), the Charitable Solicitations and Deceptive Conduct Unit (“CSDCU”), and the Predatory Lending Unit (“PLU”).

**Counseling, Intake and Referral Unit**

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

In 2016, CIRU received and processed 4,186 written consumer complaints. In addition, CIRU received and handled 28,545 telephone calls through the Consumer Hotline.
Dispute Resolution Unit

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

In 2016, DRU along with CIRU and the Section’s investigators resolved or closed 3,274 complaints. Consumer recoveries from closed complaints totaled $1,751,804.

Antitrust Unit

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

During 2016, AU completed a review of the merger of grocery retailers Koninklijke Ahold N.V., owner of the Giant and Martin’s banners, and Delhaize Group NV/SA, owner of the Food Lion banner. AU worked with the Federal Trade Commission (“FTC”) and seven other states in assessing the anticompetitive effects of the merger, and in reaching an agreement with the parties that required divestiture of eighty-one stores nationwide, including forty-one Virginia stores. The FTC accepted a Consent Order in Commonwealth of Massachusetts v. Koninklijke Ahold, N.V. (D.D.C.) that included the divestiture package. AU and the other states reached an agreement with the merging parties in a second Consent Judgment that contained additional state-specific terms and provided for attorneys’ fees. Virginia received a fee distribution of $49,933 from the parties.

During the year, the Office of the Attorney General’s nonprofit review panel, which includes representatives from AU, the Financial Law and Government Support (“FLAGS”) Section, and the Health Section, completed review of a Purchase Agreement entered into by Commonwealth Assisted
Living, LLC, and Stratford House Center and Stratford House Center Properties. Commonwealth Assisted Living acquired Stratford’s eighty-bed registered continuing care retirement community, licensed assisted living facility, and independent living facility located in Danville, Virginia.

In March, AU argued before the Fourth Circuit in Petrie v. Virginia Board of Medicine. The plaintiff had brought an action in the federal district court against the Board and six individual Board members alleging a boycott against chiropractors by the members of the Board, the majority of whom are required by statute to be medical doctors. The plaintiff, a chiropractor, previously had been sanctioned by the Board for misleading advertising and practicing outside the statutory scope of chiropractic. After two state courts upheld the Board’s findings, the plaintiff filed the antitrust case. In May 2016, the Fourth Circuit issued an unpublished opinion upholding the district court’s grant of summary judgment because the plaintiff was unable to establish any anticompetitive effect from her sanction by the Board. The Supreme Court of the United States denied her petition for writ of certiorari in November 2016.

In July, AU along with the U.S. Department of Justice (“DOJ”), seven other states, and the District of Columbia, filed suit in United States v. Aetna, Inc. and Humana, Inc. (D.D.C.) to enjoin the proposed merger of two large health insurance companies: Aetna, Inc. and Humana, Inc. Also in July 2016, AU along with the DOJ, ten other states, and the District of Columbia, filed suit in United States v. Anthem, Inc. and Cigna Corp. (D.D.C.) to enjoin the proposed merger of health insurance giants Anthem, Inc. and Cigna Corp.

In August, AU and forty-eight other states entered into a settlement agreement with the manufacturers of the prescription drug Provigil for claims related to an alleged “pay-for-delay” scheme to prevent or delay less expensive generic versions of Provigil from entering the market to preserve their monopoly profits from the sale of Provigil. The settlement in the case, State of New York v. Cephalon, Inc. (E.D. Pa.), includes a $125 million payment to the states to cover state agency purchases, restitution for state consumers who bought Provigil, and for other purposes to be specified by the states. Virginia’s total recovery is estimated at $3,240,000, consisting of approximately $980,000 for Provigil purchases by state entities or authorized purchases of state contracts, an estimated $1,587,000 for distribution to Virginia consumers for payments for Provigil, and approximately $673,000 for Virginia’s share of disgorgement and costs. In November, the U.S. District Court preliminarily approved the
settlement and scheduled a hearing on final approval for July 25, 2017.

During August, AU and forty-three other states entered into a $100 million settlement with Barclays Bank, PLC and Barclays Capital, Inc. for claims related to fraudulent and anticompetitive conduct involving the manipulation of the London Interbank Offered Rate (“LIBOR”). LIBOR is a benchmark interest rate that affects financial instruments worth trillions of dollars and has a widespread impact on global markets and consumers. Government entities and not-for-profit organizations in Virginia and throughout the U.S., among others, were defrauded of millions of dollars when they entered into swaps and other investment instruments with Barclays without knowing that Barclays and other banks on the U.S. dollar-LIBOR-setting panel were manipulating LIBOR and colluding with other banks to do so. Under the settlement, Virginia entities are eligible to recover at least $1 million.

In September, AU and thirty-five other states filed suit in State of Wisconsin v. Indivior, Inc. (E.D. Pa.), against the manufacturers of the prescription drug Suboxone for alleged “product-hopping,” a scheme to prevent or delay less expensive generic versions of Suboxone from entering the market to preserve their monopoly profits from the sale of Suboxone. Suboxone is a combination drug product consisting of two active pharmaceutical ingredients that are used together as an opioid replacement therapy for the treatment of opioid dependency. The matter remains in active litigation.

In December, AU and twenty other states filed suit in State of Connecticut v. Aurobindo Pharma USA, Inc. (D. Conn.) against five manufacturers of generic pharmaceuticals for alleged price-fixing and market allocation related to the generic drugs Doxycycline Hyclate Delayed Release, a tetracycline-class antimicrobial indicated as adjunctive therapy for severe acne, and Glyburide, an oral diabetes medication used to treat Type 2 diabetes. The matter remains in active litigation.

Also during the year, AU concluded a case that was filed with the DOJ and thirty-three other states and territories in 2012 against five of the six major ebook publishers and Apple, Inc. for alleged price-fixing to raise the prices of ebooks at the time of Apple’s iPad launch. The five publishers settled prior to trial. In Texas v. Penguin Group (USA) Inc. (S.D.N.Y.), the court found Apple liable under both federal and state antitrust laws and entered an injunction against Apple. Before the damages phase of the trial, Apple reached a settlement with the state plaintiffs providing that the amount of damages Apple
would pay would depend on the outcome of its appeal of the liability ruling against it. In August 2015, the Second Circuit upheld the liability finding and the injunction. Apple’s petition to the Supreme Court of the United States for a writ of certiorari was denied on March 7, 2016, so its settlement with the states was then executed. Consumers in Virginia were eligible to receive approximately $11 million to $15 million in refund checks or ebook credits. The Commonwealth received a civil penalty of $100,000 and reimbursement of attorneys’ fees and costs in the amount of $544,717.

Charitable Solicitations and Deceptive Conduct Unit

The Charitable Solicitations and Deceptive Conduct Unit (“CSDCU”) investigates and prosecutes suspected violations of the Virginia Consumer Protection Act (“VCPA”), the Virginia Solicitation of Contributions law, and other state and federal consumer protection statutes. It also serves as counsel to the Office of Charitable and Regulatory Programs within the Virginia Department of Agriculture and Consumer Services. During 2016, CSDCU led or participated in several significant multistate settlements in addition to bringing various enforcement actions in Virginia.

In April, CSDCU, along with the FTC, the forty-nine other states, and the District of Columbia, reached a settlement with Cancer Fund of America, Inc., Cancer Support Services, Inc., and James Reynolds, Sr. resolving claims that the allegedly sham charities violated state charitable solicitation laws and the FTC Act by misrepresenting the purposes for which donations solicited from the public would be used. As part of the settlement of the case, FTC v. Cancer Fund of America, Inc. (D. Ariz.), the fraudulent organizations were placed into receiverships and Reynolds was permanently banned from charitable fundraising, charity management, and controlling charitable assets. Judgments were entered against the charities and Reynolds for $75,825,653. CSDCU played a leadership role in the case by serving on the multistate executive committee that coordinated the litigation and negotiated the settlement.

In June, CSDCU, forty-two other states, and the District of Columbia entered a Partial Settlement Agreement with Volkswagen Auto Group of America, Inc. and related entities for consumer protection claims involving emission defeat devices installed in their 2.0-liter diesel vehicles. The settlement includes injunctive relief prohibiting future unlawful conduct related to emission defeat devices and payment of $20,179,839 in consumer protection civil penalties to the Commonwealth. The settlement was announced in
conjunction with other settlements involving the federal government and private class actions and incorporates the restitution relief provided for affected consumers in those settlements. The settlements give consumers a choice to have their vehicles fixed or to sell back their vehicles at pre-scandal resale value. Consumers also will be provided a $5,100 to $10,000 restitution payment based on the value of the vehicle. Additionally, Virginia will be able to apply to receive more than $87 million from an environmental mitigation trust fund established through the federal settlements for use on projects to improve the environment by reducing air pollution in the transportation sector. Volkswagen also committed to other investments to develop environmentally friendly cars and support infrastructure, and has provided $20 million to the National Association of Attorneys General to establish a fund for further consumer protection efforts.

In September, CSDCU, forty-eight other states, and the District of Columbia entered a Settlement Agreement with USA Discounters, Ltd. (doing business as USA Living and Fletcher’s Jewelers) and related companies to resolve the states’ claims that the retailer used deceptive practices in marketing to and collecting from its customer base of largely military families and veterans. CSDCU’s investigation resulted in the largest multistate consumer settlement ever led by Virginia. The settlement, which was approved by the U.S. Bankruptcy Court for the District of Delaware, In re USA Discounters, Ltd., provides for consumer restitution and forgiven debt with an estimated total value of $100 million nationally including $27,403,638 in debt relief and credits to thousands of Virginia customers and the extinguishment of certain other debts. USA Discounters also agreed to a $40 million subordinated unsecured civil penalty claim with Virginia’s portion being $1,680,391. Among other things, the settlement also prohibits the companies from bringing suit against any consumers except in the city or county where the consumer resides at the time the action is filed or, subject to venue laws and rules, the state where the consumer was physically present when the contract was signed by the consumer; contacting anyone other than the consumer who owes the debt in its collection activities, except for certain limited purposes; and contacting a service member’s chain-of-command to discuss the consumer’s debt.

In October, CSDCU, thirty-two other states, and the District of Columbia reached a multistate settlement with Hyundai Motor Company, Hyundai Motor America, Kia Motors Corporation, Inc., and Kia Motors America, Inc. to resolve consumer protection claims that the companies over-stated the fuel economy of
several vehicle lines. The Consent Judgment entered in the case, Commonwealth v. Hyundai Motor Co. (Henrico Cir. Ct.), enjoined Hyundai and Kia from misrepresenting the fuel economy of any new motor vehicle and provided for monetary payments to the states totaling $41.2 million for reimbursement of the states’ attorneys’ fees and costs. Virginia’s share of the payment was $1,181,999. Also in 2016, CSDCU, forty-eight other states, and the District of Columbia, entered an Agreement with MoneyGram Payment Systems, Inc. regarding fraud-induced money transfers. In the settlement, MoneyGram agreed to enhance and maintain a comprehensive anti-fraud compliance program designed to avoid assisting fraud-induced money transfers, including training, a hotline, and other fraud-evaluation mechanisms. MoneyGram also agreed to pay $13 million to the states with approximately $9 million for restitution for customers who previously filed complaints that they were victims of fraud-induced money transfers involving wire transfers from the United States to payees located in foreign countries. Virginia received a $20,000 payment for its attorneys’ fees and costs.

In June, CSDCU filed suit against Shockoe Bottom Automotive & Tires, Inc., a Richmond-based company that sells and installs new and used tires, for alleged violations of the VCPA and Virginia’s “bait and switch” statute. Among other things, the Complaint alleged that the business advertised a price of $25 per tire and a free alignment with a two-tire purchase, but did not actually provide that price or service to consumers. The suit also alleged that the business refused to honor coupons posted online and in-store that offered “buy three (3) tires, get the fourth tire free.”

In November, CSDCU entered an Assurance of Voluntary Compliance with Kelly Johnson, doing business as Kelly Home Improvement, for alleged violations of the VCPA and § 54.1-1115(B) of the Code of Virginia, which makes it illegal to operate as an unlicensed contractor. Through the Order Approving the Assurance, Commonwealth v. Kelly Patrick Johnson (City of Richmond Cir. Ct.), Johnson is enjoined from future violations of those statutes. The settlement also includes a restitution judgment in favor of seven individuals totaling $24,235, a civil penalty judgment of $17,500, and an attorneys’ fees judgment of $2,500.

Also in November, CSDCU entered into a Consent Judgment with Donorworx, Inc., a Delaware corporation that runs face-to-face fundraising campaigns for charitable organizations across the United States and Canada, for
alleged violations of the Virginia Solicitation of Contributions law. In the case, *Commonwealth v. Donorworx, Inc.* (Arlington Cir. Ct.), CSDCU alleged that Donorworx failed to file solicitation contracts between itself and a charitable organization, failed to file written authorization from the charitable organization to solicit on its behalf, failed to register with the Office of Charitable and Regulatory Programs as a professional solicitor prior to soliciting within the Commonwealth, and failed to file a Solicitation Notice ten days prior to the commencement of a solicitation campaign. The Consent Judgment included injunctive relief, civil penalties totaling $2,500, and attorneys’ fees totaling $1,500.

In December, CSDCU entered into an Assurance of Voluntary Compliance with Capital Meats, Inc., a door-to-door and online seller of poultry, pork, seafood, and beef products, for alleged violations of the Virginia Home Solicitation Sales Act (“VHSSA”) and the VCPA. In the case, *Commonwealth v. Capital Meats, Inc.* (Frederick Cir. Ct.), CSDCU alleged that Capital Meats violated the statutes by failing to provide buyers with a receipt that included a VHSSA-compliant statement of the buyer’s right to cancel and notice-of-cancellation form. The Complaint further alleged that Capital Meats misrepresented the quantity, weight, and quality of its wholesale meat products to consumers in violation of the VCPA. The settlement enjoined Capital Meats from engaging in further violations of the statutes and required Capital Meats to pay a civil penalty of $2,500 and attorneys’ fees of $1,500.

Also during the year, CSDCU issued restitution checks to consumers in consumer protection cases that were resolved in previous years. CSDCU sent checks totaling $20,501 to 265 consumers from funds collected to satisfy judgments obtained in *Commonwealth v. KLMN Readers Services, Inc.* (Chesapeake Cir. Ct.), as well as other restitution agreed to by KLMN Readers Services. CSDCU also sent checks totaling $12,338 to 20 consumers from funds collected under the Assurance of Voluntary Compliance entered and approved in *Commonwealth v. Trio Alarm, LLC* (Newport News Cir. Ct.).

**Predatory Lending Unit**

The Predatory Lending Unit ("PLU") investigates and prosecutes suspected violations of state and federal consumer lending statutes, including laws concerning payday loans, title loans, consumer finance loans, mortgage loans, mortgage servicing, and foreclosure rescue services.
In January 2016, PLU obtained court approval of an Assurance of Voluntary Compliance entered with MoneyKey – VA, Inc., a Delaware-based internet lender, for alleged violations of Virginia’s consumer finance statutes and the VCPA. In the case, Commonwealth v. MoneyKey – VA, Inc. (City of Richmond Cir. Ct.), the Commonwealth alleged the business made open-end credit loans to Virginians via the internet but failed to comply with Virginia’s open-end credit statute, which permits lenders to charge interest at agreed-upon rates, provided that they give borrowers a minimum 25-day, interest-free grace period during which to repay their advances. However, MoneyKey instead assessed its borrowers an immediate 15% cash-advance fee without providing the grace period. The failure to comply with the statute made MoneyKey subject to the consumer finance statutes, which it violated by charging interest in excess of 12% annually. The settlement included injunctive relief, over $18,000 in restitution to consumers, over $5 million in forbearances of interest and other fees owed, and $30,000 in attorneys’ fees and costs to the Commonwealth.

In February 2016, PLU joined 48 other states, the District of Columbia, the DOJ, the Consumer Financial Protection Bureau (“CFPB”), and the U.S. Department of Housing and Urban Development in a settlement with mortgage lender and servicer HSBC North America Holdings (“HSBC”) to address mortgage origination, servicing, and foreclosure abuses. United States v. HSBC North America Holdings (D.D.C.). The settlement required HSBC to provide loan modifications and other relief to Virginia borrowers, including principal reductions and refinancing for underwater mortgages. HSBC was also required to substantially change how it serviced mortgage loans and handled foreclosures. The settlement further required HSBC to offer refunds to approximately 3,100 foreclosed Virginia borrowers totaling an estimated $2.4 million.

In June 2016, PLU filed suit against a Stafford-based pawnbroker for alleged violations of the Virginia pawnbroker statutes and the VCPA. In Commonwealth v. 610 Pawn, Inc. (Stafford Cir. Ct.), PLU alleged that the company violated the pawnbroker statutes, and therefore the VCPA, by charging illegal and excessive fees in connection with its pawnbroker loan transactions.

In June 2016, PLU also filed suit against two related entities for violations of the consumer finance statutes, motor vehicle title lending statutes, and the VCPA. In Commonwealth v. 5StarNetworkMoving, Inc. (City of Richmond Cir. Ct.), PLU alleged that 5StarNetworkMoving (“5 Star”) never received a license
to operate as a motor vehicle title lender and was making motor vehicle title loans in Northern Virginia in violation of the motor vehicle title lending statutes and the VCPA. In addition, by charging an interest rate of 720% on its motor vehicle title loans, 5 Star violated the consumer finance statutes.

In June 2016, the CFPB published a Notice of Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans (“Proposed Payday Loan Rules”). At the same time, the CFPB issued a Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans, and Open-End Lines of Credit (“Request for Information”). The Proposed Payday Loan Rules sought to curtail payday loans and debt traps by requiring lenders to take steps to make sure that consumers have the ability to repay the loans. The Request for Information invited comment on any loan products that fell outside the scope of the Proposed Payday Loan Rules, but which served similar populations and needs as those covered by the Proposed Rules. In October 2016, PLU filed comments with the CFPB in support of a number of the Proposed Rules’ provisions, including the requirement that lenders determine whether a borrower can actually repay the loan. The comments also expressed concern regarding the CFPB allowing any exceptions to the required “ability-to-repay determination.” In November 2016, PLU submitted comments to the CFPB in response to the Request for Information. The comments focused on the open-end line of credit product that currently is made available to Virginians at brick-and-mortar locations and over the internet. PLU obtained substantial information from the Bureau of Financial Institutions and the Virginia Poverty Law Center in preparing the comments.

**Insurance and Utilities Regulatory Section**

The Division’s Insurance and Utilities Regulatory Section serves as the Attorney General’s Division of Consumer Counsel in matters involving public utilities and insurance companies before the State Corporation Commission (“SCC”) and federal agencies such as the Federal Energy Regulatory Commission (“FERC”). In this capacity, the Section represents the interests of Virginians as consumers in the regulation of insurance companies and regulated utilities including electric, natural gas, water, and telecommunications companies. The Section also appears before General Assembly legislative committees to address issues that implicate consumer interests in the regulation of these industries.
Consumer Counsel participated in Appalachian Power Company’s (“APCo’s”) application filed with the SCC for a determination of the return on common equity (“ROE”) applicable to APCo’s rate adjustment clauses (“RACs”). Legislation passed by the 2015 General Assembly now provides for stand-alone ROE proceedings for APCo in 2016 and 2018, and for Dominion Virginia Power in 2017 and 2019, in lieu of the companies’ comprehensive biennial review base rate proceedings. The 2015 legislation froze the companies’ base rates and suspended SCC review of their earnings. New authorized ROEs therefore do not affect base rates, but rather the various rate riders established through statutorily-authorized RACs. APCo’s last approved ROE from its 2014 biennial review was 10.0%. The company requested a new ROE of 10.43%. Consumer Counsel filed the testimony of a financial expert, who identified APCo’s cost of equity as 8.60%. The SCC found that a market cost of equity within a range of 8.50% to 9.50% percent fairly represents the actual cost of equity in capital markets for companies comparable in risk to APCo, and it set the ROE at 9.40% for the purpose of establishing revenue requirements for APCo’s RACs. In an earlier ROE matter, Consumer Counsel supported the SCC’s effort to revise the allowed return for Dominion in individual RAC cases of the company before the 2017 statutory proceeding. The Commission set a new ROE of 9.60%, which served to reduce costs to customers by millions of dollars compared to the 10.0% ROE that had been in effect.

In APCo’s and Dominion’s Integrated Resource Plan (“IRP”) cases, Consumer Counsel challenged various modeling assumptions concerning compliance with potential EPA carbon emission regulations, but generally accepted the filings as being reasonable and not contrary to the public interest. Following up on an issue Consumer Counsel raised in Dominion’s 2015 IRP with respect to expenditures for a potential third nuclear unit at North Anna, Dominion reported that it had reduced projected near-term investment to a minimum level necessary to secure a Combined Operating License from the Nuclear Regulatory Commission. The company acknowledged that, while it believes its continuing investments for development of North Anna 3 are prudent, it is shareholders, and not customers, who are at risk should those investments ultimately be found by the SCC to be imprudent. Consistent with the position of Consumer Counsel, the SCC found both companies’ IRP filings to be reasonable and in the public interest for the specific and limited purpose of the IRP statute. The Commission also noted that the General Assembly’s base rate freeze is highly unlikely to protect APCo’s and Dominion’s customers from
the bulk of costs, if any, from the EPA’s carbon emission regulations because such compliance costs would likely be beyond the rate freeze period, and otherwise eligible for recovery through separate RACs.

In a case with significant cost ramifications to customers, Consumer Counsel negotiated a settlement with Dominion in its request for approval of a program to bury approximately one-fifth of its existing overhead distribution tap lines. If fully implemented, the program would cost $2 billion, not including financing costs. The SCC had previously rejected a 2015 application finding that the company had failed to establish that its proposed level of investment was reasonable, prudent, or in the public interest. It had found, however, that a more targeted, lower cost pilot-type program could potentially be approved in the future. This second case addressed a “Phase One” plan for undergrounding approximately 400 miles of the company’s overhead distribution network, impacting approximately 6,000 customers, at an initial capital cost $140 million. The stated purpose of Phase One was to demonstrate how targeted undergrounding of a limited number of outage prone overhead lines can improve reliability and reduce outage times across the company’s system. The Stipulation entered into between Consumer Counsel and Dominion limited Phase One, for cost recovery purposes, to a total investment of $122.5 million. It also included a $1.8 million credit against the first year annual revenue requirement of $21.3 million, and for the succeeding two years. The SCC adopted the position of Consumer Counsel that for approval of cost recovery on future phases of the program, the company must collect data necessary to measure whether the program can be a cost effective means of ensuring reliability for all of its customers.

Consumer Counsel participated in several other RAC and new generation certificate cases involving Dominion and APCo. It supported Dominion’s application for approval of its new $1.3 billion (excluding financing costs) Greensville Power Station, a 1,588 megawatt gas-fired generating facility. Consumer Counsel observed, however, that customers will pay twice for the same generation capacity during the time the rate increase from this RAC overlaps with the General Assembly’s base rate freeze because the Commission is unable to remove from base rates the capacity costs associated with expiring purchase power contracts. Consumer Counsel also supported Dominion’s request for approval of three new solar generation facilities totaling 56 megawatts, which were projected to cost $129.5 million, excluding financing costs. It did not oppose the company’s novel proposal to recover costs using a
market index rate in lieu of a traditional cost-of-service model. The SCC issued the requested certificates, but approved cost recovery based on a cost-of-service methodology and not the market index. Consumer Counsel generally supported Dominion’s application to update the RACs for its demand-side management programs and to add two new programs, a residential programmable thermostat program and small business improvement program. The total annual revenue requirement approved was reduced to $45.9 million from the requested $49.5 million. In APCo’s application to update its RAC that recovers costs associated with its participation in the state’s Renewable Portfolio Standard (“RPS RAC”), Consumer Counsel successfully opposed a position advocated by a group of large industrial customers, who are exempt from the RPS RAC, which would have shifted more costs onto residential and commercial customers.

For the first time in 2016, an electric cooperative, Rappahannock Electric Cooperative, sought approval of a RAC under the 2007 Electric Utility Regulation Act. The cooperative proposed a Demand Response Cost Recovery Rider to recover costs of operating a demand-side management program that allows participating residential customers to install on air conditioning units a switching device enabling the unit to be switched off remotely during periods of peak summer demand to reduce overall demand on the system. To increase participation and retention in the program, the cooperative sought approval of cost recovery to fund a $24 per switch recurring annual credit. With Consumer Counsel’s support, the SCC approved the cooperative’s request. The evidence in the case indicated that the program would be cost beneficial for all of the cooperative’s member customers.

At the federal level, the Attorney General’s Office had previously worked with other states’ utility consumer advocate offices to secure the endorsement of the PJM Interconnection, LLC for a permanent funding mechanism for the Consumer Advocates of PJM States (or “CAPS”) organization. PJM operates the transmission grid and wholesale electricity markets in the multistate region that includes Virginia, and thus has significant influence over rates ultimately paid by customers of Virginia’s electric utilities. CAPS is a relatively new organization specifically formed to coordinate the participation of state utility consumer advocate offices in the PJM stakeholder process. PJM filed a proposal with the FERC designed to provide an annual funding mechanism for the CAPS through PJM’s FERC-administered tariff. The individual offices of CAPS successfully defeated a protest to the funding mechanism from an independent power producer that claimed, among other things, the funding
mechanism would violate the First Amendment to the United States Constitution. FERC soundly rejected the protest and denied a request for rehearing on the First Amendment issue. In another FERC matter, APCo, through its parent company American Electric Company, submitted for filing proposed revisions to its transmission formula rates and annual update protocols. AEP sought to amend its FERC formula rate to transition its transmission formula rates from “historic” to “forward looking” and to make revisions to its annual update protocols. Consumer Counsel submitted comments to FERC protesting certain changes to AEP’s formula rate annual update protocols which could improperly shift the burden of proof, from the utility to ratepayers, for demonstrating rates to be just and reasonable.

Consumer Counsel was also active in a SCC case involving a major water utility company. Virginia-American Water Company had an application for an increase in rates to produce additional annual revenues of $8.69 million, an increase of approximately 18.0%. Virginia-American serves approximately 79,000 customers in four separate districts: Alexandria, Hopewell, Prince William, and the Eastern District. The application included a number of new rate design proposals, including rate consolidation among the separate districts, the establishment of an infrastructure surcharge, and a decoupling mechanism. Consumer Counsel filed expert testimony that opposed the rate decoupling request; offered options for ratepayer protections if the infrastructure surcharge were approved (while maintaining the surcharge was not necessary); opposed the move towards single tariff pricing rate consolidation for the Alexandria, Hopewell, and Prince William systems; and recommended several ratemaking adjustments to the revenue requirement. The SCC hearing examiner issued a report with recommendations favorable to the positions of Consumer Counsel. A final order from the Commission will be issued in 2017.

Finally, in the area of insurance regulation, Consumer Counsel continued its annual participation in the workers’ compensation rate proceeding of the National Council on Compensation Insurance to establish the advisory “loss cost” component of rates for the voluntary market and the “assigned risk” rates for the assigned risk market. For the voluntary market, individual insurers add their own “loss cost multiplier” to include administrative costs, commissions, taxes, et cetera. Our work in this proceeding includes retaining an actuarial consultant to participate in a working group among the insurance industry, the SCC’s Bureau of Insurance, and other interested stakeholders to identify and address actuarial issues before the rate cases each year. For the industrial
classifications, the 2016 proceeding resulted in an overall average decrease of 5.5% to the loss cost component of rates in the voluntary market, and an overall decrease of 10.0% to assigned risk rates.

**Division of Debt Collection**

The mission of the Division of Debt Collection is to provide all appropriate and cost effective debt collection services on behalf of state agencies. The Division has eight attorneys and thirteen staff members dedicated to protecting the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth’s receivables. Division attorneys also provide advice on collection, bankruptcy, and legislative issues to client agencies and to other Divisions within the Office of the Attorney General, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

In 2013, the Division assumed oversight and coordination responsibilities for non-Medicaid related recoveries under the Virginia Fraud Against Taxpayers Act. In fulfillment of these responsibilities, the Division intervened in the Integra case. Initially filed in the City of Richmond Circuit Court, the case was bifurcated after partial removal to federal court. The bifurcated cases were *Commonwealth ex rel. Integra REC, LLC v. Barclays Capital Inc.* (City of Richmond Cir. Ct.), and *Commonwealth ex rel. Integra REC, LLC v. Countrywide Securities Corp.* (E.D. Va.). In the cases, the Commonwealth alleged that eleven financial institutions misrepresented their underwriting standards, and submitted fraudulent prospectus statements on which the Virginia Retirement System relied to purchase residential mortgage backed securities. All defendants from both cases agreed to participate in settlement negotiations before a federal magistrate. The Commonwealth resolved the allegations with all defendants for a total of $63,221,897. This result set the record for the largest non-Medicaid recovery achieved to date under the Virginia Fraud Against Taxpayers Act. Almost all of these funds were returned to the Virginia Retirement System to help protect retirement plans for thousands of public employees in Virginia.

In 2014, the Division commenced a partnership with the Construction Litigation Section of the Attorney General’s Office to leverage the expertise of both Sections through joint representations on debt collection matters that involve construction litigation. In fiscal year 2016, this partnership resulted in collections of almost $2.5 million.
The Division is self-funded by contingency fees earned from its recoveries on behalf of state agencies. The Division manages both the State Collection and State Fraud Recovery (“FATA”) budget service areas.

During the twelve months from July 1, 2015 through June 30, 2016, gross recoveries for thirty-nine agencies totaled more than $16.4 million for State Collection Services. During fiscal year 2016, the Division earned fees of almost $3.5 million from this service area. Fiscal year 2016 fees were nearly $800,000 in excess of Division expenditures. Out of these excess fees, along with cash on hand, $1,100,000 was returned to the agencies, resulting in a thirty-one percent reduction of the base contingency rate paid by agencies. The balance of the fees was turned over to the General Fund at fiscal year-end. Gross FATA recoveries for fiscal 2016 totaled over $65.4 million. FATA fees earned during fiscal 2016 totaled over $1.1 million.

Health Professions Unit

The Health Professions Unit prosecutes cases involving health care professionals. The cases are heard by various health care regulatory boards in the Virginia Department of Health Professions, including the boards of Medicine, Nursing, Pharmacy, Veterinary Medicine, Dentistry, Funeral Directors and Embalmers, Counseling, Long-Term Care Administrators, Social Work, Psychology, Physical Therapy, Optometry, and Audiology and Speech-Language Pathology. They involve standard of care violations, substance abuse, mental illness/incompetence, inappropriate sexual conduct, and patient abuse. Following formal hearings, disciplinary sanctions, including suspension and revocation of licenses, are often imposed.

Consistent with the initiatives that the Governor and Attorney General have taken with respect to the current opioid epidemic plaguing the Commonwealth, the Unit continues to vigorously prosecute cases against physicians and pharmacists who engage in excessive and unwarranted prescription of opioids and other controlled substances. Two such cases that were prosecuted before the Board of Medicine this year involved Dr. Brian Bittner and Dr. David Morgan.

In both cases, the physicians prescribed large quantities of narcotics to multiple patients over the course of many years without establishing bona fide medical conditions justifying the prescriptions, obtaining prior treatment records, monitoring the effects of prescribed medications on patients, or
monitoring and managing the patients’ appropriate usage of the medications. Each physician ignored obvious signs of substance abuse and doctor shopping, including constant requests for early refills, improbable stories about losing or destroying medications or having them stolen, admissions of medication overuse, inconsistent urine drug screens, and irregular patient pharmacy profiles on the Prescription Monitoring Program.

Dr. Bittner had previously been sanctioned by the Board of Medicine in 2008 for the same substandard and dangerous prescribing practices. He failed to change his behavior to conform to applicable statutes and regulations despite taking multiple Board-ordered remedial courses in proper prescribing and medical recordkeeping. Consequently, at the formal hearing, the Board of Medicine revoked his medical license, the most severe sanction available. This sanction entails a minimum three-year period before a licensee can apply for reinstatement.

Dr. Morgan’s case was particularly compelling in that four patients who had exhibited red flags for drug abuse died from overdosing on medications that he prescribed. In light of this tragic outcome and the fact that he had previously been sanctioned by the Board of Medicine for the same substandard and dangerous practices, the HPU was prepared to ask for the maximum sanction of license revocation. However, a settlement agreement was reached via a consent order. It provided for a suspension of Dr. Morgan’s license for a minimum of thirty-six months, the equivalent of the maximum three-year time period allowed by statute for revocation of a healthcare license.

The Unit’s success in prosecuting facilitators of the current opioid epidemic has not been limited to physicians. It also includes the prosecution of pharmacists. One such matter involved Brenda A. Epps, Pharmacist-in-Charge and owner of Appomattox Drugs in Chesterfield County. During a routine inspection in October 2014, the pharmacy inspector discovered that Epps had failed to timely report the loss of Schedule II controlled substances from two weeks prior. Further, she had not maintained emergency access alarm codes/keys in compliance with legal requirements. Based on the inventory logs acquired during the inspection, an investigation was opened. The pharmacy inspector’s analysis of the evidence disclosed Epps was filling 65% of the prescriptions to out-of-state residents from Florida, Ohio, Kentucky, and New York. The evidence also showed that she was buying and selling drugs from/to independent pharmacies over the internet through “brokerage” websites in
violation of law. An expert hired by the Board reviewed the material and rendered the opinion that Epps had failed to meet the standard of care. Epps ultimately agreed to a consent order which subjected her to indefinite suspension for a minimum of one year, plus other conditions.

Another type of ongoing conduct that constitutes serious malfeasance for most of the healthcare profession boards involves dual relationships and “boundary violations,” especially sexual or romantic relationships with patients. In one such case, the Unit prosecuted Marie P. Donlan, L.M.F.T., C.S.A.C., before the Virginia Board of Counseling. The Board summarily suspended Donlan’s license to practice marriage and family therapy and her certificate to practice substance abuse counseling. The evidence showed that she had engaged in a dual romantic and sexual relationship with Client A, an individual whom she had treated for six years for alcoholism and marital difficulties. She had previously provided marital therapy to Client A and Client B, Client A’s wife. As a result of this experience, Client A relapsed on alcohol, and Client B suffered emotional harm, including anxiety, chest pains, and difficulty breathing and sleeping. The Board and Donlan entered into a consent order for the indefinite suspension of her license and certificate for not less than one year.

The Unit prosecuted another significant case involving Edward A. Longwe, D.D.S. before the Virginia Board of Dentistry. It involved the death of a four-and-a-half year old boy who died from hypoxic brain injury and cardiac arrest that resulted from the loss of his airway during a dental procedure, without the loss being recognized. The Board and Longwe entered into a consent order for revocation of his license. The Board found he committed numerous violations of the standard of care, including negligence with regard to his anesthesia administration to and management of the patient, failure to perform and document an evaluation of the patient’s airway prior to the administration of anesthesia, administration of an excessive amount of midazolam, failure to evaluate and document pre-oxygenation prior to the administration of midazolam and propofol, failure to perform and document continuous temperature monitoring of the patient, and failure to adequately ventilate and monitor the patient throughout the post-resuscitation period resulting in the presence of an excess of carbon dioxide in the patient’s blood.

**Division of Human Rights and Fair Housing**

The Division of Human Rights (“DHR”) performs two primary missions with regard to Virginia’s civil rights laws. First, DHR investigates complaints
alleging discrimination in employment, places of public accommodation, and educational institutions in violation of the Virginia Human Rights Act or corresponding federal laws. At the conclusion of an investigation, DHR reviews the evidence to determine whether there is reasonable cause to believe discrimination occurred. As part of its investigative process, the DHR also facilitates conciliation efforts among the parties to resolve their cases either before or after an investigation. DHR participates in a work-share agreement with the federal Equal Employment Opportunity Commission ("EEOC") to investigate and make determinations with regard to alleged violations of Title VII of the Civil Rights Act of 1964, and related civil rights laws. DHR met its goal of investigating forty-six cases for violations of Title VII under the EEOC work-share agreement covering federal fiscal year 2016. Overall, the unit registered 183 complaints of discrimination in 2016. The Division issued determinations in fifty-four matters and resolved three other cases through conciliation or mediation.

Notably, in Ward v. Golden Living, the Division found reasonable cause that Golden Living terminated Ward because of her disability. The evidence showed that Ward, a thirteen-year employee, had successfully performed her duties with the assistance of long-standing reasonable accommodations. When a new supervisor was hired for Ward’s department, that supervisor eliminated those reasonable accommodations and then issued several disciplinary actions against Ward for matters that arose from her disability and the denial of her accommodations. After DHR issued its determination, the parties settled Ward’s claim for $25,000.

In Leicht v. Office of Lloyd Moss, DDS, DHR investigated Leicht’s claim that her employer engaged in the unlawful discriminatory practice of terminating her employment because of her pregnancy. After fifteen months of satisfactory work performance, Moss became aware of Leicht’s pregnancy. Soon afterward, Leicht experienced numerous medical conditions related to her pregnancy. On a few occasions, the severity of her medical conditions related to her pregnancy prevented Leicht from reporting to work. Between the time Leicht announced her pregnancy and the date of her termination from employment, January 17, 2014, she was absent from work approximately six days. Three of those days immediately preceded her termination.

The evidence showed that Moss considered Leicht’s pregnancy-related absences from work to be problematic for the business, adversely affecting its
staff and practice. Moss expected Leicht to address the needs of her pregnancy during times not scheduled to work or with enough advance notice that scheduling changes could be made. Ultimately, Moss announced Leicht’s resignation to his staff even though Leicht had not submitted her resignation or represented that she would resign. Upon hearing of this later that day, Leicht made numerous attempts to contact Moss and clarify that she had not resigned. Moss eventually responded to Leicht stating that she was no longer employed by them and another person was already hired to fill her position. Based on the evidence gathered during the investigation, DHR found that reasonable cause existed to believe that Moss terminated Leicht because of her pregnancy. The parties were unable to conciliate this matter, and Leicht retained private counsel to litigate the violation of the Virginia Human Rights Act.

In its second primary function, DHR’s attorney serves as counsel to the Real Estate Board and Fair Housing Board for allegations of housing discrimination filed by complainants. If an investigation of housing discrimination results in a “reasonable cause” finding and “Charges of Discrimination” are issued by either or both of the Boards, the Unit prosecutes the alleged violations of the Virginia Fair Housing Law through civil actions filed in the appropriate local circuit court. In 2016, DHR litigated six civil actions alleging discrimination by housing providers. Four of these cases involve alleged discrimination against families with children and two alleged discrimination against persons with a disability. Additionally, DHR provided eight consultation opinions in fair housing investigations to the Real Estate and Fair Housing Boards and provided assistance in resolving five other fair housing investigations. These cases involved the following protected classes: race, disability, familial status, and sex.

In the case of Commonwealth ex rel. Fair Housing Board v. East Bank Street Properties (Petersburg Cir. Ct.), DHR filed suit against an apartment complex and property management company in Petersburg on behalf of a person with a disability. The person with a disability was the victim of a robbery just three blocks from her apartment, and the experience exacerbated her disability—general anxiety disorder and post-traumatic stress disorder. Since the victim’s keys, driver’s license, and other personal information were stolen and never recovered, she no longer felt safe in her apartment due to her anxiety and post-traumatic stress disorder. She requested, as a reasonable accommodation, to be let out of her lease early. The defendants summarily denied the victim’s request despite her supporting medical information from her health care providers.
After filing suit, the parties reached a settlement that provided $27,000 for the person with a disability. The defendants also agreed to have their property manager and leasing staff undergo fair housing training annually for a period of three years; adopt non-discriminatory and reasonable accommodation policies consistent with federal and state laws, regulations, and guidance; and to display fair housing materials in common areas accessible to tenants and prospective tenants.

In *Commonwealth ex rel. Fair Housing Board v. Belmeade at Ridgely Manor Condominium Association, Inc.* (Virginia Beach Cir. Ct.), DHR initiated a civil action in Virginia Beach on behalf of three families against the defendants to challenge whether the Association’s recreational rules discriminated against families with children by placing several limitations on the ability of children to play outside, including through stringent rules enforcement. During litigation, the parties worked collaboratively to reach a settlement in this matter. In this settlement, the defendants agreed to pay the families $22,500. The defendants further agreed to adopt non-discrimination policies, including amendment to its recreational rules so that they are non-discriminatory towards families with children but maintain the community’s safety standards; to have its Board of Directors attend fair housing training once annually for a period of three years; and to make fair housing materials available to community members.

**HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION**

Attorneys in the Health, Education, and Social Services Division represent agencies and institutions of the Commonwealth in the Secretariats of Health and Human Resources as well as Education. Health and Human Resources agencies provide social services, health and disability services, and vocational rehabilitation to vulnerable populations. They protect public health by monitoring and advising on contagious diseases, and they regulate medical professionals to ensure a proper standard of care. Education agencies provide K-12 guidance and assistance to local school systems and to higher education institutions. The Commonwealth’s colleges, universities, and community college system offer quality education and undertake important research. Virginia’s public museums and the Library of Virginia fulfill significant artistic, historic, and cultural missions.

Division attorneys provide a full range of legal services to client agencies, including advice regarding statutory and regulatory interpretation, personnel,
and compliance with laws governing the administration of government, such as the Administrative Process Act, FOIA, and the Virginia Public Procurement Act. By providing legal counsel to client agencies, Division attorneys help to assist them in fulfilling their mission of enhancing the lives of Virginia residents.

In addition, Division attorneys help to ensure the proper use of government resources by recouping Medicaid funds paid to health care providers as a result of improper billing. They also work to ensure that parents properly support their children financially through vigorous child support enforcement.

**Child Support Section**

The forty-five attorneys in the Child Support Section represent the Division of Child Support Enforcement (“DCSE”) of the Virginia Department of Social Services (“DSS”) by providing legal advice and program guidance, conducting training for agency staff, and appearing in both state and federal courts to determine paternity and establish, modify, and enforce child support obligations. The Section Chief oversees all work of the Section and provides advice and counsel to the DSS Deputy Commissioner responsible for the child support program. The Section’s organization is based on three broad regions of the Commonwealth: the Central, Eastern, and Western Regions. Each Region is managed by an attorney who serves as the regional director of legal operations. The Section employs an additional director of legal operations who advises child support agency directors on program administration and operations, finance, information technology, and other matters. The remaining forty Section attorneys are located in the field and serve eighteen DCSE offices.

**Caseload Statistics**

During 2016, the Section continued to handle an extremely large child support caseload efficiently, appearing at 107,043 child support hearings that spanned nearly 3,700 juvenile and domestic relations district court dockets. On average, each field attorney appeared in court twice per week to handle

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3 Larger juvenile and domestic relations district courts hear two child support dockets on simultaneous basis in one day, while smaller courts handle such dockets on a monthly or quarterly basis.
approximately 220 hearings per month. Twenty-one outside counsel assisted the Section’s field attorneys throughout the state with the hearings caseload, filling in gaps due to vacancies, overlapping dockets, conflicting schedules, and attorney leave. Altogether, outside counsel handled about five percent of the Section’s court hearings. In 2016, the Section established new child support orders totaling almost $1.4 million and enforced existing orders by obtaining lump sum payments of more than $10 million, as well as coercive sentences totaling over 500,000 days in jail.

Professional development, service, and training activities

In addition to carrying out their official duties, Section attorneys participated extensively in professional development, service, and training activities this year. They participated in the annual Policy Forum of the National Child Support Enforcement Association and the Department of Justice’s convening titled “Progress and Promise: Momentum in the Reform of Justice Debt and Bail Practices.” One Section attorney spoke on bankruptcy issues at the national conferences of the American Bankruptcy Institute and the Federal Bar Association, and published two bankruptcy articles in the American Bankruptcy Institute Law Journal. Section attorneys also published an article in the Virginia Family Law Quarterly, the newsletter of the Family Law Section of the Virginia State Bar. In addition, one Section attorney served on a Virginia State Bar disciplinary committee during the year.

The Section conducted training for DCSE local district offices and for court-appointed mediators. Section attorneys also provided continuing legal education (“CLE”) training to, and public service announcements for, local bar associations in Virginia Beach, Fairfax, and Prince William County. One Section attorney taught a CLE course at Regent University on “Avoiding Unintended Consequences in Drafting Mediation Agreements,” which addressed extending child support past the statutory period, drafting spousal support agreements, and the tax and Affordable Care Act consequences of allocating the dependency exemption to a noncustodial parent. Section attorneys also educated high school seniors about paternity and child support laws and met with Army and Navy JAG officers to discuss issues relating to child support such as service of process, medical coverage for dependents, the

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4 This monthly figure does not account, however, for the small percentage of cases handled for field attorneys by outside counsel.
Servicemembers Civil Relief Act, passport revocation, interstate child support recovery cases, and domicile issues.

Compliance Initiatives

During the year, the Section worked closely with DCSE offices to implement a variety of new initiatives designed to increase parental compliance with child support orders. These included modifying child support orders to amounts that parents can realistically afford by limiting scenarios where income is imputed, adding payer dockets where parents come to court on a weekly or monthly basis with cash payments from self-employment, streamlining the proposed modified court order process, and implementing mediation. The Section also explored different procedures and dispositions for civil contempt cases, such as graduated purge amounts and jail time based on total arrears owed; delayed reporting to jail with lump sum or monthly installment purge amounts; and “one and done” dispositions where sentences include a brief (two- to eight-week) delayed report date and a low, attainable purge (usually $500-$1,000). It also worked with DCSE to improve and implement new technology, including collaborating with judges, clerks, and city officials to place child support payment kiosks at courthouses.

The Section also worked closely with DCSE on the Debt Compromise Program, under which noncustodial parents at or below 200% of the federal poverty level can receive a $2 credit for every $1 paid towards public assistance child support debt owed the Commonwealth. This program is designed as an outreach to parents, encouraging them to make and maintain payments while connecting them with beneficial services and offering modest reductions in their arrears. The program has been quite successful, resulting in the collection of $6.81 million through the participation of 20,751 of the 56,588 parents identified as eligible.

The Section assisted DCSE in securing a Procedural Justice-Informed Alternatives to Contempt (“PJAC”) grant, collaborating with DCSE and other partners to submit a successful demonstration grant proposal to the federal Office of Child Support Enforcement. DCSE will use the grant funding to design and implement a program using treatment and control groups in the Hampton and Richmond caseloads to test whether incorporating procedural justice principles into child support business practices increases reliable child support payments.
Bankruptcy Unit

During each month, the Section’s Bankruptcy Unit processed nearly one hundred new cases filed under Chapters 7 and 13 of the U.S. Bankruptcy Code. The Unit also averaged filing over fifty pleadings per month, including proofs of claims, objections to Chapter 13 plans, and motions to dismiss. The Section’s bankruptcy expert appeared at approximately fifteen to twenty hearings in bankruptcy courts across the Commonwealth each month. As of December 2016, the Bankruptcy Unit was handling 1,034 active bankruptcies affecting 1,233 DCSE cases, including 222 cases filed under Chapter 7, and 812 cases filed under Chapter 13.

The Bankruptcy Unit successfully persuaded Chapter 13 trustees in the Norfolk/Newport News Division of the U.S. Bankruptcy Court for the Eastern District of Virginia to adopt the same concurrent payment schedule as other trustees throughout the Commonwealth instead of requiring debtors to pay attorneys’ fees—up to $5,100—before any money goes toward child support arrears. Now all divisions in both the Eastern and Western Districts establish Chapter 13 bankruptcy plans that pay attorneys’ fees and child support arrears concurrently. This important change results in child support arrears being paid much sooner.

Policy and Legislation

The Section assisted DCSE’s Program Guidance Team to ensure that changes in agency policy were in accordance with all applicable state and federal law. It also reviewed state and federal form changes necessary to comply with new child support laws for international cases mandated by The Hague Convention. Further, the Section suggested changes to make DCSE’s administrative review and modification procedures more efficient. During the 2016 legislative session, the Section reviewed legislation amending child support or other domestic relations laws and provided legal advice and counsel on numerous bills that had the potential to impact DCSE.

The Section assisted DCSE with two of its agency bills that passed during the 2016 legislative session. The first piece of legislation (H.B. 428) amends § 20-63 of the Code of Virginia to increase the amount that a county or city pays to “not less than $20 nor more than $40” for each week that a noncustodial parent performs public service work while jailed for contempt for failure to pay
support.\textsuperscript{5} This increase reflects the current minimum child support guidelines and designates DSS as the entity to which a county or city shall pay funds for the support of a prisoner’s spouse or children.

The second bill (H.B. 1026) added “electronic means” as a method of service that allows DCSE to serve notices electronically through “MyChildSupport,” the online child support portal, to case participants who create a user account and agree to receive communications and service through the portal. The portal will record the date and time that the served notice is viewed by the user. This new law will allow case participants to receive notices faster and more securely while also saving DCSE both time and money.

**Education Section**

The forty-eight lawyers in the Education Section advise the Commonwealth’s public educational institutions and its museums. The Section’s guidance to the Department of Education often influences the manner in which Virginia’s local elementary and secondary schools maintain discipline and safety, implement the Standards of Learning and Standards of Quality, provide access to technology for disadvantaged students, improve school facilities, and ensure compliance with federal education programs. The Section’s assistance to Virginia’s public colleges and universities encompasses a wide range of issues, including campus safety and security, admission and educational quality issues, personnel issues, delineating the proper relationship between colleges and the Commonwealth, contracts, procurement, and financing.

**Campus Sexual Assault**

In addition to providing a wide range of advice to Virginia’s public educational institutions, the Section works to increase public awareness of campus sexual assault. Section attorneys are frequently called upon to advise governing boards and various individuals on campus, including athletic staff, student affairs deans, and the president, on the highly complex legal issues that are encountered when a student or employee reports an allegation of sexual violence. Issues on which attorneys advise include compliance with intricate federal requirements, fostering a trauma-informed recovery for the victim,

\textsuperscript{5} The former statutory language provided that not less than $5 nor more than $25 be paid for each week.
coordinating with local law enforcement, properly weighing a request from a victim for confidentiality or not to pursue an investigation against the safety concerns of the campus community, and providing due process to the accused individual.

The Section’s work on campus sexual assault matters requires knowledge and application of Title IX, the 2013 Violence Against Women Act, various state laws regarding sexual violence on campus the voluminous case law and guidance documents interpreting it; the 2013 Violence Against Women Act and the regulations and guidance documents interpreting it; as well as various state law provisions adopted to combat sexual violence on campus. In response to these continually changing mandates, Section attorneys act quickly to provide advice on revisions to existing campus policies on sexual violence and Title IX issues when necessary, as they apply to both accusers and respondents in assault matters.

Recodification of Title 23

After two years of careful consideration, the Virginia Code Commission recommended the amendment and recodification of Title 23 governing educational institutions. In response, legislation was advanced in the General Assembly that proposed adding Title 23.1 and was passed during the 2016 General Assembly session. Section attorneys contributed to all stages of the legislative drafting process, including post-passage identification of statutory terms that required further clarification or correction. Section attorneys also assisted affected state institutions in identifying updates to policies and handbooks that became necessary as a result of the recodification.

Working Group on State Contracts

During the year, the Section’s attorney participated in the Office-wide working group established to address specific recommendations proposed by the Joint Legislative Audit and Review Commission in its study of the Development and Management of State Contracts in Virginia. The working group conducted a comprehensive review of all standard contract provisions developed or recommended for agency use by certain purchasing entities, and also assisted in preparing guidance regarding the legal services the Attorney General’s Office offers to assist agencies with contract procurement.
Health Services Section

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

During 2016, the attorneys in the Health Services Section continued to represent the Commonwealth and the Department of Behavioral Health and Developmental Services in the implementation of the settlement agreement entered by the United States District Court for the Eastern District of Virginia between the United States and the Commonwealth regarding Virginia’s system of services for individuals with developmental disabilities. Two status conferences were held before the court. Section attorneys continued negotiating with the Department of Justice to establish timelines for compliance with the settlement agreement in lieu of a court-ordered schedule of compliance. The Section also assisted the Department of Behavioral Health and Developmental Services with legal issues that arose in the process of decertifying and closing the skilled nursing facility unit at Central Virginia Training Center.

Further, Section attorneys successfully defended the Department of Behavioral Health and Developmental Services, and its facilities and employees, in multiple state and federal court actions brought by current and former patients. Throughout the year, the Section provided legal advice to the Department of Behavioral Health and Developmental Services on many issues including civil commitment, confidentiality, human resources, and regulatory compliance.

The Section continued its efforts assisting the Department of Health Professions and its fourteen health regulatory boards in numerous disciplinary proceedings under the Administrative Process Act. Many of these cases were appealed by the disciplined professionals to state courts, and the Section’s attorneys successfully represented the Boards. In addition, the attorneys assisted in successfully defending the Board of Medicine in a federal lawsuit pursued to the Supreme Court of the United States by a licensee alleging antitrust
violations. The attorneys were also involved in exploring ways to increase access to Naloxone within the parameters of state and federal pharmacy laws in an effort to prevent deaths from opioid overdose.

The attorneys in the Health Services Section advised the Department of Health on legal issues relating to its response to the Zika virus, including the right to enter private property to inspect and abate mosquito nuisances and the confidentiality of the records of those infected or exposed to the disease or whose property is inspected. The Section also advised the Commissioner of the Department of Health in her consideration of the cooperative agreement application filed by two health systems located in southwestern Virginia. Further, Section attorneys successfully defended the Department of Health in three court actions arising from a procurement matter. As in past years, the Section continued to provide advice to the Department of Health on a variety of issues including reporting of child abuse and neglect, vital records, exchange of health information, emergency medical services, employee grievances, emergency preparedness, and certificate of public need.

Additionally, the Section successfully represented the Department for Aging and Rehabilitative Services in a federal court action filed by a vocational services client who alleged violations of the Americans with Disabilities Act.

**Medicaid and Social Services Section**

The nine attorneys and two support staff in the Medicaid and Social Services Section represented the Department of Medical Assistance Services, the Department of Social Services, the Office of Children’s Services, and the Department of Rehabilitative Services on several noteworthy matters this past year and assisted these clients in protecting the health and safety of children and other vulnerable residents of the Commonwealth. The Section was also responsible for the recovery of millions of public dollars that had been inappropriately disbursed. Several Section attorneys also provided invaluable assistance to the American Association of Health and Human Services Attorneys, which held its annual conference in Norfolk this past year.

**Department of Medical Assistance Services (“DMAS”)**

The Section successfully defended a number of Medicaid appeals related to Medicaid provider reimbursement appeals and continued to develop law covering DMAS’s audit practices. The Court of Appeals of Virginia decided
Morrison Comprehensive Learning Center, LLC v. DMAS, the first case directly interpreting last year’s Court of Appeals decision in Culpeper Regional Hospital v. DMAS. The Appellant argued that a material breach standard was still applicable and that the progeny of cases that led to the court’s decision in Culpeper applied a material breach analysis. In this case, the court agreed with DMAS that the Culpeper decision did not so hold and that the Provider Participation Agreement displaced ordinary contractual rules of material breach. The court also upheld DMAS’s retraction of the entire payment irrespective of whether the breach was material. Similarly, the Court of Appeals affirmed Bon Secours St. Mary’s Hospital v. DMAS and held that the provider agreement displaced contractual default rules in a certification case involving inpatient hospital care.

The Section worked closely with the DMAS procurement team to post a number of Requests for Proposals (“RFPs”) to contract with businesses to ensure the Department’s efficient delivery of Medicaid reimbursement claims and services to recipients. In order to replace the Medicaid Management Information System, DMAS designed and the Section reviewed five RFPs that will comprise the new Medicaid Enterprise System: Core Services Solution, Financial Management Solution, Integration Services Solution, Enterprise Data Warehouse Solution, and Pharmacy Benefit Management Solution. The Section continues to assist DMAS in the negotiations phase of this extensive project.

Another significant project that DMAS rolled out last year is the Department’s new Managed Long Term Services and Supports Program, which includes 212,000 eligible members and offers a managed care program that will serve Medicaid recipients, including children and adults with disabilities and complex needs. DMAS issued an RFP soliciting proposals from Virginia licensed and qualified Contractors to enter into fully capitated, risk-based contracts to administer a coordinated delivery system that focuses on improving quality, access and efficiency under the Medicaid program. The Section assisted DMAS in reviewing the RFP and subsequently resolving protests filed by two offerors; this will result in contracts with seven managed care organizations to provide services to Medicaid recipients throughout the Commonwealth.

The Section also reviewed the Non-Emergency Medical Transportation Brokerage Services RFP that should be awarded by DMAS in 2017.

Further, the Section was involved in certifying several significant regulatory packages. Section attorneys worked closely with the Department of
Behavioral Health and Developmental Services ("DBHDS") and its attorneys to review emergency regulations regarding the restructuring of three Medicaid waivers: the Day Support Waiver for Individuals with Mental Retardation (formerly the Building Independence Waiver), the Intellectual Disability Waiver (formerly the Community Living Waiver), and the Individual and Family Supports Developmental Disabilities Waiver (formerly the Family and Individual Supports Waiver). This effort represents the culmination of two years of work among DMAS, DBHDS, advocates, and families of individuals with intellectual disabilities and other developmental disabilities, to offer new services designed to promote improved community integration and engagement to this targeted population.

In the fall, the Section assisted DMAS in its efforts to combat the opioid crisis in Virginia by certifying a fast track regulation that creates a new program, Addiction and Recovery Treatment Services, which will provide a comprehensive continuum of addiction and recovery treatment services based on the American Society of Addiction Medicine Patient Placement Criteria.

The Section also reviewed an emergency regulation that permits DMAS to cover lung cancer screenings for at-risk adults, enabling DMAS to help make further reductions in lung cancer morbidity and mortality. Additionally, the regulations permit DMAS to align itself with established federal recommendations which support lung cancer screening.

Department of Social Services ("DSS")

In its representation of DSS, the Section litigated a number of cases, including defending the local departments of social services’ findings of abuse and neglect of children, decisions involving various benefits programs, and decisions by DSS revoking or denying certain licenses including substandard child day cares and assisted living facilities. One noteworthy case this year involved the filing of an amicus curiae brief to address interstate adoption procedures and the putative father (birth father) registry.

The Section reviewed and certified a number of regulatory packages dealing with various DSS programs, including the review of child protective services regulations that establish the regulatory framework for protecting children from abuse and neglect while balancing the rights of parents and family, the review of the regulations regarding background checks for Child Welfare Agencies, the review of the regulation regarding licensure threshold for
voluntary registration of family day homes, and the review of the regulations regarding assisted living facilities. The Section also identified areas in the Code of Virginia that need amending in order to comply with federal Title IV-E provisions regarding permanency planning hearings and reasonable efforts requirements in Virginia’s child removal statutes. Additionally, the Section drafted legislation that will align the Code with the federal Comprehensive Addiction and Recovery Act. This legislation will protect children affected by substance abuse.

The Section also continued its work on a number of matters dealing with DSS’s Child Care Subsidy Program, including the further development of its appeals process. The Section successfully defended a termination of a vendor agreement for failure to have background checks of its employees. The Section also assisted DSS in resolving a number of disputes with providers.

Office of Children’s Services (“OCS”)

The Office of Comprehensive Services, along with its supervisory body, the State Executive Council (“SEC”), administers the provisions of the Children’s Services Act for At-Risk Youth and Families, a law that establishes a single state pool of funds to purchase services for at-risk youth and their families. The Section continued to provide legal counsel and advice to OCS and the SEC, particularly the refinement of its audit practices with localities throughout the Commonwealth.

Department of Rehabilitative Services (“DARS”)

The Section shares its duties to this client with the attorneys in the Health Section, with its focus centering on DARS’s oversight of adult protective services and the Auxiliary Grant program. The Section certified emergency regulations expanding coverage under the Auxiliary Grant program. In addition to the options of assisted living facilities and adult foster care homes, Virginia’s program added supportive housing as a third setting.

TRANSPORTATION, REAL ESTATE, AND CONSTRUCTION LITIGATION DIVISION

The Transportation, Real Estate, and Construction Litigation Division (or “TREC”) includes three Sections: Transportation, Real Estate and Land Use, and Construction Litigation. It provides comprehensive legal services to
executive agencies, state boards, and commissions within its areas of expertise. The Division provides legal advice on a wide variety of subjects, including employment, contracts, purchasing, and the regulatory process. Division attorneys regularly assist state agencies with complex transactions and also represent those agencies in court, often in close association with other attorneys in the Attorney General’s Office.

**Transportation Section**

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report to (or are assigned to) the Secretary of Transportation. These bodies include the Virginia Department of Transportation (“VDOT”), the Commonwealth Transportation Board, the Department of Motor Vehicles (“DMV”), the Commission on the Virginia Alcohol Safety Action Program, the Department of Rail and Public Transportation, the Virginia Port Authority, the Virginia Port Authority’s Board of Commissioners, the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, the Virginia Commercial Space Flight Authority, and Virginia’s Office of Transportation Public-Private Partnerships. The Section also advises and acts as counsel to the Secretary of Transportation.

Section attorneys serve their transportation clients in numerous administrative, regulatory, transactional/contractual, and litigation matters, including Public-Private Transportation Act transactions; bond issuance and bond refunding and refinancing transactions; contract negotiation, drafting, and dispute issues; eminent domain/condemnation issues and litigation; land use issues; outdoor advertising and roadway sign issues relating to highway rights-of-way; land use permit agreements for the construction and operation of cell and wireless towers in highway rights-of-way; legal jurisdictional transfer requests involving federal agencies; personnel issues; environmental issues; procurement strategies and disputes; automobile titling and registration issues; driver licensure and regulation issues; motor vehicle fuels tax collection and enforcement issues; motor vehicle dealer licensure, regulation, and disciplinary issues; administration of motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; administration of the Virginia Alcohol Safety Action Program; review of transportation legislation; rail and other grant agreement drafting and negotiation; FOIA requests; review of agency procurement contract provisions in response to Joint Legislative Audit and Review Commission recommendations; conflict of interests inquiries; and
This year, Section attorneys engaged in litigation in state and federal courts throughout Virginia to protect the Commonwealth’s transportation interests. In *Vista-Graphics v. Virginia Department of Transportation* (E.D. Va.), the Section successfully defended the Commonwealth against a First Amendment challenge to state content restrictions on tourism literature available to travelers at VDOT rest-area facilities. The U.S. District Court for the Eastern District of Virginia issued an order and opinion in this case granting the Commonwealth’s motion to dismiss. Relying primarily on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the court held that the tourism literature is government speech rather than private speech. The advertising vendor appealed the decision, and the case remained pending before the Fourth Circuit at the end of 2016. The Office of the Solicitor General is handling the appeal.

In *Stinnie v. Holcomb* (E.D. Va.), four plaintiffs filed suit against the Commissioner of the DMV, claiming discrimination as a result of license suspensions imposed for the non-payment of fines and costs. The plaintiffs alleged Due Process and Equal Protection violations and sought class-action certification for the case. The Section filed a 12(b) motion to dismiss, which was followed by a memorandum in opposition from the plaintiffs. The Section then filed a rebuttal in response. The ACLU filed an amicus brief on behalf of the plaintiffs, and the U.S. Department of Justice also filed a brief on behalf of the plaintiffs. At the end of 2016, the Section’s motion to dismiss remained pending before the court.

Throughout the year, the Section advised VDOT regarding multiple key transportation project transactions. Section attorneys provided extensive legal advice and drafted preliminary Public Private Transportation Act (“PPTA”) transactional and procurement documents. The largest PPTA project was a $2.7 billion proposal to add about 22 miles of High Occupancy Toll (“HOT”) Lanes in Northern Virginia, specifically in the median of Interstate 66 from I-495 (the Capital Beltway) to Gainesville, Virginia. This project was notable as Virginia’s first PPTA project where no public contribution was required. Virginia will receive approximately $1.8 billion in transportation and transit funding as part of the project. The Section also assisted in negotiations with the Washington Metropolitan Area Transit Authority (“WMATA”) to develop a
Project Coordination Agreement for the I-66 Outside the Beltway project that addresses WMATA’s concerns while protecting the Commonwealth’s interests and enabling the developer to work successfully in the area of the transit system.

Section attorneys assisted with the creation of the I-66 Tolling Integrator Contract, a $40 million contract between VDOT and Transcore to install tolling infrastructure on Interstate 66 inside the beltway in Northern Virginia. This is not a PPTA project. VDOT will collect the toll revenue for use in transit projects benefitting toll payers along the I-66 Inside the Beltway Corridor. The Section also assisted with drafting both an initial Memorandum of Agreement and also an Amended and Restated Memorandum of Agreement with the Northern Virginia Transportation Authority (“NVTA”) to provide toll revenue funding of I-66 HOT lanes for multimodal transportation improvements being developed by VDOT on the I-66 Inside the Beltway Corridor. Additionally, the Section assisted in amending existing PPTA transactional agreements with Transurban to provide for a northern I-395 HOT Lanes extension of the I-95 HOT Lanes as well as a 2.2 mile southern extension. The Section also began work with VDOT on an I-95 HOT Lanes extension to Route 17 just north of Fredericksburg. This project is in the very early stages of planning and VDOT is currently narrowing its procurement options, which include a potential PPTA concession.

In Hampton Roads, the Section assisted with the Interstate 64 Capacity Improvements Project, which proposes to widen the road to Williamsburg in both directions over the course of three phases of construction. This is the first highway project of the Hampton Roads Transportation Accountability Commission (“HRTAC”). The Section also worked with HRTAC and VDOT on the High Rise Bridge Improvement Project, which will be constructed as a design-build project and is expected to be one of VDOT’s largest design-build projects at a cost of approximately $600 million. In addition, Section attorneys assisted VDOT with a toll integrator contract procurement designed to add tolls and express lanes to certain portions of I-64 within the next year.

In Southwest Virginia, the Section assisted VDOT in advancing the U.S. Route 121 (formerly Coalfields Expressway) P3 project. It provided guidance throughout the bankruptcy of one of the two developers and the reorganization of a new company, and it helped resolve multiple critical issues to enable the project to move forward. Negotiations continue regarding the terms of the Amended and Revised Comprehensive Agreement. The Section also assisted
VDOT in the Poplar Creek $4 million amendment to the design-build contract for an ongoing PPTA project involving the Coalfields Expressway. The amendment will allow the design-builder to perform certain preliminary design work prior to the National Environmental Policy Act (“NEPA”) re-evaluation in accordance with direction from VDOT on the project.

In 2016, the Section oversaw the issuance of over $350 million of VDOT bonds for transportation programs, revenue refunding, and capital project revenues. Section attorneys also reviewed an entity sale and refinance of project debt for the Pocahontas Parkway under the existing PPTA Comprehensive Agreement. The purchase price for the new concessionaire was $637 million. In addition, the Section spent significant time reviewing standard VDOT contract documents in response to the Joint Legislative Audit and Review Commission’s report on state procurement and contracting, which was published in the summer of 2016. Section attorneys also assisted VDOT in its review of the VDOT Professional Services Manual.

During the year, the Section provided extensive legal support to VDOT concerning communications towers in the highway right-of-way. The communications industry has litigated the issue of its rights to permits for towers in the highway right-of-way and has proposed significant state legislative changes. Federal regulatory changes are also pending, which are being heard by the Federal Communications Commission.

The Section was heavily involved in rail transportation and transit issues throughout the year. Section attorneys continued to assist the Department of Rail and Public Transportation (“DRPT”) in its response to the Federal Transit Administration’s (“FTA”) concerns about the Tri-State Oversight Committee, which oversees safety on the WMATA metro-rail system. As reported last year, those concerns led to efforts on the part of the FTA to create—via interstate compact—a new Safety Service Oversight entity to oversee WMATA and its safe operation of the metro-rail system. During 2016, Section members conferred with counsel from the District of Columbia, Maryland, and the Washington Council of Governments to draft a Metrorail Safety Commission Interstate Compact, which is being considered by the governing bodies and their legislatures for adoption into law. Once the two state jurisdictions and the District of Columbia enact the compact as statutes, the compact will be presented to the United States Congress for ratification.
Other accomplishments include participation in negotiations for the Southeast High Speed Rail (“SEHSR”) Corridor with CSX Transportation; assistance with agreements concerning environmental studies for the development of SEHSR; negotiation with VDOT and AMTRACK concerning parking expansion for the Richmond Staples Mill Amtrak station; and the negotiation and drafting of agreements with Amtrak for federally-required state assumption of financial responsibility for all intercity passenger service.\(^6\) The Section also participated in extensive negotiations and the drafting of project agreements in connection with the Pulse Bus Rapid Transit Project that is planned to run along Broad Street in Richmond from the Willow Lawn area of Henrico County to Rocketts Landing in the City of Richmond. This is a major transit initiative for the City.

Significant efforts were made to support DRPT in its expansion into the realm of project oversight and transit operations. The Section provided extensive assistance to DRPT in negotiating agreements between DRPT and the City of Virginia Beach, and in consulting with Hampton Roads Transit concerning funding and oversight related to the proposed extension of The Tide light rail transit system to the City of Virginia Beach. The City, however, chose to forego the project after it was voted down in a non-binding referendum. Section attorneys also provided assistance to DRPT in negotiating the transfer of a transit facility from Virginia Regional Transit to the Central Shenandoah Planning District Commission in order to preserve the federal purpose of the facility and to avoid DRPT having to reimburse the FTA for grant funds previously provided. This effort will remain ongoing in 2017. In addition, the Section assisted DRPT on a very short timeframe in finalizing a four-year agreement between DRPT and WMATA for Virginia’s portion of funding for WMATA during this time period, which is required in order for WMATA to receive proportionate funding from Maryland, the District of Columbia, and the federal government.

The Section also spent considerable time advising DRPT and working with both the Federal Railroad Administration and CSX regarding the ongoing Arkendale to Powell’s Creek third track project, which is the first part of the planned Southeast High Speed Rail Corridor. Further, Section attorneys provided substantial legal support for issues pertaining to the Washington, D.C., area.

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\(^6\) Projects mentioned in this particular sentence are long-term projects that were also mentioned in last year’s report.
to Richmond segment (“DC2RVA”) of the SEHSR Corridor, which included development of a strategy for review and consolidation of historical corridor-level agreements between DRPT and CSX; development of a master grant agreement with CSX for preliminary engineering services for the Atlantic Gateway segment of DC2RVA; and negotiations with the Federal Railroad Administration, the District of Columbia, the Department of Transportation, Virginia Railway Express, and CSX for a Memorandum of Agreement and Understanding regarding preparation of the Long Bridge Project National Environmental Policy Act Environmental Impact Statement. Other tasks included providing legal review and advice concerning numerous transit and rail grant agreements, assisting with responses to FOIA requests, and providing legal advice relating to various Requests for Proposals that DRPT forwarded for the Section’s consideration.

During the year, the Section was actively involved in advising the Virginia Port Authority (“VPA”). Section attorneys assisted the VPA and its Board of Commissioners in numerous matters related to container and rail logistics at the Port. Also of particular note is the Section’s assistance with VPA’s new fifty-year capital lease of the Virginia International Gateway (“VIG”) terminal. This lease will enable the VPA to develop the VIG terminal and double its container capacity while ensuring the cost effectiveness of the improvements and providing for a longer term of ownership of the terminal at the end of the lease period.

In 2015, the VPA secured a new forty-year lease at the Port of Richmond. The lease was challenged by the disappointed bidder, who filed a bid protest against the City of Richmond and the VPA that remained pending in the City of Richmond Circuit Court at the end of 2016. The lawsuit alleges that the City did not follow the applicable statutory procedure when it granted the lease to VPA permitting it to rent, maintain, and operate the Port of Richmond. In April 2016, the court dismissed three of the five counts against the VPA at the demurrer stage. The Section continues to litigate the remaining two counts.

Finally, the Section continued to assist the Virginia Commercial Space Flight Authority (Virginia Space) and the Secretary of Transportation in settling and resolving the rebuilding of Virginia’s Mid-Atlantic Regional Spaceport (“MARS”) on Wallops Island after the Orbital Sciences Corporation unsuccessfully attempted a third Commercial Resupply Mission to the International Space Station two years ago. The launch anomaly and explosion
upon liftoff of the Orbital Antares Rocket caused damage to launch pad “0A” at the Virginia MARS facility in the amount of $15 million. The Section provided extensive advice to Virginia Space regarding the launch anomaly and was able to facilitate the successful return of both Virginia Space and the Orbital Sciences Corporation to the facility for a successful Commercial Resupply Mission launch in the fall of 2016.

**Real Estate and Land Use Section**

The Commonwealth of Virginia, through its various agencies, departments, educational institutions, museums, and authorities, is the largest holder of real property interests in the Commonwealth, with the possible exception of the federal government. The Real Estate and Land Use Section handles many of the attendant real estate transactions, and may participate in litigation involving real property interests. One of the Section’s attorneys works out of Northern Virginia and is shared with TREC’s Construction Section.

The Section’s multiple roles include providing daily advice on real estate issues to the Division of Real Estate Services of the Department of General Services (“DGS”) and to other state agencies with significant real estate activity, including interagency transfers of property by written agreement; providing advice to the Division of Engineering and Buildings (“DEB”) within DGS regarding policies, procedures and other issues that arise in DEB’s role as statewide construction manager and building official; providing real estate support to the various institutions of higher education and museums that do not have the requisite authority to act independently under the Restructured Higher Education Financial and Administrative Operations Act; serving as general counsel to the Department of Historic Resources, the Fort Monroe Authority, the Virginia Outdoors Foundation, and the Director’s Office of DGS; reviewing and approving all required bid, payment, and performance bonds for construction projects managed by DGS, Norfolk State University, the Department of Military Affairs, the Department of Game and Inland Fisheries, and the Department of Conservation and Recreation; reviewing real estate related legislation introduced at each session of the General Assembly; acting as line counsel for real estate opinions of the Attorney General; serving as the Office of the Attorney General’s real estate subject matter experts in real estate related litigation, at both the trial and appellate levels; and serving as special real estate counsel to independent authorities upon request.
During the year, the Section completed 172 transactions, including purchases; conservation and open space easements; utility, access, water and other such routine-type easements; interagency land transfers; Department of Alcoholic Beverage Control store lease transactions; and payment and performance bond approvals. Thirty-two purchase transactions and four sale transactions remained in progress at the end of 2016.

Significant transactions and other activities are detailed below, listed by order of the name of the state agency or entity involved:

Department of Agriculture and Consumer Services (“VDACS”)

The Section handled the transfer of the Eastern Shore Farmers and Seafood Market from the Virginia Public Building Authority to VDACS.

Department of Alcoholic Beverage Control (“ABC”)

The Section reviewed twenty-two leases for new stores and relocations, thirteen updated leases for existing stores, and forty-three lease extensions.

Department of Behavioral Health and Developmental Services (“DBHDS”)

The Section assisted in the sale of Southside Virginia Training Center, North Campus, following the closure of the facility in 2014 pursuant to a settlement agreement between the Commonwealth and the U.S. Department of Justice (“DOJ”). The transaction involved a sale and partial leaseback of approximately forty-nine acres with improvements in Dinwiddie County, a portion of which was used by the Department of Corrections as a probation and parole office. The property was sold to the Virginia Electric and Power Company (“VEPCO”) for a purchase price of $1,200,000. In addition to the purchase price, VEPCO paid the Department of Corrections $200,000 to offset the cost of relocating the probation and parole office. VEPCO also leased to the Department of Corrections the portion of the property it had used for the office to allow it time to secure a new location.

The Section also provided assistance with the sale of the Northern Virginia Training Center in Fairfax County, following that facility’s closure this year pursuant to the Commonwealth’s settlement agreement with DOJ. A possible purchaser has been identified. At the end of the year, however, the matter remained under negotiation.
Department of Corrections (“DOC”)

The Section represented DOC in acquiring the Grayson Billings parcel (Grayson County), adjacent to the River North Correctional Center, for a purchase price of $231,976. It also assisted DOC by negotiating the settlement of an easement claim made by an adjacent property owner to certain property of the Sussex I and II Correctional Centers and the Sussex Farm/Greenville Work Center.

Department of Game Inland Fisheries (“DGIF”)

The Section assisted DGIF in two significant conservation-related acquisitions during the year. First, it assisted the agency in the acquisition of 1,964.8 acres in Sussex County from The Nature Conservancy. This purchase was funded in part with grants from the Virginia Land Conservation Foundation and the Wildlife Restoration Program administered by the U.S. Fish and Wildlife Service. The property was added to the Big Woods Wildlife Management Area and is anticipated to provide habitat for the endangered red-cockaded woodpecker, as well as space for the preservation and restoration of native longleaf pine. Second, the Section assisted DGIF in the acquisition of 241.2 acres in Roanoke County. This purchase was funded in part with grant funding from the Wildlife Restoration Program, and the property was added to the Havens Wildlife Management Area, which is home to a variety of species of wildlife.

The Section also assisted in the exchange of real estate between DGIF and certain related entities of the Salem Stone Corporation in Wythe County. DGIF relinquished real estate consisting of approximately 150 acres in the Big Survey Wildlife Management Area to those entities in consideration of two separate tracts of land (approximately 36 acres and 88.322 acres, respectively) adjacent to the wildlife management area. The land relinquished by DGIF, though greater in acreage, was not usable by the public because of lack of access and its proximity to active mining operations. The exchange, among other things, (i) provided DGIF and licensees and permittees of DGIF with access to portions of the wildlife management area (from State Routes 640, 684, and 685) that were not previously readily accessible to the public, (ii) enhanced recreational opportunities, (iii) provided a diversity of habitats, enhancing benefits to the local wildlife, and (iv) added two watersheds believed to be home to 100 species of greatest conservation need, including the Appalachian yellow-bellied sapsucker and the mountain chorus frog.
Another DGIF matter involved issues relating to the ownership of certain subaqueous lands on bottomlands of the Hazel River in Culpeper County. DGIF desired to remove a 150-year-old dam to eliminate a dangerous obstruction in the river and to promote aquatic life. Determining ownership of the river’s bottomlands required an examination of various chains of title extending back to King’s grants from the early 1700s. DGIF purchased the dam in 2016 from its owner as was revealed by the Section’s title work, and it was able to remove the dam prior to a significant rainy season, protecting the mussels and fish in the river.

Department of General Services (“DGS”)

The Section assisted with the transfer of stewardship responsibilities for the Virginia War Memorial Carillon, a Georgian Revival bell tower constructed as the Commonwealth’s official monument to those who died as a result of World War I. Transfer of stewardship responsibilities for the Carillon from the City of Richmond to DGS was directed by the General Assembly in the 2016 Budget Bill.

The Section continues to assist the Virginia Women’s Monument Commission with plans for the construction of a women’s monument on Capitol Square. Along with the Construction Section of TREC and the Technology and Procurement Section of CET, the Section is assisting the Commission in drafting (i) an agreement for the transfer of privately-owned intellectual property interests in the schematic designs for the monument, and (ii) an agreement for the construction of the monument. Negotiations remain ongoing. DGS is providing support for the Commission in planning the project.

The Section also is assisting in the transfer of the Mid-Rise Building in Herndon from the Innovation and Entrepreneurship Investment Authority to DGS, in accordance with the General Assembly’s directive in the 2016 Budget Bill.

During the year, the Section advised DGS in advancing final regulations to ban the carrying of concealed weapons in state executive branch offices, pursuant to the directive in Governor’s Executive Order 50. The Section also assisted in terminating a DGS lease on office property in Roanoke, which provided space and housing for several state agencies. Following a decision by the state agencies to vacate the property, which was based on various factors, the
Section assisted DGS in terminating the lease and settling outstanding issues involving the landlord.

**Department of Historic Resources ("DHR")**

In its role as primary counsel for DHR, the Section responds to day-to-day legal issues and attends the agency’s quarterly board meetings. The majority of the Section’s assistance to DHR, however, has to do with the agency’s easement program. This year, the Section reviewed and approved DHR historic preservation easements in Chesterfield County (Castlewood), Culpeper County (Komrowski Tract at Brandy Station Battlefield), Gloucester County (Fairfield Foundation Lot), Dinwiddie County (Dear Tract, Peeble’s Farm, and the Breakthrough Battlefields), Henrico County (J. H. Mellert (Crew) House and the Alcor-Shield Tract at Malvern Hill Battlefield), and Louisa County (Shiflett Tracts at Trevilian Station Battlefield).

The Section also assisted DHR with the assignment of an easement held by the Board of Historic Resources over approximately fifty-eight acres in Gloucester County, known as the Werowocomoco Archaeological Site, to the National Park Service. This assignment was part of a larger transaction in which the National Park Service acquired 264 acres, including the Werowocomoco site, for inclusion in the Captain John Smith Chesapeake National Historic Trail. The assignment instrument included a reverter provision to protect the Commonwealth’s interests in the historic resources and the open-space character of the site.

**Department of Juvenile Justice ("DJJ")**

The Section worked with the Division of Real Estate Services with respect to the potential acquisition of an eleven-acre site from the City of Chesapeake for a proposed Joint Juvenile Justice Center. This project is ongoing.

**Department of Military Affairs ("DMA")**

The Section assisted in a DMA project involving agreements with the U.S. Navy concerning restricting the use of portions of Camp Pendleton, which is adjacent to the U.S. Navy operation at Dam Neck. This project remains ongoing.
Department of Veterans Services (“DVS”)

The Section worked with the Department of General Services, DVS, and other parties with respect to the acquisition of sites for Veterans Care Centers in Northern Virginia and Virginia Beach. Fauquier County, the Vint Hill Economic Development Authority, and Vint Hill Village are working together to donate the land for the Northern Virginia site to the Commonwealth. The land for the Virginia Beach site is to be donated by the City of Virginia Beach. These acquisitions are ongoing.

Fort Monroe Authority (“FMA”)

The Section advises the FMA’s Board of Trustees, which oversees the preservation, management, and reuse planning of Fort Monroe, a historically significant decommissioned U.S. Army base located in the City of Hampton. Fort Monroe contains approximately 565 acres of land along with numerous buildings and other facilities. Following closure of the base in 2011, large portions of the property reverted to the Commonwealth’s ownership. Both raw land and improved properties owned by the Commonwealth on the site are leased for commercial and residential uses. The Section advises the FMA’s Board of Trustees and staff on general contract matters, FOIA, lease and development issues, and matters of internal governance.

As noted in last year’s Annual Report, the Commonwealth conveyed 121 acres in Fort Monroe to the National Park Service (“NPS”) in 2015 for incorporation into the Fort Monroe National Monument. This year, the Section assisted the Commonwealth in a supplemental conveyance that is to grant NPS a historic preservation easement on a portion of the site that remains under state ownership. In addition, the Section finalized negotiations with respect to the Commonwealth’s conveyance of the Wherry Quarter to the NPS for incorporation into the National Monument. These conveyances, which will connect the two existing parcels of the National Monument to make one contiguous monument, are expected to be completed in 2017.

Throughout the year, the Section continued to assist the Governor’s Office and FMA in negotiating an Economic Development Conveyance with the Army under the Base Realignment and Closure Act for eighty-three acres of property that may not have reverted from the U.S. Army to the Commonwealth following Fort Monroe’s closure. Negotiations with the U.S. Army have been in progress
for several years; however, the transaction is expected to be finalized in early 2017.

Virginia Museum of Fine Arts (“VMFA”)

The Section assisted in the reconveyance to VMFA of certain real property located at 200 N. Boulevard (Richmond) and known as the Pauley Center. VMFA had formerly conveyed the property to the Virginia Public Building Authority as security for the Authority’s Series 1995A Bond Issuance.

Virginia Outdoors Foundation (“VOF”)

The Section serves as general counsel to the VOF, which holds easements pursuant to Virginia’s Open-Space Land Act on over 800,000 acres in the Commonwealth. VOF also owns a number of significant properties including the Bull Run Mountains Preserve in Prince William and Fauquier Counties, and House Mountain in Rockbridge County. The Section advises the VOF’s Board of Trustees and staff on easement acquisition and stewardship, administration of VOF-owned lands, and general agency operations. The advice provided relates not only to issues of real property, but also to issues of contracts, procurement, taxation, FOIA, statutory authority, and Board procedure.

The Section provided extensive legal and policy advice to VOF with respect to Atlantic Coast Pipeline project proposed by a joint venture led by Dominion Resources. The path of the pipeline is anticipated to cross several VOF open-space easements in Virginia. If Dominion obtains the required federal permit for the pipeline, the project could represent the largest ever § 1704 conversion of open-space lands in the Commonwealth. Pursuant to § 10.1-1704 of the Code of Virginia, whenever certain open-space land is converted for another use, the acting party shall provide other real property to replace it. In accord with this mandate, the Section advised VOF during its negotiations with the Dominion Company over the replacement property Dominion is required by the statute to provide. The Section also worked with VOF and Dominion to negotiate the terms of an option agreement that Dominion will use to secure rights to the pipeline corridor.

The Section also advised VOF in several legal disputes relating to real property. It continued to assist in the dispute between Martha Boneta and the Piedmont Environmental Council (“PEC”) over an easement co-held by VOF and PEC on property owned by Ms. Boneta. The parties are engaged in an
undertaking to draft an amended easement that may resolve the dispute. Also, the Section continued to represent VOF in a lawsuit brought against VOF by the Rockbridge Area Conservation Council concerning the management of 876 acres in Rockbridge County owned by VOF, which includes the peaks of House Mountain. In addition, the Section assisted VOF in a dispute regarding one of the agency’s easements covering 1,780 acres in Bath County. The easement contains a complex plan of division for the property, establishing multiple smaller residential lots while protecting two very large tracts in a relatively undisturbed state. The Section continues working with VOF and counsel for the landowners in an effort to reach a resolution acceptable to all parties regarding the majority landowner’s proposed boundary line adjustments.

**Virginia State Police (“VSP”)**

As part of the City of Staunton’s ongoing efforts to redevelop the former site of Western State Hospital, the City proposed acquiring VSP’s existing Staunton headquarters, which is located on the former site. In exchange for the land, the City’s Economic Development Authority offered to provide an alternate site for VSP to construct a new headquarters facility. The Section worked with the DGS, the Bureau of Capital Outlay Management, VSP and the Staunton Economic Development Authority to refine the terms of this transaction, prepare the necessary documents, and finalize the property exchange.

The Section also represented VSP with regard to various income and expense leases for cell towers throughout the Commonwealth.

**Virginia Workers’ Compensation Commission (“VWCC”)**

The Section continues to assist the VWCC and the Division of Real Estate Services with a lease and option to purchase with respect to the VWCC’s potential relocation of its headquarters in Richmond.

The Section also had limited participation in litigation during the year. It prepared and submitted an amicus brief to the Supreme Court of Virginia in the case of *Mount Aldie, LLC v. Land Trust of Virginia, Inc.*, which concerned the construction of the terms of a conservation easement with respect to breach.
Construction Litigation Section

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

The Section provided legal advice to VDOT in every major transportation construction project the agency was involved in during the year. This advice was given over the course of each construction project and, in many cases, continued throughout the claims process and any ensuing litigation. Some of the more notable cases are mentioned below.

The Section assisted VDOT with issues regarding the Virginia HOT Lanes, the widening of I-66,\(^7\) and the widening of Route 7. Of particular significance is the Section’s assistance with the I-95 Virginia HOT Lanes Project, an almost billion-dollar undertaking. During the construction of the main section of the I-95 Virginia HOT Lanes project, Section attorneys provided support on schedule issues, compensation due to alleged design revisions, change order language, claims management, issue documentation, the drafting of correspondence, noise study and sound wall issues, the project’s document retention policy, and FOIA matters. The Section worked with both VDOT and the Transportation Section on the negotiation and procurement of northern and southern extensions of the original project.

Another significant VDOT project the Section provided support on was the $267 million Route 29/Linton Hall Road Interchange project. This project involved the construction of a temporary detour for Route 29, construction of

\(^7\) The I-66 widening is a $56 million project that seeks to widen approximately 3.6 miles of I-66 in Prince William County and involves the reconstruction of two heavily-traveled bridges across I-66.
two railroad overpasses, the widening of Route 29, and the creation of a limited-access facility on a portion of Route 29.

The Section also advised VDOT on the $76 million design-build contract at the Mark Center, a U.S. Department of Defense facility with 6,400 employees located in the City of Alexandria at Seminary Road and I-395. This project involved VDOT constructing a reversible High Occupancy Vehicle/Transit ramp on I-395 at Seminary Road as well as significant pedestrian enhancements.

The Section also assisted the Commonwealth in claims and litigation involving in the aggregate over tens of millions of dollars of public funds. For example, the Section was extensively involved in investigating, litigating, and responding to FOIA and media requests relating to the case of Commonwealth v. Trinity Industries, Inc., pending in the City of Richmond Circuit Court. In this case, the Commonwealth intervened against the defendant Trinity under the Virginia Fraud Against Taxpayers Act. Trinity manufactures and sells guard rail end treatments that are held out to act as crash cushions when motorists traveling on highways have an accident and crash into the end of a guard rail. Changes were made to the product in 2005 and neither the Federal Highway Administration nor any of the states, including Virginia, were notified of the changes by Trinity. The changes appear to have made the product less safe.

Additionally, the Section defended VDOT in a $22.4 million suit stemming from the Chincoteague Bridge project on the eastern shore of Virginia. This project was the largest road and bridge transportation project on the eastern shore of Virginia in many years. After a seven-week trial and post-trial briefing, the Accomack County Circuit Court ruled in VDOT’s favor on numerous key issues.

Finally, the Section provided legal advice, consistent with Joint Legislative Audit and Review Commission recommendations, regarding the updating of construction contracts and best practices for use by Virginia state agencies.

OPINIONS SECTION

Section 2.2-505 of the Code of Virginia authorizes the Attorney General to issue official opinions when requested by certain state or local officials. Official opinions are public documents and are published on the Attorney General’s website, and also in the Annual Report. The Attorney General’s Office also has inherent authority to issue confidential informal opinions to those officials. In
addition, § 2.2-3121 of the Code of Virginia authorizes the Attorney General to issue advisory opinions to certain officials regarding the State and Local Government Conflict of Interests Act. The Opinions Section processes and manages all such requests.

When a request for an opinion is received, the Opinions Section first determines whether it qualifies for issuing an opinion. There are a number of factors which, by longstanding tradition, make issuance of an opinion inappropriate, including, for example, pending litigation involving the subject of the opinion, the need to resolve issues of fact, and deciding matters reserved by law for decision by another official or agency.

Fifty-eight opinions were issued in 2016, consisting of thirty-three official opinions, twenty-one informal opinions, and four conflict of interest advisory opinions. The recipients included the Governor of Virginia, members of the Virginia House of Delegates and Senate of Virginia, Sheriffs, Circuit Court Clerks, Treasurers, Commissioners of the Revenue, several county, city, and town attorneys, local electoral boards, and various officials of state government. The requests came from counties, cities, and towns in all parts of the Commonwealth, including Verona, Winchester, Prince William, Pearisburg, Manassas, Falls Church, Mount Vernon, Virginia Beach, Norfolk, Bedford, Powhatan, Hampton, Poquoson, Richmond, Montross, Harrisonburg, Fauquier, Westmoreland, and Charlottesville, to name a few. The official opinions that were issued this year are included as a part of this Annual Report.

The Opinions Section is responsible for publishing the Annual Report of the Attorney General, pursuant to § 2.2-516 of the Code of Virginia.

PROGRAMS & COMMUNITY OUTREACH SECTION

The Programs & Community Outreach Section works to maximize citizens’ access to the resources and services offered by the Office of the Attorney General. The Section coordinates and oversees multiple programs and initiatives, some of which are discussed in detail below. The Section promotes these programs and initiatives with the assistance of community outreach coordinators placed in each region of the Commonwealth who provide information regarding the resources to their local communities. Outreach coordinators also partner with school and civic groups, organizations for seniors, law-enforcement agencies, human services providers, and other stakeholders in
crime prevention and other programs, and they represent the Attorney General’s Office on a variety of task forces and workgroups within their assigned regions.

During the year, the Section secured over $3.7 million in new federal and state grants to operate its programs and initiatives. Members of the Section delivered over 300 presentations, participated in at least 159 conferences and trainings, and served in at least 119 professional organizations, committees, task forces, and forums. Throughout the course of the year, the Section reached over 580,000 Virginians in its mission to promote safety, awareness, and the availability of resources.

Triad

Since 1995, the Attorney General’s Office has used the Triad Program to increase awareness of scams and frauds targeting seniors, to strengthen communication between seniors and law enforcement, and to inform seniors of local and state resources that may benefit them. The Section’s outreach coordinators work closely with the regional Triads, the Medicaid Fraud Control Unit ("MFCU"), and with law-enforcement officials and senior-based organizations to educate seniors on crime prevention issues. In 2016, the Attorney General’s Office signed charters for four new Triad chapters (Essex, Spotsylvania/Fredericksburg/Stafford, Pulaski, and Lexington/Rockbridge), which increased the total number of Virginia Triad chapters to 138. This includes more than 230 participating cities, counties, and towns. In March, the Section hosted a three-day Virginia Triad Conference that was attended by nearly 150 guests and vendors. Late in the year, the Attorney General’s Office offered a mini-grant opportunity to Virginia Triad chapters, with funding to be awarded in early 2017.

Victim Notification/Domestic Violence Services

Through its Victim Notification Program, the Section provides notice to individuals of any appeal or habeas corpus proceeding involving a case in which they were a victim, in addition to administering the Commonwealth’s Identity Theft Passport Program. Through these efforts, the Section provided assistance to 1,879 victims of crime, including 638 victims in criminal cases, 406 victims in sexually violent predator civil commitment cases, and 835 victims of identity
theft who participated in the Identity Theft Passport Program. Moreover, the Section’s Domestic Violence Services enrolled twenty-nine new families and renewed participation for fifty-nine families into Virginia’s Address Confidentiality Program, a confidential mail-forwarding service for victims of domestic violence, sexual assault, and stalking.

The Section recently secured funding to enhance services to victims by hiring an advocate who will provide assistance to victims in cases prosecuted by the Major Crimes and Emerging Threats Section ("MC&ET") and the Medicaid Fraud Control Unit ("MFCU").

Lethality Assessment Protocol

As part of its ongoing efforts to combat domestic violence homicides, the Section continued to provide technical assistance to the nearly two dozen law-enforcement agencies and their partnering domestic violence programs that received extensive training in Lethality Assessment Protocol ("LAP") from the Attorney General’s Office in 2015. LAP is an evidence-based screening tool that allows first responders to identify victims of domestic violence who are at high risk of imminent serious injury or death and connect them to local domestic violence services. Section staff also provided LAP training and subsequent technical assistance to the City of Virginia Beach this year, and several additional localities in Virginia are currently preparing for LAP implementation in the months ahead. Trainings in these localities by Section staff and other collaborative partners (including the Department of Criminal Justice Services and the Virginia Sexual and Domestic Violence Action Alliance) will be scheduled in 2017. Section staff secured funding through a $50,000 grant from the Verizon HopeLine to provide cell phones with free minutes to law-enforcement officers and victims, for their use in contacting local domestic violence programs that can assist victims with services and safety planning as prescribed through LAP.

Human Trafficking and other Trainings

During the year, the Section hosted several trainings on human trafficking. In July, the Section entered into an agreement with the U.S. Department of

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8 A single victim may be counted more than once depending on the number of cases the individual is involved in.
Homeland Security’s Blue Campaign to host four Human Trafficking trainings in Hampton Roads, two of which were provided to law-enforcement officers and prosecutors, while the other two were designed for and provided to community partners. These trainings were held in August. In November, the Section hosted a day-and-a-half long Human Trafficking training in Chesterfield for law-enforcement officers and prosecutors, which was presented by the National Attorneys General Training and Research Institute. Throughout the year, the Section also hosted several “Human Trafficking 101” presentations in various locations for community members, apartment managers, and court interpreters.

During the year, the Section also hosted a two-day domestic violence related training in Abingdon discussing the connection between animal abuse and crimes of domestic violence, blood sports, and drug activity. In addition, it hosted “Beyond the Clutter: Dangers and Consequences of Hoarding” in Woodbridge, which included educational information on elder abuse and neglect.

Hampton Roads Human Trafficking Task Force

In the fall of 2016, the Section, in collaboration with Samaritan House in Virginia Beach and the U.S. Department of Homeland Security, secured a $1.4 million federal grant for the creation of the Hampton Roads Human Trafficking Task Force. This multidisciplinary task force will combat human trafficking in Hampton Roads by identifying, rescuing, and restoring victims; building awareness about the realities of human trafficking in the region and across Virginia; and investigating and prosecuting trafficking crimes.

Sexual Assault Kit Testing Initiative

The Section is leading a multimillion-dollar project to eliminate Virginia’s three-decade old backlog of untested PERKs (Physical Evidence Recovery Kits) by identifying and testing these kits. This year, the Attorney General’s Office hosted four steering committee meetings and worked with law enforcement across multiple jurisdictions to begin the process of shipping stored kits for testing. To date, four jurisdictions have sent their kits to be tested. Victim notification protocols are being finalized for localities whose kits are being submitted. In October, the Attorney General’s Office and the Department of Forensic Science received a nearly $2 million grant from the Bureau of Justice Assistance as part of the National Sexual Assault Kit Initiative. This grant will allow the Office to inventory and test kits that are eligible for DNA testing not
yet covered by the PERK grant received last year. The grant also provides financial support for the development of an automated system for kit tracking. A statewide inventory of the untested kits is currently underway under the Attorney General’s leadership.

Re-Entry Program

Through the Re-Entry Program, the Section provides assistance to local jails and sheriffs’ offices as they prepare inmates for release and connect them with community organizations that provide housing, employment, behavioral health, or substance abuse services. The goal of the program is to provide resources to help returning citizens live productive lives in order to reduce recidivism and strengthen communities. This year, the Attorney General’s Office hosted Virginia’s first statewide re-entry conference, “Future Directions in Re-Entry: A Collaboration for Safe Communities,” which was held in Williamsburg with over 250 attendees. To further enhance re-entry efforts, the Section secured $750,000 in federal funds for a re-entry project that will assist inmates preparing for release from the Norfolk City Jail. This project is intended to reduce recidivism among gang-involved probationers by 5% over a three-year period. It is designed to facilitate collaboration among service providers, implement evidence-based care to address underlying risk factors for criminal behavior, and provide for improved responses to probationers’ noncompliance.

During the year, the Section also secured federal funding from the Second Chance Act through its partnership with the Department of Corrections and the Department of Criminal Justice Services. These funds were used in part to provide training on trauma-informed, evidence-based programs for women incarcerated in both local jails and state prisons.

Virginia Rules

The Section oversees Virginia Rules, a Virginia-specific curriculum for teens featuring twenty-six independent modules covering a wide variety of juvenile law issues. Drugs, bullying, and internet safety are some of the topics featured in the curriculum. New additions to the curriculum this year include a module on heroin, a viewing guide for the Office of the Attorney General’s documentary titled “Heroin: the Hardest Hit,” and a module designed to educate youth on their rights and responsibilities when interacting with law enforcement (“Give It, Get It: Trust and Respect between Teens and Law Enforcement”). In
2016, Virginia Rules provided resources and tools to 295 newly-enrolled instructors, increasing the total number of instructors statewide to 1,726. Instructors reported giving presentations to nearly 38,000 students, which represents a 31% increase in the number of students taught as compared to 2015. In addition, the Section sponsored Virginia Rules Summer Camps in fourteen localities across the state, providing nearly 800 middle and high school students with a week-long day camp experience. These students experienced traditional camp fun, learned about Virginia law, and built positive relationships with their school resource officers and other law-enforcement officers who served as camp counselors.

**Project Safe Neighborhoods**

To address violence and gang-related crimes in Norfolk, the Section reached out to the City’s at-risk youth population through the Project Safe Neighborhoods initiative. The goal of this initiative is to reduce violent crime by educating youth about the consequences of gang involvement and the illegal use of guns. During the summer of 2016, the Section joined forces with the Norfolk Police Department, the Norfolk Redevelopment and Housing Authority, and other community allies to host three Anti-Bullying and Gangs Forums, reaching nearly 350 community members.

**Heroin and Opioid**

As part of the Attorney General’s ongoing efforts to combat the heroin and opioid epidemic facing Virginia, the Section oversaw distribution of DVDs of the documentary “Heroin: The Hardest Hit” and staffed documentary screenings throughout the Commonwealth. Section members also served on local and regional substance abuse coalitions and task forces, and they participated in numerous town halls, community forums, and other events held throughout the Commonwealth to heighten awareness of the dangers of heroin and opioid addiction. In April and October, the Section assisted with community Drug Take-Back events in cooperation with law-enforcement and substance abuse coalition partners.

**Partnerships and Collaborations**

On behalf of the Attorney General’s Office, the Section collaborated with numerous state agencies, law-enforcement agencies, nonprofit organizations, businesses, schools, universities, faith-based organizations, and other partners to
accomplish its mission. Over the course of the year, the Section joined forces with the Department of Criminal Justice Services, the Department of Forensic Science, the Office of the Chief Medical Examiner, the Division of Child Support Enforcement, the Virginia Sexual and Domestic Violence Action Alliance, the Virginia Coalition to Prevent Elder Abuse, the Commonwealth’s Attorneys’ Services Council, the Virginia Department of Corrections, the National Organization of Black Law Enforcement Executives, the Maryland Network Against Domestic Violence, the Supreme Court of Virginia’s Office of the Executive Secretary, the Virginia Victim Assistance Network, the Virginia Association of Chiefs of Police, the Virginia Sheriffs’ Association, the Virginia Juvenile Justice Association, the Virginia Gang Investigators Association, Virginia State University, and other entities to serve residents, communities, and providers throughout Virginia. These ongoing partnerships and collaborations have been crucial to the Section’s promotion of secure and thriving communities across the Commonwealth. Although the Programs & Community Outreach Section has been in place for only two years, its work has become integral to the operations of the Attorney General’s Office.

LEGISLATIVE ACCOMPLISHMENTS

During the 2016 Legislative Session, the Attorney General worked to advance several key pieces of legislation in the General Assembly. Foremost among these efforts was a successful collaboration between the Attorney General’s Office and a bipartisan group of legislators to pass four pieces of legislation recommended by the Governor’s Task Force on Combating Campus Sexual Violence. Passage of this legislation will make campuses safer for students by enhancing collaboration between campuses and community stakeholders and promoting a better understanding of students’ rights under Title IX and the Violence Against Women Act.

The first bill (H.B. 1016), patroned by Delegate Jimmie Massie, strengthens local Sexual Assault Response Teams by adding representatives of institutions of higher education to the list of individuals invited to participate in a team’s annual meeting. Passage of the bill will foster a greater level of community coordination in response to campus sexual assaults.

The second bill (H.B. 1015) was sponsored by Delegate Massie on behalf of the Attorney General’s Office to promote cooperation between institutions of

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9 This Task Force is chaired by the Attorney General.
higher education and local law enforcement in dealing with campus sexual assault. The enactment permits any public or nonprofit private institution of higher education to request and obtain a memorandum of understanding with its primary local law-enforcement agency to address the prevention of, and response to, criminal sexual assault. Among other things, the new law will promote communication and collaboration between campus police and local law enforcement.

The third legislative item (H.B. 1102), patroned by Delegate Eileen Filler-Corn, requires the Department of Criminal Justice Services (“DCJS”) to develop a trauma-informed training module for sexual assault investigators. DCJS, in consultation with the State Council of Higher Education for Virginia and the Virginia Association of Campus Law Enforcement Administrators, is required by the new law to develop the multidisciplinary curricula. This training will better inform all professionals involved with a sexual assault investigation on victims’ rights, as well as their respective roles in an investigation in relation to the federal Office of Civil Rights, Title IX, and the Violence Against Women Act.

The fourth legislative item followed the recommendation of the Governor’s workgroup on sexual assault to update the procedures by which the Commonwealth collects, stores, and processes Physical Evidence Recovery Kits (“PERKs”). As noted in the “Programs and Community Outreach” summary above, an initiative of the Attorney General currently is underway to eliminate the existing backlog of untested PERKs in Virginia. Pursuant to the workgroup’s recommendation, several bills were introduced during the 2016 Session to reform the PERKs process going forward to better address victim’s needs and to obtain test results in a timely manner. The legislation that was eventually enacted (H.B. 1160/S.B. 291) established a comprehensive statewide procedure for the collection and analysis of PERKs collected on or after July 1, 2016.

Other significant legislative items are as follows:

As in 2015, the Attorney General’s Office continued working with Delegate Lingamfelter in an attempt to amend the felony homicide statute in order to prevent drug dealers from evading prosecution for deaths resulting from use of the illegal drugs that they distribute. Unfortunately, this legislation (H.B. 102) did not receive the proper budget appropriation, and prosecutors continue...
to struggle to find ways to utilize the felony homicide statute to hold drug dealers accountable.

Lastly, the Attorney General’s Office helped advance legislation regarding the method of authenticating electronic evidence in court. Former Delegate (now Senator) Jennifer McClellan patroned House Bill 924, the passage of which now permits the provider of an electronic communication service or remote computing service to verify the authenticity of contents of electronic communications by providing an affidavit from the custodian of the written records and reports (or the person to whom the custodian reports) certifying that they are true and complete and prepared in the regular course of business. This eliminates the requirement that a custodian of record be present in the courtroom to verify their authenticity.

**CONCLUSION**

It is an honor and pleasure to serve the citizens of the Commonwealth as Attorney General. The achievements of the attorneys and staff of this Office are many, and while it is impossible to include all of their accomplishments in this report, the names of the dedicated professionals who served the Office during 2016 are listed on the following pages. The citizens of the Commonwealth have been well served by their efforts.

With kindest regards, I am

Very truly yours,

Mark R. Herring
Attorney General
## PERSONNEL OF THE OFFICE

Mark R. Herring ..................................................................................... Attorney General  
Cynthia E. Hudson ...........................................................Chief Deputy Attorney General  
Cynthia V. Bailey ...................................................................... Deputy Attorney General  
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K. Michelle Welch ................................................... Senior AAG/Director, Animal Law Unit  
Alice G. Burlinson ............................................. Senior AAG/Director, Legal Operations  
Nancy J. Crawford .............................................. Senior AAG/Director, Legal Operations  
Victoria W. Dullaghan ............................................. Senior AAG/Director, Legal Operations  
Josh S. Ours ....................................................... Senior AAG/Director, Legal Operations  
R. Thomas Payne II .................................. Senior AAG/Director, Civil Rights Unit, Fair Housing

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1 This list includes all persons employed by the Office of the Attorney General during calendar year 2016, as provided by the Office’s Division of Administration. The most recent title is used for any employee whose position changed during the year.
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Rachel Anne Lawless .................................................................. Director of Scheduling
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Nicole Danielle Monroe ........................................................... Director of Information Systems
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Terrie Darnell Montour .......................................................... Legal Secretary
Patricia A. Morrison ....................................................................... Unit Manager, DRIU
Zachary H. Moyer ........................................................................ Criminal Investigator/Computer Forensic Examiner
### ATTIORNEYS GENERAL OF VIRGINIA 1776 – PRESENT

<table>
<thead>
<tr>
<th>Attorneys General</th>
<th>Years</th>
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<tbody>
<tr>
<td>Edmund Randolph</td>
<td>1776–1786</td>
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<td>James Innes</td>
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<td>Robert Brooke</td>
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<td>Sidney S. Baxter</td>
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<td>Willis P. Bocock</td>
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<td>Raleigh T. Daniel</td>
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<td>James G. Field</td>
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<td>Rufus A. Ayers</td>
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<td>R. Taylor Scott</td>
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<td>William A. Anderson</td>
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<td>Samuel W. Williams</td>
<td>1910–1914</td>
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<td>John Garland Pollard</td>
<td>1914–1918</td>
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<td>J.D. Hank Jr.</td>
<td>1918–1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918–1934</td>
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<tr>
<td>Abram P. Staples</td>
<td>1934–1947</td>
</tr>
<tr>
<td>Harvey B. Apperson</td>
<td>1947–1948</td>
</tr>
<tr>
<td>J. Lindsay Almond Jr.</td>
<td>1948–1957</td>
</tr>
<tr>
<td>Kenneth C. Patty</td>
<td>1957–1958</td>
</tr>
</tbody>
</table>

1 The Honorable John J. Marshall served as acting Attorney General in the absence of James Innes from mid-October 1794 until late March 1795.
2 The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.
3 The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders, and served until October 6, 1947.
4 The Honorable Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of the Honorable Abram P. Staples, and served until his death on January 31, 1948.
5 The Honorable J. Lindsay Almond Jr. was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of the Honorable Harvey B. Apperson, and resigned September 16, 1957.
6 The Honorable Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of the Honorable J. Lindsay Almond Jr., and served until January 13, 1958.
Albertis S. Harrison Jr. ................................................................. 1958–1961
Frederick T. Gray7 ........................................................................... 1961–1962
Robert Y. Button ........................................................................... 1962–1970
Andrew P. Miller ............................................................................. 1970–1977
Anthony F. Troy8 ............................................................................ 1977–1978
Gerald L. Baliles .............................................................................. 1982–1985
Mary Sue Terry .............................................................................. 1986–1993
Richard Cullen11 ........................................................................... 1997–1998
Randolph A. Beales12 ................................................................. 2001–2002
Jerry W. Kilgore ............................................................................. 2002–2005
Robert F. McDonnell ..................................................................... 2006–2009
William C. Mims14 ....................................................................... 2009–2010
Kenneth T. Cuccinelli II ............................................................... 2010–2014
Mark R. Herring ............................................................................. 2014–

7 The Honorable Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of the Honorable Albertis S. Harrison Jr. upon his resignation on April 30, 1961, and served until January 13, 1962.
8 The Honorable Anthony F. Troy was elected Attorney General by the General Assembly on January 26, 1977, to fill the unexpired term of the Honorable Andrew P. Miller upon his resignation on January 17, 1977, and served until January 14, 1978.
9 The Honorable William G. Broaddus was appointed Attorney General on July 1, 1985, to fill the unexpired term of the Honorable Gerald L. Baliles upon his resignation on June 30, 1985, and served until January 10, 1986.
11 The Honorable Richard Cullen was appointed Attorney General to fill the unexpired term of the Honorable James S. Gilmore III upon his resignation on June 11, 1997, at noon, and served until noon, January 17, 1998.
12 The Honorable Randolph A. Beales was elected Attorney General by the General Assembly on July 10, 2001, and was sworn into office on July 11, 2001, to fill the unexpired term of the Honorable Mark L. Earley upon his resignation on June 4, 2001, and served until January 12, 2002.
13 The Honorable Judith Williams Jagdmann was elected Attorney General by the General Assembly on January 27, 2005, and was sworn into office on February 1, 2005, to fill the unexpired term of the Honorable Jerry W. Kilgore upon his resignation on February 1, 2005, and served until January 14, 2006.
14 The Honorable William C. Mims was elected Attorney General by the General Assembly on February 26, 2009, and was sworn into office on February 27, 2009, to fill the unexpired term of the Honorable Robert F. McDonnell upon his resignation on February 20, 2009, and served until January 16, 2010.
CASES
IN THE
SUPREME COURTS
OF THE
UNITED STATES
AND
VIRGINIA
SUPREME COURT OF THE UNITED STATES

DECIDED

Contreras v. Davis, No. 15-5310; Johnson v. Manis, No. 15-1; Jones v. Virginia, No. 14-1248; Sanchez v. Pixley, No. 14-1478. Following its decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the Court granted the petitions for certiorari, vacated the judgments, and remanded these four cases for further consideration in light of Montgomery.

Wittman v. Personhuballah, No. 14-1504. In an appeal from the decision of a three-judge court in the Eastern District of Virginia, which found that Virginia’s Third Congressional District was an unconstitutional racial gerrymander, the Court dismissed the case after the lead intervenor-congressman submitted a letter following oral argument stating that he would run for reelection in a different district regardless of the outcome of the appeal, leading the Court to find that none of the intervenors had standing.

REFUSED

Apple, Inc. v. United States, No. 15-565. Certiorari denied in case where Apple, Inc. was found liable for price-fixing to raise the prices of ebooks at the time of Apple’s iPad launch.

Armel v. Virginia, No. 15-1315. Certiorari denied in case where petitioner argued that, in light of MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013), a conviction based on the anti-sodomy statute (Virginia Code § 18.2-361(A)) is unconstitutional.

Gray v. Zook, No. 15-9473. Certiorari denied; declined to review the Fourth Circuit’s decision to affirm dismissal of Gray’s habeas corpus petition. Petition for rehearing also denied.


**Petrie v. Virginia Board of Medicine**, No. 16-524. Certiorari denied in case where it was found that the Board of Medicine did not commit alleged antitrust violations in its discipline of a licensed chiropractor.

**Teleguz v. Zook**, No. 15-1450. Certiorari denied; declined to review the Fourth Circuit’s decision to affirm dismissal of Teleguz’s habeas corpus petition by the U.S. District Court for the Western District of Virginia.


**PENDING**

**Arkansas v. Delaware**, No. 146 Original. Pending original action brought by a number of states against Delaware for failing to distribute to other states their share of funds from unclaimed official checks issued by the money-transfer company MoneyGram.

**Bethune-Hill, et al. v. Virginia State Board of Elections**, No. 15-680. Pending appeal by voters from twelve House of Delegate districts of a decision by a three-judge panel of the U.S. District Court for the Eastern District of Virginia that the districts were not racial gerrymanders in violation of the U.S. Constitution.

SUPREME COURT OF VIRGINIA

DECIDED

Baker v. Commonwealth, No. 151120. Affirming the decision of the Court of Appeals to find the defendant guilty of felony animal abuse.

Blackwell v. Commonwealth, No. 151821. Affirming a decision of the Court of Appeals, which found evidence sufficient to convict the defendant of arson and larceny by false pretenses for several fires set in her home and her attempt to obtain insurance proceeds.

Blount v. Clarke, No. 151017. In a case involving certified questions from the U.S. District Court for the Eastern District of Virginia concerning the scope of the Governor’s authority to commute a life sentence to a term-of-years sentence, the Court ruled that the Governor’s act of clemency should be treated as a partial pardon for which the petitioner’s consent was not required.

Cherry v. Commonwealth, No. 150518. Dismissing as improvidently granted an appeal challenging the decision of the Court of Appeals to affirm misdemeanor convictions for obstruction of justice and resisting arrest.

Clark v. Virginia Department of State Police, No. 151857. In a suit brought under the Uniformed Services Employment and Reemployment Rights Act, the Court ruled that the Department of State Police had sovereign immunity.

Clarke, Director v. Galdamez, No. 151022. Affirming the circuit court’s decision that a habeas petitioner was prejudiced by counsel’s incorrect immigration advice.
Collins v. Commonwealth, No. 151277. Affirming the decision of the Court of Appeals to uphold the trial court’s denial of a motion to suppress, because the officer had probable cause to search the motorcycle parked in the defendant’s driveway under the automobile exception to the Fourth Amendment warrant requirement.

Commissioner of Highways v. Gloria Marcon, No. 151958. Reversing the trial court’s dismissal of the Commissioner’s Petition in Condemnation and remanding back to the circuit court to conclude the prior proceeding in accordance with the findings of the jury.

Commonwealth v. Bass, No. 151163. Reversing the decision of Court of Appeals and affirming the trial court’s decision to convict the defendant of robbery, because the Court of Appeals improperly applied the ends of justice exception to reverse the conviction when there was a variance between the indictment and proof adduced at trial.

Commonwealth v. Lambert, No. 160132. Reversing the decision of the Court of Appeals to overturn the defendant’s conviction for misdemeanor assault and battery of a child under Virginia Code § 18.2-57.

Commonwealth v. Proffitt, No. 151514. Reversing the decision of the circuit court concerning the admissibility of certain testimony in a sexually violent predator proceeding. The circuit court had granted the respondent’s motion to exclude two of the Commonwealth’s witnesses, both of whom were victims of the respondent’s sexual offenses. On appeal by the Commonwealth, the Supreme Court found that the circuit court had abused its discretion in finding that the victims’ testimony would not be relevant. Further, the Court found that the proffered testimony was neither unduly prejudicial nor cumulative of the Commonwealth’s expert witness testimony.

Commonwealth v. Virginia Association of Counties Group Self Insurance Risk Pool f/k/a Virginia Association of Counties Risk Pool, No. 150930. Reversing in part and affirming in part the decision of the circuit court in a case in which the parties sought a declaration of
liability coverage, priorities, and limitations between the Commonwealth’s Risk Management Plan and a risk pool established by an association of Virginia counties.

_Du v. Commonwealth_, No. 151058. Affirming a decision of the Court of Appeals, which found that the trial court did not abuse its discretion by placing the defendant on lifetime probation following fifty years’ active incarceration, rather than life imprisonment, and ordering the defendant not to contact the victims as a condition of the suspended sentence.

_Edmonds v. Commonwealth_, No. 151100. Affirming the decision of the Court of Appeals that the trial court did not abuse its discretion by denying the defendant’s motion to withdraw his guilty plea under Virginia Code § 19.2-296, because the defendant failed to show that the threat of harm was imminent and that taking possession of the firearm and leaving the apartment was the only way for the defendant to avoid the threatened harm.

_Ekwalla v. Virginia State Bar_, No. 160401. Affirming the decision of the Virginia State Bar Disciplinary Board to revoke an attorney’s license to practice law based on numerous violations of Disciplinary Rules.

_Granado v. Commonwealth_, No. 150936. Reversing the decision of the Court of Appeals to deny an appeal for failure to file a timely-written statement of facts, when a timely statement had been added to the record by a circuit court clerk after a one-judge denial.

_Herrington v. Commonwealth_, No. 150085. Affirming a decision of the Court of Appeals to uphold a conviction for possession with intent to distribute or sell a controlled substance.

_Hicks v. Barksdale_, No. 140887. Original jurisdiction; granting in part and denying in part a habeas corpus petition on the ground that counsel was ineffective for rehabilitating a juror who testified during voir dire.
that she lived with one of the victims. Petitioner’s convictions for malicious wounding were vacated, and a new trial was awarded.

*Howell v. McAuliffe*, No. 160784. In an original action for mandamus and prohibition against the Governor and other officials, the Court ruled that blanket executive orders restoring the political rights of convicted felons en masse violated Article I, § 7 and Article II, § 1 of the Constitution of Virginia.

*In re: Nathaniel Edward Epps*, No. 140312. Original jurisdiction; dismissing a petition for writ of actual innocence as moot when petitioner died during the pendency of the proceedings.

*In re: Rebecca Vauter*, No. 151723. Original jurisdiction; Denying a petition for a writ of prohibition against the Dinwiddie County Circuit Court in habeas corpus proceedings, where detention was pursuant to an order of the Alexandria Circuit Court.

*Johnson v. Commonwealth*, No. 141623. Affirming the decision of the Court of Appeals that Johnson’s life sentence for first-degree murder did not violate the Eighth Amendment and that the trial court did not err in denying his motion for the assistance of a neuropsychologist.

*Johnson v. Commonwealth*, No. 151200. Affirming the decision of the Court of Appeals that the defendant’s three convictions for felony failure-to-appear (premised upon a single missed preliminary hearing addressing three underlying felonies) did not violate the Double Jeopardy Clause.

*Payne v. Commonwealth*, No. 151524. Affirming a decision of the Court of Appeals, which held that the trial court did not err in denying a separate jury instruction regarding eyewitness identification testimony and in redacting a portion of an email.

*Rich v. Commonwealth*, No. 151841. Affirming the decision of the Court of Appeals that the evidence was sufficient to support the defendant’s conviction for DUI maiming.

Small v. Commonwealth, No. 150965. Affirming the decision of the Court of Appeals that the trial court did not abuse its discretion in denying the defendant’s motion to withdraw his guilty plea.

Smith v. Brown, No. 141487. Reversing the decision of the circuit court to deny the petitioner habeas corpus relief and remanding for an evidentiary hearing.


Velazquez v. Commonwealth, No. 150849. Affirming the decision of the Court of Appeals as the right result for the wrong reason, and finding that both the Court of Appeals and the trial court erred in holding that the trial court had lost jurisdiction to consider Velazquez’s motion to withdraw his plea. Although the Court of Appeals failed to address the merits of Velazquez’s motion to withdraw the guilty plea, the trial court did not abuse its discretion when it denied the motion on the alternative basis that Velazquez failed to prove manifest injustice.

Wallace v. Commonwealth, No. 151296. Affirming the decision of the Court of Appeals that the trial court did not err in denying the defendant’s motion to dismiss for alleged speedy trial violations.

Whitt v. Clarke, No. 151080. Affirming the circuit court’s denial of a habeas corpus petition alleging improper prosecutorial conduct and ineffective assistance of counsel.
REFUSED

*Boukhira v. George Mason University*, No. 160038. Refusing a petition for appeal of the Court of Appeals decision that res judicata barred a subsequent claim for permanency benefits after an initial permanency claim was denied on the merits.

*Corporate Executive Board Company v. Virginia Department of Taxation*, No. 160376. Procedural dismissal of a petition for appeal of a circuit court decision granting summary judgment in favor of the defendant in a dispute regarding the calculation of the plaintiff’s state-owed corporate income tax. A petition for rehearing was also denied.

*Lindiwe Njoki Kubweza v. Craig M. Burns*, No. 160678. Refusing a petition for a writ of mandamus that sought to compel the Tax Commissioner to refund monies that were garnished from the appellant’s wages and applied to outstanding tax debts.

*Mall Amusements, LLC, d/b/a King Pinz v. Virginia Department of Alcoholic Beverage Control*, No. 161435. Refusing a petition for appeal in a case involving a challenge under the Virginia Administrative Process Act to an administrative agency decision involving the scope of witness examination by an administrative hearing officer.

*Ramsey v. Virginia Department of State Police*, No. 160121. Refusing a petition for appeal of the Court of Appeals decision to affirm a former state trooper’s thirteen misdemeanor convictions of computer invasion of privacy arising from misuse of the Virginia Criminal Information Network.

*Rush v. University of Virginia Health System*, No. 150760. Refusing a petition for appeal of the Court of Appeals decision that for the presumption created in § 65.2-105 of the *Code of Virginia* to apply, the injured worker must be physically or mentally unable to testify.
PENDING

*Daily Press, LLC v. Office of the Executive Secretary of the Supreme Court of Virginia*, No. 160889. Pending appeal concerning whether, under FOIA, the appellee must release felony-related case information maintained in the circuit court case management system, which is operated on behalf of circuit court clerks.

*David G. Kalergis, et al. v. Commissioner of Highways*, No. 161347. Pending appeal of the trial court’s decision that the Commissioner of Highways correctly construed the term “purchase price” in accordance with Virginia law when re-acquiring the appellant’s property.

*Kohl’s, Inc. v. Virginia Department of Taxation*, No. 160681. Pending appeal of the circuit court’s decision to grant summary judgment in favor of appellant in a case regarding whether certain royalty expenses are considered income taxable by the Commonwealth.

*Lindsey v. Commonwealth*, No. 151111. Pending appeal of the decision of the Court of Appeals to find the defendant guilty of petit larceny as a third or subsequent offense.

*Meyers v. Commonwealth*, No. 150962. Pending appeal regarding the decision of the Court of Appeals to deny an appeal after the defendant’s counsel filed an *Anders* brief.


*Palmer v. Atlantic Coast Pipeline, LLC*, No. 160630. Pending appeal concerning the constitutionality of Virginia Code § 56-49.01, which
permits an interstate natural gas company to enter private property for surveying purposes after notice to the property owner; the Commonwealth appears as an amicus curiae to defend the constitutionality of the statute.

_Woolford v. Virginia Department of Taxation_, No. 161095. Pending appeal of the trial court’s decision to grant summary judgment in favor of the Virginia Department of Taxation based upon the failure of the taxpayers to support their claim for tax incentives with a qualified appraisal offered by a qualified appraiser.
OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL
Each opinion in this report is preceded by an opinion number and main headnote(s) briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the opinion number preceding the opinion first appears. Cite an opinion in this report as follows: 2016 Op. Va. Att’y Gen. ____.

Opinions of the Attorney General beginning with opinions issued in January 1996, and certain Annual Reports of the Attorney General may be accessed on the Internet at www.oag.state.va.us. Opinions of the Attorney General are also available on LEXISNEXIS, beginning with opinions issued in July 1958; on WESTLAW, beginning with opinions issued in July 1976; on HeinOnline, beginning with opinions issued in 1895; and on CaseFinder, beginning with opinions issued in July 1967.
Service of a confessed judgment on a nonresident by “posting” is sufficient if authorized under the law of the foreign jurisdiction. Service is not sufficient, however, if the return is marked by the officer as “Not Found.”

If service is attempted by mailing, it is sufficient if the clerk sends a copy of the order by registered or certified mail to the nonresident debtor’s last known address and files a certificate showing that such has been done. This is so regardless of whether the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

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

FEBRUARY 19, 2016

ISSUES PRESENTED

You ask several questions concerning service of a confessed judgment on a nonresident debtor under § 8.01-438 of the Code of Virginia. First, you ask whether service is sufficient if the officer serving process in the foreign jurisdiction returns the service as “Posted.” You also ask whether a return of service marked by the officer as “Not Found” is sufficient.

Finally, you ask whether service is sufficient if the clerk mails a copy of the order by registered or certified mail to a nonresident judgment debtor at his last known post-office address and then files a certificate with the case papers showing that such has been done, but the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

APPLICABLE LAW AND DISCUSSION

Section 8.01-432 authorizes the practice of judgment by confession. The statute provides that a debtor or his attorney-in-fact may confess a judgment, regardless of whether a suit has been brought on the debt:
Any person being indebted to another person, or any attorney-in-fact pursuant to a power of attorney, may at any time confess judgment in the clerk’s office of any circuit court in this Commonwealth, whether a suit, motion or action be pending therefor or not, for only such principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court. Such judgment shall be as final and as binding as though confessed in open court or rendered by the court, subject to the control of the court in the clerk’s office of which the same shall have been confessed.\[1\]

When a judgment is confessed by an attorney-in-fact, § 8.01-438 provides that the debtor must be served with a copy of the order. The statute establishes procedures for serving a debtor, including detailed instructions for service if the debtor is a nonresident:

If a judgment is confessed by an attorney-in-fact, it shall be the duty of the clerk within ten days from the entry thereof to cause to be served upon the judgment debtor a certified copy of the order so entered in the common-law order book, to which order shall be appended a notice setting forth the provisions of § 8.01-433. The officer who serves the order shall make return thereof within ten days after service to the clerk. The clerk shall promptly file the order with the papers in the case. The failure to serve a copy of the order within sixty days from the date of entry thereof shall render the judgment void as to any debtor not so served.

Service of a copy of the order on a nonresident judgment debtor by an officer of the county or city of his residence, authorized by law to serve processes therein, or by the clerk of the court sending a copy of the order by registered or certified mail to such nonresident judgment debtor at his last known post-office address and the filing of a certificate with the papers in the case showing that such has been

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done or of a receipt showing the receipt of such letter by such nonresident judgment debtor, shall be deemed sufficient service thereof for the purposes of this section.\(^2\)

You inquire regarding the sufficiency of service on nonresident debtors under § 8.01-438 in certain scenarios.\(^3\) I will answer each of your questions in turn.

1. **Sufficiency of Service on Nonresident if Returned as “Posted”**

   Section 8.01-438 states that an “officer of the county or city of [debtor’s] residence, authorized by law to serve processes therein,” may serve a copy of the judgment upon a nonresident debtor. This clause differs from the Commonwealth’s more general statute establishing requirements for serving process on nonresidents, in that it limits the class of individuals who may execute service to officers who are authorized by the law of the foreign jurisdiction to serve process therein.\(^4\) This distinction suggests that the procedures of the foreign jurisdiction, rather than those of the Commonwealth, should apply with respect to methods of service.\(^5\)

   Based on the foregoing, I conclude that service under § 8.01-438 is sufficient if a foreign officer executes the same in accord with the law of the

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\(^2\) Section 8.01-438 (2015) (emphasis added). I note that, in accord with procedures established in § 8.01-433, a debtor may make a motion to set aside or reduce the judgment within twenty-one (21) days after receiving notice of the judgment. Furthermore, under § 8.01-438, a confessed judgment is void if sufficient service is not made within sixty (60) days from date of entry. These provisions apply to resident and nonresident debtors alike.

\(^3\) I assume, for purposes of this opinion, that personal jurisdiction exists under the Virginia Long Arm Statute. See § 8.01-328.1 (2015).

\(^4\) Compare § 8.01-438 with § 8.01-320.

\(^5\) “We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” Alger v. Commonwealth, 267 Va. 255, 261 (2004) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295 (1990)). See generally RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 126 (1971) (stating broadly that matters of procedure, including methods of serving process, are governed by the law of the forum state).
foreign jurisdiction. In particular, service by posting is sufficient if authorized under the law of the foreign jurisdiction.⁶

2. Sufficiency of Service on Nonresident if Process is Returned “Not Found”

It is well-established that a return marked “Not Found” is not an effectuation of service. The Supreme Court of Virginia has recognized that the notation “Not Found” indicates that the individual tasked with executing service could not accomplish it under the methods prescribed by law.⁷ Accordingly, it is my opinion that a return marked as “Not Found” is not sufficient service on a nonresident under § 8.01-438.

3. Sufficiency of Service on Nonresident if the Clerk Mails a Copy of the Order as Prescribed in § 8.01-438 and Files a Certificate Verifying Mailing

Although a clerk may arrange for service through an officer of the foreign jurisdiction, § 8.01-438 also provides he may satisfy the service requirement by mailing a copy of the order to the nonresident debtor:

Service of a copy of the order on a nonresident judgment debtor . . . by the clerk of the court sending a copy of the order by registered or certified mail to such nonresident judgment debtor at his last known post-office address and the filing of a certificate with the papers in the case showing that such has been done or of a receipt showing the receipt of such letter by such nonresident judgment debtor, shall be deemed sufficient service thereof for the purposes of this section.⁸

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⁶ I note, however, that posting must be executed in a manner reasonably calculated to apprise the party of the judgment. See Greene v. Lindsey, 456 U.S. 444, 449-50 (1982). So long as it is executed in this fashion, posting satisfies constitutional procedural due process requirements as a “singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.” Id. at 452-53.


⁸ Section 8.01-438.
You ask whether this method is sufficient in the event the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

The statute provides that a clerk may file a certificate verifying mailing “or” a receipt showing delivery was made to the debtor. Generally, the term “or” is used in the disjunctive to indicate alternative choices,9 “implying an election to do one of two things.”10 Indeed, courts will interpret the term “or” as a disjunctive unless it is clear the legislature intended it to be used as a conjunctive.11 Here, there is no clear indication that the legislature intended the term to be used as a conjunctive. Therefore, it is my opinion that service is sufficient under § 8.01-438 if the clerk files a certificate of mailing with the case papers, even if the registered or certified mail receipt is not returned by the post office, or it is returned stating “not accepted” or “not at this address.”12

**CONCLUSION**

Accordingly, it is my opinion that service of a confessed judgment on a nonresident by “posting” is sufficient if authorized under the law of the foreign jurisdiction. Service is not sufficient, however, if the return is marked by the officer as “Not Found.” If service is attempted by mailing, it is sufficient if the clerk sends a copy of the order by registered or certified mail to the nonresident debtor’s last known address and files a certificate showing that such has been done. This is so regardless of whether the registered or certified mail receipt is

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12 In such scenarios, actual notice is not necessary to satisfy procedural due process requirements, as mailing is reasonably calculated to apprise the debtor of the judgment. *Cf.* Equip. Fin. Grp., Inc. v. Traverse Computer Brokers, 973 F.2d 345, 347 (4th Cir. 1992) (holding that service through the Secretary of the Commonwealth was complete, even though notice was returned by the post office as “undeliverable”); Banks v. Leon, 975 F. Supp. 815, 818 (W.D. Va. 1997); Va. Polytechnic Inst. & State Univ. v. Prosper Fin., Inc., 284 Va. 474, 482 (2012); Basile v. Am. Filter Serv., Inc., 231 Va. 34, 38 (1986) (holding service through the Secretary of the Commonwealth was complete, even though notice to defendant was returned “unclaimed” by post office).
not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”

OP. NO. 15-058

CONSERVATION: VIRGINIA OUTDOORS FOUNDATION

The Virginia Outdoors Foundation may, in its sound discretion, award grants from the Open-Space Lands Preservation Trust Fund to cover the costs of baseline documentation reports and (where appropriate) surveys associated with the conveyance of open-space or conservation easements to the Foundation.

MS. BRETT C. GLYMPH
EXECUTIVE DIRECTOR, VIRGINIA OUTDOORS FOUNDATION

FEBRUARY 19, 2016

ISSUE PRESENTED

You ask whether the Virginia Outdoors Foundation may award grants from the Open-Space Lands Preservation Trust Fund to cover the costs of baseline documentation reports and land surveys associated with the conveyance of open-space or conservation easements to the Foundation.

APPLICABLE LAW AND DISCUSSION

The Virginia Outdoors Foundation (“VOF”) is a body politic “established to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.”\(^1\) As part of its mission, VOF administers the Open-Space Lands Preservation Trust Fund (the “Fund”). The purpose of the Fund is to facilitate the donation or sale of open-space or conservation easements to VOF.\(^2\)

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\(^1\) VA. CODE ANN. § 10.1-1800 (2012).

\(^2\) See § 10.1-1801.1(D) (2012). If VOF consents, however, an easement may be conveyed to both VOF and a local co-holder, while still remaining eligible for grants from the Fund. See id. (setting forth the conditions under which a conveyance is eligible for grants from the Fund).
With respect to the use of monies in the Fund, § 10.1-1801.1(D) provides that “[t]he purpose of grants made from the Fund shall be to aid . . . persons conveying conservation or open-space easements with the costs associated with the conveyance of the easements, which may include legal costs, appraisal costs or all or part of the value of the easement.”3 Although the statute contains a list of items that clearly qualify as permitted costs, the inclusion of the phrase “may include” indicates the list is nonexclusive.4 Thus, an item may be a permitted cost even if it does not constitute strictly legal costs (e.g., the costs of drafting a conveyance and recording it), appraisal costs, or all or part of the value of the easement. The precise issue you present is whether the costs of baseline documentation reports and land surveys should be considered “costs associated with the conveyance of [an] easement” that are eligible for funding through grants made from the Fund.

In answering your inquiry, I first note that the chief object of statutory interpretation is “to ascertain and give effect to legislative intent.”5 Thus, “[a] statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose . . . .”6 In keeping with this principle, the language of the statute governing use of the Fund must be interpreted consistently with the legislature’s purpose of promoting conservation by facilitating easement conveyances. Therefore, costs that are necessary or appropriate to facilitate a conveyance should generally be considered permissible.

As you relate, the preparation of a baseline documentation report ("BDR") is considered essential for a land trust to accept the conveyance of an easement.7 A BDR is a detailed report of the condition of the property at the time the

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3 Section 10.1-1801.1(D). The aid is also available for “localities acquiring open-space easements” as co-holders with VOF. Id.
7 See, e.g., Jane Ellen Hamilton, Conservation Easement Drafting and Documentation 207 (Land Trust Alliance ed., 2008).
easement is conveyed. Generally, it includes maps, photographs, and other documents that are necessary to establish the existing status of all natural, scenic or historic resources sought to be protected by the easement. By documenting the condition of the property at the time of conveyance, the BDR provides a basis by which to measure a landowner’s compliance with the easement over time. This allows the holder of the easement to bring judicial proceedings, if necessary, to enforce the terms of the easement and to protect the conservation interests associated with the property.  

At the same time, preparation of a BDR also protects the interests of the landowner by documenting the conditions that predate the agreement to conserve the property, including the presence of any man-made improvements, existing damage to historic sites, or prior depletion of natural resources. Thus, in keeping with established best practices for land trusts, VOF historically has required preparation of a BDR prior to accepting any conveyance of an easement.

Additionally, I note that preparation of a BDR typically is required for a person donating an easement to receive certain tax benefits designed to promote land conservation. For example, where a donor has retained any right in the property that may impair a protected conservation interest, a BDR is required prior to the conveyance for the donor be eligible for a federal income tax deduction for a “qualified conservation contribution,” as well as for tax credits under the Virginia Land Conservation Incentives Act.

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8 See, e.g., James L. Olmsted, *Climate Surfing: A Conceptual Guide to Drafting Conservation Easements in the Age of Global Warming*, 23 ST. JOHN’S J. C.R. & ECON. DEV. 765, 836 (“[A]dequate baseline documentation is a critical component of any easement holder’s stewardship program. In the absence of baseline documentation, the easement holder is legally hamstrung in the event of violation of the easement’s terms because there is no documentary or physical evidence to support the testimony of the parties as to the condition at the time the easement was created.”).

9 See HAMILTON, supra note 7, at 207. Generally, VOF assumes the task of preparing a BDR; however, qualified third-party contractors are sometimes used. For example, a landowner may opt to hire a qualified outside contractor to prepare the BDR.

10 See 26 C.F.R. § 1.170A-14(g)(5)(i) (providing, in relevant part, that “when [a] donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable . . . the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of
Based on the foregoing, it is my opinion that the cost of a BDR should be considered a “cost associated with the conveyance of an easement” and therefore eligible for funding through grants made from the Fund.  

Second, with respect to land surveys, you indicate it is sometimes necessary, or prudent, for VOF to obtain a new survey prior to acceptance of an easement. This ensures that the boundaries of the easement are properly identified prior to conveyance. Often, an existing survey will suffice for purposes of identification. As you relate, however, obtaining a new survey is important in certain cases, such as those where no previous survey exists, or where an existing survey may contain antique, inaccurate, or disputed legal descriptions.

As a written conveyance of an interest in real property, every written conveyance of an easement must contain a description of the land that is to be subjected to the easement with sufficient clarity to locate it with reasonable certainty. By obtaining new surveys when necessary or prudent, VOF ensures that all conveyances of easements conform to this legal standard. The practice also is in keeping with established best practices for land trusts, which direct that a land trust obtain a new survey in certain circumstances to ensure that each
transaction is “legally, ethically and technically sound.” Based on the foregoing, it is my opinion that the cost of obtaining a survey, when necessary or prudent to do so, qualifies as a “cost associated with the conveyance of an easement” that is eligible for funding through grants made from the Fund.

**CONCLUSION**

Accordingly, it is my opinion that VOF may, in its sound discretion, award grants from the Open-Space Lands Preservation Trust Fund to cover the costs of baseline documentation reports and (where appropriate) surveys associated with the conveyance of open-space or conservation easements to the Foundation.

**OP. NO. 15-073**

**PROPERTY AND CONVEYANCES: PROPERTY OWNERS’ ASSOCIATION ACT**

A property owners’ association may not deactivate a member’s barcode for nonpayment of a regular assessment if deactivation would endanger health, safety, or property. Further, deactivation for nonpayment of a special assessment under § 55-514 is not permitted when it would deny the owner “direct” access to his or her property through the roads of the development which are common areas.

**THE HONORABLE BRYCE E. REEVES**
MEMBER, SENATE OF VIRGINIA

**FEBRUARY 19, 2016**

**ISSUE PRESENTED**

You inquire whether it is legal under the Virginia Property Owners’ Association Act (the “Act”) for a property owners’ association (a “POA”) to deactivate a member’s barcode decal if he or she is more than sixty days late paying an assessment. Deactivation of the barcode decal will restrict but not completely deny entry into the neighborhood.

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You relate that the board of directors of a POA in your district adopted a resolution providing that after giving a member an opportunity for a hearing, the board of directors has the right to suspend a member’s and his or her tenants’ or family’s use of a barcode decal, in the event of nonpayment of assessments, fees, or fines owed to the POA where payment is more than sixty days past due. The barcode decal is used to facilitate the manned main gate at the front of the subdivision and is required to use the unmanned gate to enter at the back of the subdivision. Without the barcode decal, an owner can still access his or her home by using the manned main gate, but for those owners whose homes are closer to the unmanned back gate, this access may be less convenient. The location of the back gate is approximately five miles from the main gate when driving around the subdivision, and it is approximately three miles from the main gate when driving through the subdivision. The streets within the subdivision are common area private roads.

APPLICABLE LAW AND DISCUSSION

The Act provides that the board of directors of a POA has “the power to establish, adopt, and enforce rules and regulations with respect to use of the common areas,” and such enforcement may be “by any method normally available to the owner of private property in Virginia.”2 The board of directors also has the power, to the extent the declaration or rules and regulations of the POA expressly so provide, to

suspend a member’s right to use facilities and services . . . provided directly through the association for nonpayment of assessments which are more than 60 days past due, to the extent that access to the lot through the common areas is not precluded and provided that such suspension shall not endanger the health, safety, or property of any owner, tenant, or occupant . . . . [3]

2 VA. CODE ANN. § 55-513(A) (Supp. 2015). Under the Act, a “common area” is “property within a development which is owned, leased or required by the declaration to be maintained or operated by a property owners’ association for the use of its members and designated as common area in the declaration.” Section 55-509 (Supp. 2015).

3 Section 55-513(B). Before any action can be taken, the member must have the opportunity to correct the violation, and, if the violation remains uncured, the member must be given an opportunity
For a member who fails to timely pay an assessment, this statute bars a POA from suspending the right to use facilities and services if the suspension either denies access to the lot or if the suspension endangers the health, safety, or property of any owner, tenant, or occupant.

If the member fails to pay a special assessment, a second statute, § 55-514(C), may impose an additional restriction on a POA’s ability to suspend the right to use facilities and services:

The failure of a member to pay the special assessment . . . will provide the association with the right to deny the member access to any or all of the common areas. Notwithstanding the immediately preceding sentence, direct access to the member’s lot over any road within the development which is a common area shall not be denied the member.[5]

For failure to pay a regular assessment, the question is whether denial of access to the back gate “endanger[s] . . . health, safety, or property.” There could conceivably be situations where an owner needs to return to his or her property for an emergency affecting health, safety, or property. If the property is close to the back gate but distant from the main gate, and if the owner approaches from that direction, then denial of access through the back gate could possibly endanger health, safety, or property in violation of the Act.

For failure to pay a special assessment, the additional question under § 55-514 is whether denial of access to the back gate denies the owner “direct” access to his or her lot. For certain lots that are a significant distance from the main gate but close to the back gate, and depending on the direction from which

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“to be heard and to be represented by counsel before the board of directors or other tribunal specified in the [POA’s] documents.” Section 55-513(C).

[4] The unpaid special assessments statute does not apply if authority to impose a special assessment derives from the recorded governing documents. If the recorded governing documents are the source of authority for special assessments, then the controlling statute remains § 55-513. It grants and limits powers under recorded governing documents, and it imposes a slightly different limit for remedies for unpaid assessments, namely, that any remedy may not “endanger . . . health, safety, or property.”

the owner arrives, “direct” access might be only through the back gate, while for other lots, “direct” access may be through the main gate. For certain lots, deactivating the barcode and thereby denying use of the back gate could thus deny the owner “direct” access to his or her property in violation of the Act.

These are questions of fact. The Office of the Attorney General has consistently declined to answer questions resolving factual matters. Accordingly, I can express no opinion about the overall legality of the resolution in question, other than to say that it may not be applied in such a way as to violate the Act.

CONCLUSION

For the reasons stated, while I express no opinion about the overall legality of the resolution in question, it is my opinion that it may not legally be applied against any owner if deactivation of the owner’s bar code for nonpayment of a regular assessment would endanger health, safety, or property; or if deactivation for nonpayment of a special assessment under § 55-514 would deny the owner “direct” access to his or her property through the roads of the development which are common areas.

OP. NO. 16-013

ADMINISTRATION OF GOVERNMENT: PROHIBITION AGAINST SERVICE BY LEGISLATORS ON BOARDS, COMMISSIONS, AND COUNCILS WITHIN THE EXECUTIVE BRANCH

CONSTITUTION OF VIRGINIA: SEPARATION OF POWERS

There is a significant risk that the Supreme Court of Virginia would find that House Bill 834, proposing the Virginia Growth and Opportunity Board, violates the separation-of-power principles in the Constitution of Virginia on two grounds. First, the bill creates an executive-branch policy board that does not have executive-branch officials, employees, or appointees as a majority of its members. Second, the bill grants the legislative members of the Board effective veto power over the Board’s grant decisions.

ISSUE PRESENTED

You have expressed concern that House Bill 834, legislation that has been passed by both houses of the General Assembly and presented for your consideration, violates the separation-of-powers principles in the Constitution of Virginia. Among other things, House Bill 834 creates a Virginia Growth and Opportunity Board that would make grants of appropriated funds to promote regional economic activities in the Commonwealth. Although you do not question the laudable policy benefits of creating a statewide public body that would promote regional economic and workforce projects, you are concerned about the structure proposed by the General Assembly for the Board’s governing body.

A majority of the Board’s membership consists of members of the General Assembly and their appointees; moreover, the Board’s legislative members would have veto power over grant-making decisions of the Board. You ask whether the “current proposed composition and duties of the Virginia Growth and Opportunity Board and the Board’s placement in the executive branch of government as a policy-making board violates the separation of powers doctrine outlined in the Virginia Constitution.”

BACKGROUND

During the General Assembly’s 2016 Regular Session, the Assembly passed legislation proposing the Virginia Growth and Opportunity Act (the “Act”). The Act would create a Virginia Growth and Opportunity Board (the “Board”) as “a policy board in the executive branch of state government,” with the purpose of “promot[ing] collaborative regional economic and

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2 See generally id. (lines 81-322).
3 Id. (lines 101-02).
The legislation also would create in the state treasury a special nonreverting fund designated as the Virginia Growth and Opportunity Fund (the “Fund”), monies from which would “be used to incentivize and encourage cooperation among business, education, and government on regional strategic economic development and workforce development efforts.”

The General Assembly would appropriate monies for the Fund. The Act would create regional councils across the Commonwealth, consisting of representatives of the government and the business and education communities in each region; these councils could apply to the Board for grants from the Fund based on expected economic impact and other criteria.

The primary power and duty of the Board would be to award grants of money from the Fund to encourage regional economic and workforce development projects. Specifically, the Board would “[r]eceive and assess applications for awards from the Fund submitted by regional councils and determine the distribution, duration, and termination of awards from the Fund for uses identified in such applications.” Among other powers and duties, the Board would also “[d]evelop and implement guidelines and procedures for the application for and use of any moneys in the fund”; “[s]eek independent analytical assistance from outside consultants, including post-grant assessments and reviews to evaluate the results and outcomes of grants”; “[e]nter into contracts to provide services to regional councils to assist with prioritization, analysis, planning, and implementation of regional activities”; and advise the Governor in related areas.

The Board would have twenty-two members, consisting of seven legislative members, twelve nonlegislative citizen members, and three ex officio members. Members would be appointed as follows:

4 Id. (lines 102-03).
5 Id. (lines 175-87).
6 Id. (line 178).
7 Id. (lines 142-43; 204-29; 259-85).
8 Id. (lines 146-48).
9 Id.
10 See id. (lines 139-74).
11 Id. (lines 104-06).
four members of the House of Delegates, consisting of the Chairman of the House Committee on Appropriations and three members appointed by the Speaker of the House of Delegates; three members of the Senate, consisting of the Chairman of the Senate Committee on Finance and two members appointed by the Senate Committee on Rules; four nonlegislative citizen members to be appointed by the Speaker of the House of Delegates, who shall be from different regions of the Commonwealth and have significant private-sector business experience; four nonlegislative citizen members to be appointed by the Senate Committee on Rules, who shall be from different regions of the Commonwealth and have significant private-sector business experience; and four nonlegislative citizen members to be appointed by the Governor, who shall be from different regions of the Commonwealth and have significant private-sector business experience. At least two of the nonlegislative citizen members appointed by the Governor shall represent areas other than those represented by Planning District 8, 15, 16, or 23. The Governor shall also appoint three Secretaries from the following, who shall serve ex officio with voting privileges: the Secretary of Agriculture and Forestry, the Secretary of Commerce and Trade, the Secretary of Education, the Secretary of Finance, and the Secretary of Technology. Nonlegislative citizen members shall be citizens of the Commonwealth.[12]

The chairman of the Board would be a nonlegislative citizen elected by the Board from among its membership, and a majority of the Board’s members would constitute a quorum.[13]

Section 2.2-2101 of the Code of Virginia generally prohibits service by legislators on boards, commissions, and councils within the executive branch:

Members of the General Assembly shall be ineligible to serve on boards, commissions, and councils within the executive branch of state government who are responsible for administering programs

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12 Id. (lines 106-20). See also id. (lines 121-29) (providing for terms of members: “[l]egislative members and ex officio members of the Board shall serve terms coincident with their terms of office”; “nonlegislative citizen members shall be appointed for a term of four years”).

13 Id. (lines 130-31).
established by the General Assembly. Such prohibition shall not extend to boards, commissions, and councils engaged solely in policy studies or commemorative activities. If any law directs the appointment of any member of the General Assembly to a board, commission, or council in the executive branch of state government that is responsible for administering programs established by the General Assembly, such portion of such law shall be void, and the Governor shall appoint another person from the Commonwealth at large to fill such a position.\[14\]

The General Assembly has created a number of exceptions to that statutory prohibition, however, and has allowed legislators to serve on nearly twenty executive-branch boards, commissions, and councils.\[15\] To enable legislators to serve on the Board, House Bill 834 would amend § 2.2-2101 to add the Board to the list of exempted entities.\[16\]

Any award granted by the Board would have to be approved not only by a majority of the full Board but also by a majority of each of the two groups of legislative members on the Board as well as the ex officio members:

A decision by the Board to award grants from the Fund shall require an affirmative vote of (i) a majority of the members of the Board who are present and voting, (ii) a majority of the legislative members of the Board from the House of Delegates who are present and voting, (iii) a majority of the legislative members of the Board from the Senate who are present and voting, and (iv) a majority of the members of the Board who are gubernatorial Secretaries who are present and voting. Decisions of the Board shall be final and not subject to review or appeal.\[17\]

**APPLICABLE LAW AND DISCUSSION**

You relate that you have concerns that House Bill 834 violates the Constitution of Virginia with respect to the Board’s composition and the

14 VA. CODE ANN. § 2.2-2101 (Supp. 2015).
15 Id.
16 House Bill 834 (lines 79-80).
17 Id. (lines 313-18).
legislative members’ veto power, in light of the duties assigned to it. Part 1 below discusses the separation-of-powers principles that guide my analysis, while Parts 2 and 3 address two ways in which there is significant risk that the Supreme Court of Virginia would find that House Bill 834 violates separation-of-powers principles.

1. The Constitution of Virginia requires separation of powers, so that no branch exercises the “whole power” of another.

The separation-of-powers principle appears in two places in the Constitution of Virginia. Article I, § 5 provides “[t]hat the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.” Article III, § 1 further provides that “[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . . .”

Notwithstanding the seemingly absolute terms in which the separation-of-powers principle is couched, courts have held that the required separation is not absolute. In a 1906 case, Winchester & Strasburg Railroad Co. v. Commonwealth, for example, the Supreme Court of Virginia upheld the constitutionality of the powers of the State Corporation Commission despite its exercise of some judicial, executive, and legislative authority. The Court drew on Joseph Story to explain that “we are to understand this [separation-of-powers] maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct . . . .” It elaborated:

It is undoubtedly true that a sound and wise policy should keep these great departments of the government as separate and distinct from each other as practicable. But it is equally true that experience has shown that no government could be administered where an absolute and unqualified adherence to that maxim was enforced. The universal construction of this maxim in practice has been that the whole power

18 VA. CONST. art. I, § 5.
19 VA. CONST. art. III, § 1.
20 106 Va. 264 (1906).
21 Id. at 270 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 393 (Melville M. Bigelow ed., 5th ed. 1891)).
of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent.[22]

This principle appears in modern cases as well. In a 1991 case, *Taylor v. Worrell Enterprises, Inc.*, the Supreme Court of Virginia observed that “[t]he legislative branch may delegate some of its powers to agencies in the executive branch if the delegation is accompanied by appropriate standards for the exercise of that authority. There will also be instances where the line between the powers of two branches may be less than clear and incidental encroachment is necessary and permitted.”[23] And in a 2013 case, *Elizabeth River Crossings OpCo, LLC v. Meeks*,[24] holding that the General Assembly may empower a private entity to assist the Virginia Department of Transportation to impose and set rates of roadway user fees, the Supreme Court of Virginia again recognized that the separation-of-powers principle is not absolute. It wrote there that “[p]ractical considerations of modern governance require some degree of intermixing governmental powers between branches,”[25] and that this “is particularly true in the area of the Executive Branch’s administration and enforcement of law enacted by the General Assembly.”[26]

The touchstone of a separation-of-powers violation, therefore, is when one branch exercises the “whole power” of another. In assessing whether one branch is exercising another branch’s “whole power” rather than only “to a limited extent,” the “common determinative factor is whether the governmental branch constitutionally vested with authority retains the final decision-making power.”[27] Thus, in 1995, in *Tross v. Commonwealth*, the Virginia Court of Appeals found that, although judicial intake officers exercise some judicial power, they do not exercise the “whole power” of the judiciary because “the

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[22] *Id.* at 268 (emphasis added). *See also In re Phillips*, 265 Va. 81, 87 (2003) (upholding constitutionality of statute that did “not authorize a circuit court to exercise the ‘whole power,’ or any part of the power, granted to the Governor to remove political disabilities resulting from a felony conviction”).


[25] *Id.* at 310 (citing Baliles v. Mazur, 224 Va. 462, 472 (1982)).

[26] *Id.* at 311.

juvenile and domestic relations district court judges control the actual disposition of juveniles before the court." 28 By contrast, in 2013, in Montgomery v. Commonwealth, the Virginia Court of Appeals found a separation-of-powers violation where the Governor conditioned a pardon on the court’s issuance of a writ of actual innocence, holding that this condition “delegate[d] the chief executive’s ‘whole [clemency] power’ to the judiciary.” 29

2. There is significant risk that the Supreme Court of Virginia would find that the composition of the Board is unconstitutional because it gives the legislative branch control over an executive-branch policy board.

The proposed composition of the Board gives the General Assembly and its appointees a great deal of control over an entity “established as a policy board in the executive branch of state government.” 30 Under the Code of Virginia, a policy “board, commission or council” such as the Board “is specifically charged by statute to promulgate public policies or regulations.” 31 Of the twenty-two members on the Board, seven would be members of the General Assembly, and another eight would be appointed by members of the General Assembly; only seven of the twenty-two members of this executive-branch entity would be appointed by the Governor. Thus, members of the General Assembly or their appointees would exercise majority voting control over the grant-making decisions of the Board. Your question amounts to whether that degree of control in an executive-branch policy board is valid.

Although the Supreme Court of Virginia has not addressed the precise issue presented here, there is significant risk that the Court would find that the separation-of-powers principles in the Constitution of Virginia forbid such intrusion into decision-making authority committed to the executive branch. As § 2.2-2101 of the Code of Virginia provides, although membership of legislators on boards, commissions, and councils within the executive branch is generally prohibited, there are nearly twenty express exceptions, 32 of which the Board

29 Montgomery, 62 Va. App. at 670 (alteration in original).
30 House Bill 834 (lines 101-02).
31 VA. CODE ANN. § 2.2-2100(A) (2014).
32 VA. CODE ANN. § 2.2-2101 (Supp. 2015).
would be another.\textsuperscript{33} But in only one of the entities listed in § 2.2-2101—the Council on Virginia’s Future—is a majority of the membership composed of or appointed by legislators. And unlike the grant-making policy board at issue here, the Council on Virginia’s Future is an “advisory” body that exercises no executive policymaking, decision-making, or spending authority.\textsuperscript{34}

No Virginia case law defines the relative number of legislators or legislative appointees who may sit on an executive-branch entity without violating separation-of-powers principles.\textsuperscript{35} But it is clear that gubernatorial nonlegislative appointees and members of the Governor’s Cabinet would not constitute a majority of the members of this executive-branch policy board and thus have control of, and be responsible for, the Board’s decisions to “determine the distribution, duration, and termination of awards” from monies appropriated by the General Assembly; instead, members of the General Assembly and their appointees—who constitute fifteen of the Board’s twenty-two members—would exercise effective control over those decisions.\textsuperscript{36} Continuing legislative control over such spending decisions could well run afoul of the Constitution’s commitment of those decisions to the executive branch.

\textsuperscript{33} See House Bill 834 (lines 46-47).

\textsuperscript{34} See VA. CODE ANN. §§ 2.2-2684 to -2686 (2014). One entity not listed in § 2.2-2101 is the Jamestown-Yorktown Foundation. See VA. CODE ANN. § 23-287 (Supp. 2015). The executive and legislative branches each appoint sixteen members of the Foundation’s Board of Trustees with the remaining 5 members appointed by the Board itself. Id. But the Foundation is an “educational institution,” not a “policy board in the executive branch of state government” for which an exception was required in § 2.2-2101. House Bill 834 (lines 101-02).

\textsuperscript{35} Federal courts have not recognized a distinction between legislators themselves serving on an executive-branch board and their appointees. See, e.g., Hechinger v. Metro. Wash. Airports Auth., 845 F. Supp. 902, 907-09 (D.D.C.) (stating that the legislative changes to the executive-branch board’s membership so that the membership was “not restricted to congressional officials, but rather to those selected by congressional officials” were “superficial,” and holding that the board “exercises significant executive powers delegated to it by Congress” and thus was unconstitutional), aff’d, 36 F.3d 97 (D.C. Cir. 1994); see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 276 (1991) (“If the [Board of Review’s] power is executive, the Constitution does not permit an agent of Congress to exercise it.”).

\textsuperscript{36} See House Bill 834 (lines 146-48).
It is solely the Governor’s role to “take care that the laws be faithfully executed.” As [James] Madison stated on the floor of the First Congress, ‘if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” A group of legislators and legislative appointees with the ability to approve—or to veto—spending decisions would be exercising the “whole power” of the executive branch, and “the governmental branch constitutionally vested with authority” would not “retain[] the final decision-making power.”

Two historical examples illustrate the limits of the General Assembly’s ability to encroach on an executive function like this one. In 1982, the Attorney General opined that the General Assembly lacks the power to defer, modify, or annul a state agency’s regulations. Applying a three-factored separation-of-powers analysis suggested by Professor Howard in his Commentaries on the Constitution of Virginia, the Attorney General considered the danger of abuse, the necessity, and the propriety of the General Assembly’s control over the promulgation of regulations. He concluded that legislative review of regulations was vulnerable to abuse and “could well lead to an impermissible intrusion into the arena of authority exercised by the executive branch.” He also concluded that a court would reject the proposed regulatory review process on the “necessity and propriety” factors. As a result, he questioned the

37 VA. CONST. art. V, § 7. Cf. 1981-82 Op. Va. Att’y Gen. 93, 96 (“It is the function of the General Assembly to confer powers and duties upon administrative agencies with appropriate standards, but the executive branch, under the supervision of the Governor, must execute and implement those powers and duties.”).


39 Montgomery v. Commonwealth, 62 Va. App. 656, 667 (2013). See also Free Enter. Fund, 561 U.S. at 498 (“Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he can oversee, the President is no longer the judge of the Board’s conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”).


43 Id. at 94.

44 Id. at 95.
constitutionality of this degree of involvement of the General Assembly in the regulatory process because it “projects the legislative branch into the executive branch beyond constitutionally permissible limits” and “violates both Art. III, § 1 and Article IV, § 11 of the Constitution of Virginia.”\textsuperscript{45}

Nine years later, the Supreme Court of Virginia held in \textit{Taylor v. Worrell Enterprises, Inc.} that a list of the Governor’s long-distance telephone calls was not subject to disclosure under the Virginia Freedom of Information Act (“FOIA”) because disclosure would unduly interfere with the chief executive’s ability to perform his duties.\textsuperscript{46} In its decision, the Court observed that “the legislature may run afoul of the separation of powers doctrine even though it is exercising legitimate regulatory authority,”\textsuperscript{47} and adopted the reasoning of the U.S. Supreme Court to determine whether a legislative act “‘disrupts the proper balance between the coordinate branches.’”\textsuperscript{48} It noted that “‘the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.’”\textsuperscript{49} Because the disclosure of the telephone records sought would “unconstitutionally interfere with the ability of the Governor to execute the duties of his office,” the Court held that the records were not subject to compelled disclosure under FOIA.\textsuperscript{50}

Federal case law also provides examples where legislative control over an executive function went too far.\textsuperscript{51} In \textit{Bowsher v. Synar},\textsuperscript{52} for instance, a case concerning the constitutionality of the Balanced Budget and Emergency Deficit Control Act, the U.S. Supreme Court held that powers granted to the Comptroller General, an agent of Congress, violated the Constitution’s command that Congress play no role in the execution of the laws. “To permit an officer controlled by Congress to execute the laws would be, in essence, to

\textsuperscript{45} Id. at 96.
\textsuperscript{46} 242 Va. 219, 224 (1991).
\textsuperscript{47} Id. at 222.
\textsuperscript{48} Id. at 223 (quoting Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 443 (1977)).
\textsuperscript{49} Id. (quoting \textit{Nixon}, 433 U.S. at 443).
\textsuperscript{50} Id. at 224.
\textsuperscript{51} See, e.g., Buckley v. Valeo, 424 U.S. 1, 119 (1976) (“[T]he Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws.”).
\textsuperscript{52} 478 U.S. 714 (1986).
permit a congressional veto.” 53  The Court further explained that “once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”54

Although there is no dispositive Supreme Court of Virginia opinion directly on point, the existing Virginia and federal authorities strongly suggest that House Bill 834 would violate separation-of-powers principles by not giving the executive branch control over this executive-branch policy board.

3. There also is significant risk that the provision allowing legislative members of the Board to veto grant-making decisions is unconstitutional.

House Bill 834 also creates a legislative veto:

A decision by the Board to award grants from the Fund shall require an affirmative vote of (i) a majority of the members of the Board who are present and voting, (ii) a majority of the legislative members of the Board from the House of Delegates who are present and voting, (iii) a majority of the legislative members of the Board from the Senate who are present and voting, and (iv) a majority of the members of the Board who are gubernatorial Secretaries who are present and voting.55

By conferring on the legislative members of the Board (the House of Delegates members and the Senate members, as subsets of their respective houses, separately and independently) the power to block the award of a grant—even if the decision were supported by a majority vote of the full Board—House Bill 834 is very difficult to square with the legal authorities addressing the question presented here. Like the arrangement that this Office concluded in 1982 was constitutionally invalid, a small group of legislators would have the power to “defer, modify, or annul” an executive-branch entity’s decisions. 56 Such a legislative veto power was invalid because it “projects the legislative branch into the executive branch beyond constitutionally permissible limits” and “violates

53 Id. at 726.
54 Id. at 733-34 (citing INS v. Chadha, 462 U.S. 919, 958 (1983)).
55 House Bill 834 (lines 313-18).
both Art. III, § 1 and Art. IV, § 11 of the Constitution of Virginia.” Just as none of the other boards, commissions, and councils listed in § 2.2-2101—with the one exception of the “advisory” Council on Virginia’s Future—has a composition that is decisively controlled by legislators and their appointees, none has a similar legislative veto provision by which legislative members can override the decision of the board.

Authorizing a subset of the General Assembly to block the spending of funds appropriated by the General Assembly likely represents an improper delegation of legislative authority. Eight years ago, in Marshall v. Northern Virginia Transportation Authority, the Supreme Court of Virginia found improper the General Assembly’s delegation of authority to the Northern Virginia Transportation Authority (the “NVTA”) to decide whether to impose certain specified regional taxes. The Court reasoned that “if the General Assembly were permitted to avoid compliance with these constraints [of Article IV, § 11, which requires that “[n]o law shall be enacted except by [a] bill” that has passed both houses of the General Assembly] by delegating to NVTA the decisional authority whether to impose taxes,” then those constraints would “be rendered meaningless.” And three years ago, a pair of Attorney General opinions relied on Marshall v. NVTA to conclude that the then-proposed Medicaid Innovation and Reform Commission would exert similarly unconstitutional powers. Those same principles also are found in federal case law.

57 Id. See also Chadha, 462 U.S. at 954-55 (“Congress made a deliberate choice to delegate to the Executive Branch . . . . Congress must abide by its delegation until that delegation is legislatively altered or revoked.”).

58 Baliles v. Mazur, 224 Va. 462 (1982), which upheld a requirement that the Virginia Public Building Authority not undertake projects without authorization by the General Assembly, is not to the contrary. There the approval was required in advance by “bill or resolution . . . by a majority of those elected to each house of the General Assembly, authorizing such project or projects.” Id. at 465, 471-72.


60 Id. at 435.

61 See 2013 Op. Va. Att’y Gen. 73, 74 (finding unconstitutional a proposed arrangement under which “budgetary language related to Medicaid [would] become effective only if, at some point after the General Assembly has passed the law and the Governor has signed it, a subset of members of the General Assembly (not constituting a majority of each house) votes that certain conditions have been met”); 2013 Op. Va. Att’y Gen. 76, 79-80 (concluding that the General Assembly “may not avoid” Article IV, § 11 (which requires that “[n]o law shall be enacted except by [a] bill” that has passed
In sum, although the Supreme Court of Virginia has not addressed the identical situation presented here, I conclude that the provision of House Bill 834 creating a legislative veto power has a significant risk of being found unconstitutional.

**CONCLUSION**

While the General Assembly’s goal to promote regional cooperation on important economic and workforce development projects is laudable, that goal may not be accomplished by creating a governance structure for the Board that violates the Constitution’s separation-of-powers requirements. Although there is no definitive Supreme Court of Virginia opinion directly on point, I conclude that there is a significant risk that the Supreme Court of Virginia would find that House Bill 834 violates the separation-of-powers principles in the Constitution of Virginia on two grounds: that it creates an executive-branch policy board that does not have executive-branch officials, employees, or appointees as a majority of its members; and that it grants the legislative members of the Board effective veto power over the Board’s grant decisions. My Office will be glad to work with you and the General Assembly to remedy these defects, and amend the bill to alter the structure and composition of the Board in order to establish this initiative.

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62 See, e.g., Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275-76 (1991) (noting that “Congress may not delegate the power to legislate to its own agents or to its own Members”; “If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7”); Bowsher v. Synar, 478 U.S. 714, 755 (1986) (Stevens, J., concurring) (“If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade the carefully crafted restraints spelled out in the Constitution.”) (internal quotation marks omitted); Chadha, 462 U.S. at 954-55 (invalidating the “one-House veto” in the Immigration and Nationality Act and noting that Congress may implement “determinations of policy . . . in only one way; bicameral passage followed by presentment to the President”).
OP. NO. 15-020

UNITED STATES CONSTITUTION: FIRST AMENDMENT (FREEDOM OF SPEECH)

Blanket prohibitions against speech on “specific personnel or student concerns” and speech identifying school officials or employees may not constitutionally be applied so as to bar speakers from discussing specific school employees or officials during open meetings. Likewise, a prohibition against all “personal attacks” during open meetings is not constitutionally permissible. However, the constitutionality of restrictions against identifying individual students would be determined by the particular circumstances involved.

THE HONORABLE RICHARD L. (RICK) MORRIS
MEMBER, VIRGINIA HOUSE OF DELEGATES

APRIL 15, 2016

ISSUE PRESENTED

You ask whether certain rules of the Franklin City School Board restricting the speech of speakers at public meetings violate the free speech rights of speakers.

BACKGROUND

The facts you present are as follows. The Franklin City School Board (the “Board”) has adopted a regulation governing the conduct of public meetings entitled, “Public Participation at School Board Meetings.” It provides a period at public meetings when citizen comment is permitted and includes a section entitled, “Rules for Citizens’ Time at School Board Meetings” (the “Rules”).¹ In relevant part, the Rules state,

[t]he School Board will not permit speakers to discuss specific personnel or student concerns during the public session, but may be invited to do so during “Closed Meeting.” Names, titles, or positions which can identify specific individuals will not be allowed during the

 Speakers having specific personnel\(^2\) or student concerns may sign up to speak on these topics during “Closed Meeting.” Only the speaker or representative of a group may be present during “Closed Meeting.” Permission to speak before the School Board in “Closed Meeting” is at the discretion of the Franklin City School Board. . . . [Speakers] . . . may not engage in personal attacks against employees of the school system or other persons.

The School Board applies the Rules so as to prohibit speakers from either praising the performance of a student or a specific employee or expressing concerns or criticism about such persons during open meetings.

**APPLICABLE LAW AND DISCUSSION**

The First Amendment to the Constitution of the United States provides that “Congress shall make no law . . . abridging the freedom of speech . . . .”\(^3\) The Fourteenth Amendment makes these restraints applicable to state and local government, which would include public school systems.\(^4\) Thus, when public comment is allowed, it must be allowed in a manner consistent with the First Amendment. There are three different types of public forums, subject to different constitutional requirements. At the two ends of the spectrum are a traditional public forum, with only minimal restrictions on speech allowed, and a nonpublic forum, with substantial restrictions on speech allowed.

Between a traditional public forum and a nonpublic forum is a middle ground commonly referred to as a limited public forum. As explained by the U.S. Supreme Court in *Christian Legal Society Chapter of the University of California v. Martinez*,\(^5\) a limited public forum exists when the government limits the public expressive activity on what is otherwise nonpublic government property to certain kinds of speakers or the discussion of certain subjects.\(^6\) The

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\(^2\) The term “personnel” is not defined. Thus, it could reasonably be interpreted to include officials such as members of the School Board as well as salaried employees of the school division.

\(^3\) U.S. CONST. amend. I.


\(^5\) 561 U.S. 661 (2010).

\(^6\) Id. at 679 n.11.
public comment period in a school board meeting has been repeatedly held to be a limited public forum.  

Accordingly, I conclude that the situation you have presented—a public meeting of a local school board with a period set aside for public comments—meets the Supreme Court’s definition of a “limited public forum.”

The fundamental constitutional requirements for a limited public forum are that any restrictions on speech must be reasonable in light of the purpose of the forum and must be viewpoint neutral. 8 A speech restriction must be narrowly tailored to serve a significant government interest and leave open ample channels of communication. 9 In addition, a permissible rule affecting speech must be applied consistently, regardless of the viewpoints of different speakers. 10

Because the Rules do not differentiate between laudatory speech and criticism, they are content-neutral. 11 Thus, the remaining questions are whether the rules against discussing “specific personnel or student concerns” and identifying specific individuals by “names, titles, or positions,” and the rule against “personal attacks,” are reasonable.

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7 See Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 759 & n.42 (5th Cir. 2010).
8 Christian Legal Society, 561 U.S. at 679 n.11.
10 City of Madison, 429 U.S. at 178-79.
11 Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719 (C.D. Cal. 1996), involved a policy regulating speech at school board meetings. In holding the policy to be in violation of the requirement of content neutrality, the court stated, at 730, “It is difficult to imagine a more content-based prohibition on speech than this policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter.” See also City of Madison, 429 U.S. at 175-76 (“To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.”).
1. Identifying specific personnel

The interest of a school division in the privacy of school employees has been held to be an insufficient basis for barring public comment on individual employees. In *Baca v. Moreno Valley Unified School District*, a federal district court held that the school district’s “interest as an employer in protecting its employees’ right of privacy cannot be characterized as a compelling government interest,” and,

[w]hen a school board holds open sessions of its meetings and is addressed by members of the public . . . it is not functioning as an employer, but as a legislative body. . . . [O]ne aspect of the legislative body’s function is to listen to public testimony, including public criticism of those persons implementing the policies . . . . The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system . . . . [The school district’s interest in employee privacy] must give way to the more fundamental constitutional right of freedom of expression.\(^{13}\)

There was a similar holding in *Leventhal v. Vista Unified School District*, where another federal district court held that “[d]ebate over public issues, including the qualifications and performance of public officials . . . lies at the heart of the First Amendment.”\(^{15}\)

As to requiring such discussions to take place only in closed meetings, the *Baca* court observed, “[t]he open session of a school board meeting is a legally proper place for citizens to voice their complaints about a school district’s employees. The policy [of requiring those complaints to be made only during closed meetings] is an invalid restriction on speech at [open] meetings, and the

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13 Id. at 732 n.13, 732.
15 Id. at 958.
fact that plaintiff and others critical of District employees may speak in closed
sessions, in public, or even on the schoolhouse steps, does not validate the
otherwise invalid policy.”16 I note that for the School Board, even holding a
closed session is discretionary and not required, and if a closed session is held, a
citizen may speak only in the discretion of the School Board. For those reasons,
I conclude that allowing discussion of individual school employees only during
closed session does not meet the constitutional standard of “leaving open ample
channels of communication.”17

For the reasons set forth in Baca and Leventhal, I conclude that the School
Board may not constitutionally bar speakers from discussing personnel issues or
identifying individual school employees or officials during public session.

The same principles apply to the Rules’ prohibition on identifying
individual students by name, albeit with a different conclusion: there is a
significant government interest in protecting the privacy of individual students
in certain circumstances, as evidenced by state and federal student privacy
laws.18 Further, depending on context, certain comments about particular
individual students may not fall within the proper scope of a school board
meeting. Because there is such a wide range of possible comments about
individual students, I can express no overall opinion on the constitutionality of
such a restriction.19 The constitutionality of barring speakers from identifying
individual students would be governed by the specific facts of the situation.

16 Baca, 936 F. Supp. at 736 (emphasis added).
17 See supra, note 9 and accompanying text.
18 See The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. §1232g, which
protects the confidentiality of education records, only permitting the release of personally
identifiable information with the consent of the students or in certain isolated instances. 20 U.S.C.
§ 1232g(b)(1) & (2). See also, e.g., VA. CODE ANN. § 22.1-287 (2011), which establishes, with
some exceptions, that “[n]o teacher, principal or employee of any public school nor any school board
member shall permit access to any records concerning any particular pupil enrolled in the school in
any class to any person except under judicial process.”
19 There may be situations where it would not be improper to identify a student by name, such as a
parent expressing gratitude to the school board for school programs or activities that were beneficial
to the parent’s son or daughter.
Attorneys General consistently have declined to render official opinions on specific factual matters.20

2. “Personal attacks”

A prohibition on “personal attacks” was held not to be content-neutral, and therefore constitutionally impermissible. As the U.S. District Court for the Eastern District of Virginia observed in Bach v. School Board of the City of Virginia Beach,21 “citizens may see no distinction between stating, ‘the principal is a liar’ and ‘the principal lied to us about spending the money.’ According to the [School Board’s] interpretation, the latter would be acceptable but the former forbidden . . . .”22 In accordance with that federal judicial precedent, I conclude that barring “personal attacks” is not constitutionally permissible.

CONCLUSION

Freedom of speech is essential to the maintenance of a free society. For the reasons stated, it is my opinion that (1) the blanket prohibitions in the Rules against speech on “specific personnel or student concerns” and speech identifying school officials or employees may not constitutionally be applied so as to bar speakers from discussing specific school employees or officials during open meetings, and (2) the prohibition against all “personal attacks” is not constitutionally permissible. The constitutionality of restrictions against identifying individual students would be determined by the particular circumstances involved.23

OP. NO. 16-014

PRISONS AND OTHER METHODS OF CORRECTION: DEATH SENTENCES

22 Id. at 743.
23 I address only the constitutionality of the Rules and general principles governing their application, not whether they have been legally applied in any particular situation.
Expedited answers to several inquiries regarding the Governor’s Amendment to House Bill 815, regarding the Commonwealth’s procurement of compounded drugs for use in lethal injections:

1) The Commonwealth and a compounding pharmacy may enter into a contract for the provision of drugs for use in a lethal injection without violating state or federal law. Further, the Commonwealth may legally use drugs obtained in this manner to carry out a court-imposed sentence of death by lethal injection.

2) The confidentiality provisions of the Amendment do not impermissibly impede a civil litigant’s ability to discover evidence under federal or state law.

3) The Department of Corrections may study or modify existing lethal-injection protocols, however it has no statutory authority to suspend or to stay executions.

4) Under the facts presented, and as a matter of general contract law, state agencies and employees would not face civil liability for using compounded drugs.

I am responding to your requests for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia. Considering the time-sensitive nature of the requests submitted, I have consolidated my response into a single opinion.

**ISSUES PRESENTED**

You have presented questions concerning the constitutionality and applicability of the Governor’s Amendment in the Nature of a Substitute (“Substitute”) to House Bill 815 (“H.B. 815”), currently pending before the General Assembly. Questions related to the process by which the Commonwealth carries out a court-imposed sentence of death are of
extraordinary importance, as this is among the most solemn and consequential powers exercised by the state.

Specifically, Delegate Miller has asked the following:

1. Whether state or federal law prohibits the Commonwealth from obtaining lethal-injection drugs from a compounding Pharmacy;

2. Whether state or federal law prohibits a compounding pharmacy from selling lethal-injection drugs to the Commonwealth of Virginia; and

3. Whether state or federal law prohibits the Commonwealth from using compounded drugs in the lethal-injection process.

Senator Surovell and Delegate Simon, in a combined request, have asked the following questions:

1. Whether the proposed limitation on the discoverability of the identities of compounding pharmacies and their employees violates a habeas petitioner’s right to gather evidence;

2. Whether any Virginia law prohibits the Department of Corrections from studying alternative lethal-injection protocols;

3. Whether any Virginia law prohibits the Department of Corrections from adopting a one-drug or other alternate protocol;

4. Whether any Virginia law prohibits the Department of Corrections from delaying executions until the 2017 General Assembly session;
5. Whether the Commonwealth of Virginia, or any of its employees, faces potential liability for using lethal-injection drugs “in violation of manufacturers’ instructions”; and

6. Whether a compounding pharmacy would violate federal law if it provided drugs for a lethal injection in accordance with the Substitute, and whether Virginia government officials might be subject to federal prosecution if they possessed drugs compounded for use in the lethal-injection process.

The sixth question posed by Senator Surovell and Delegate Simon is nearly identical in substance to the questions posed by Delegate Miller. For that reason, I will subsume my response to this sixth question in my response to Delegate Miller’s requests.

BACKGROUND

At the threshold, it is necessary to acknowledge the framework in which these questions arise. The United States Supreme Court recently reaffirmed that “capital punishment is constitutional.”1 That being so, “there must be a [constitutional] means of carrying it out.”2 Thus, the United States Supreme Court has confirmed the constitutional validity of execution by lethal injection.3

Within that framework, Virginia’s basic lethal injection protocol also has been upheld against constitutional challenges.4 Similarly, the use of compounded drugs in the lethal injection process has been upheld as constitutional.5 It is now

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2 Glossip, 135 S. Ct. at 2728.
3 Id. at 2736-37; Baze, 553 U.S. at 50. In fact, the Supreme Court “has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.” Glossip, 135 S. Ct. at 2732.
4 See Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008); see also Walker v. Johnson, 328 F. App’x 237 (4th Cir. 2009).
5 See, e.g., Zink v. Lombardi, 783 F.3d 1089, 1101 (8th Cir.), cert. denied, 135 S. Ct. 2941 (2015); Ladd v. Livingston, 777 F.3d 286, 289 (5th Cir.), cert. denied, 125 S. Ct. 1197 (2015); Wellons v.
well-recognized, however, that the Commonwealth of Virginia has faced increased difficulty in obtaining the drugs needed for use in an execution by lethal injection.6

The 2016 General Assembly passed legislation that would have made electrocution a permissible default method of execution if lethal injection drugs were unavailable. Specifically, as enrolled, H.B. 815 would have added the following language to § 53.1-234 of the Code of Virginia:

> If the Director certifies that the method of execution chosen by the prisoner or set forth in this section is not available for any reason, the remaining method of execution shall be employed, provided that the Director shall not certify that execution by lethal injection is not available unless the Director has made reasonable efforts to procure such lethal substances.

The Governor, upon review of the bill, removed this language and returned the Substitute to the General Assembly, inserting the following language:

> The Director may make and enter into contracts with a pharmacy, as defined in § 54.1-3300, or outsourcing facility, as defined in § 54.1-3401, for the compounding of drugs necessary to carry out an execution by lethal injection. Any such drugs provided to the Department pursuant to the terms of such a contract shall be used only for the purpose of carrying out an execution by lethal injection. The compounding of such drugs pursuant to the terms of such a contract (i) shall not constitute the practice of pharmacy as defined in § 54.1-3300; (ii) is not subject to the jurisdiction of the Board of Pharmacy, the Board of Medicine, or the Department of Health Professions; and (iii) is exempt from the provisions of Chapter 33 (§ 54.1-3300 et seq.) of Title 54.1 and the Drug Control Act (§ 54.1-3400 et seq.). The pharmacy or outsourcing facility providing

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such drugs to the Department pursuant to the terms of such a contract shall label each such drug with the drug name, its quantity, a projected expiration date for the drug, and a statement that the drug shall be used only by the Department for the purpose of carrying out an execution by lethal injection.

The identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such pharmacy or outsourcing facility, and any person or entity used by such pharmacy or outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs and any information reasonably calculated to lead to the identities of such persons or entities, including their names, residential and office addresses, residential and office telephone numbers, social security numbers, and tax identification numbers, shall be confidential, shall be exempt from the Freedom of Information Act (§ 2.2-3700 et seq.), and shall not be subject to discovery or introduction as evidence in any civil proceeding unless good cause is shown.

The General Assembly is scheduled to convene on April 20, 2016, to discuss and take possible action on the Substitute.

**APPLICABLE LAW AND DISCUSSION**

1. **Whether the manufacture, sale, and use of compounded drugs for an execution by lethal injection would violate state or federal law**

   The language of the Substitute removes the lethal injection process, as well as the lethal injection drug procurement procedure, from regulation by the Virginia Board of Pharmacy, the Virginia Board of Medicine, the Virginia Department of Health Professions, and from the provisions of the Virginia Drug Control Act. Thus, the Substitute exempts an individual, acting in accordance with its language, from regulation under the identified statutes.

   If federal statutory law applies at all to the production, purchase, and use of compounded drugs for use in lethal injections, the two relevant statutes are the
Food, Drug, and Cosmetic Act (“FDCA”), and the Controlled Substances Act. Although the discussion below includes a detailed analysis of both statutes, note that the Food and Drug Administration (“FDA”), the agency charged with implementing both statutes, has concluded that it lacks clear regulatory authority over the use of drugs for purposes of conducting executions, and courts will likely be constrained to defer to the FDA’s reasonable construction. Even if the FDA were to change that position, however, it is my opinion that the conduct authorized by the Substitute would not violate these federal laws for the reasons set forth below.

a. The Food, Drug, and Cosmetic Act

The core mission of the FDA is to “promote the public health by promptly and efficiently reviewing clinical research” and to “protect the public health by ensuring that . . . [human] drugs are safe and effective.” The primary enabling legislation for the FDA is the FDCA, which requires that drugs distributed in interstate commerce be approved by the FDA for specific uses. To obtain FDA approval, drug manufacturers are required to demonstrate, through clinical trials, the safety and efficacy of a new drug for each intended use.

In accordance with the FDA’s public-safety mission, the FDCA makes it unlawful to introduce into interstate commerce a “misbranded” drug or an unapproved “new drug.” An “unapproved new drug” is one that is neither “generally recognized, among experts . . . as safe and effective” for its labeled use, nor approved by the FDA as safe and effective for its proposed use.

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7 21 U.S.C. §§ 301 to 399f.
8 21 U.S.C. §§ 801 to 971.
13 21 U.S.C. §§ 355(a) & 331(d).
Also, § 353(b)(1) of the FDCA prohibits the dispensation of certain Schedule II, III, IV, or V controlled drugs without a prescription.\(^\text{16}\)

Actions brought for violations of the FDCA are, with certain limited exceptions, exclusively within the purview of the federal government.\(^\text{17}\) For this reason, the “FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance.”\(^\text{18}\) Private litigants therefore lack standing to assert a claim under the Act.\(^\text{19}\)

As pertinent here, the questions posed by the Substitute are: (1) whether the preparation, sale, or use of a lethal-injection drug by a compounding pharmacy would implicate or violate the “new drug” restrictions of the FDCA, and (2) whether dispensing a lethal-injection substance without a prescription violates § 353(b)(1) of the Act.

“Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient.”\(^\text{20}\) Compounding “is a traditional component of the practice of pharmacy, and is taught as part of the standard curriculum at most pharmacy schools.”\(^\text{21}\) Most states specifically regulate compounding practices “as part of their regulation of pharmacies.”\(^\text{22}\) Thus, “[f]or approximately the first 50 years after the enactment of the FDCA, the FDA generally left regulation of compounding to the States,” and “[p]harmacists

\(^\text{16}\) 21 U.S.C. § 353(b)(1); see also 21 C.F.R. § 290.1 (“Any drug that is a controlled substance listed in schedule II, III, IV, or V . . . must be dispensed by prescription only as required by section 503(b)(1) of the Federal Food, Drug and Cosmetic Act . . . .”). The regulations also set forth a procedure through which a prescription exemption may be obtained. See 21 C.F.R. § 310.200(b).

\(^\text{17}\) 21 U.S.C. § 337.


\(^\text{19}\) See Heckler v. Chaney, 470 U.S. 821, 835 (1985) (holding that an FDA administrative decision regarding enforcement of the FDCA was not judicially reviewable because the Act’s enforcement provisions “commit complete discretion to the Secretary to decide how and when they should be exercised”).


\(^\text{21}\) Id. at 361.

\(^\text{22}\) Id.
continued to provide patients with compounded drugs without applying for FDA approval of those drugs."\(^{23}\)

“The FDA eventually became concerned, however, that some pharmacists were manufacturing and selling drugs under the guise of compounding, thereby avoiding the FDCA’s new drug requirements."\(^{24}\) The FDA grappled with the question of whether, “[w]hen a pharmacist creates a compounded medication to suit an individual patient,” that “resulting creation constitutes a ‘new drug’ requiring FDA approval.”\(^{25}\) Although the definition of “new drug” seemingly encompassed a compounded substance, “[i]f each individualized drug product produced through compounding required FDA approval, few would undergo the costly and arduous approval process,” and that lack of approval “would in turn make nearly all compounding unlawful under the FDCA.”\(^{26}\)

In 1997, Congress reacted to this concern by enacting the Food and Drug Administration Modernization Act,\(^ {27}\) and, subsequently, the Drug Quality and Security Act of 2013.\(^ {28}\) This legislation established exemptions from new drug approval requirements for certain compounding pharmacies and “outsourcing facilities,” the latter of which, if they meet certain statutory requirements, are permitted to compound substances for general distribution and not necessarily pursuant to a prescription for an “identified individual patient[].”\(^ {29}\)

Following these statutory amendments, the generally accepted view is that, “[t]hough compounded drugs are ‘new drugs,’ they are neither uniformly exempt from the new drug approval requirements nor uniformly subject to them.”\(^ {30}\) “Properly construed, the statutory scheme . . . creates a limited exemption from

\(^{23}\) Id. at 362.

\(^{24}\) Id.


\(^{26}\) Id.


\(^{30}\) Med. Ctr. Pharm., 536 F.3d at 394 (emphasis in original).
the new drug approval requirements for compounded drugs that comply with conditions explicitly delineated in [the Act].”

The compounding exemption established by § 353a of the FDCA applies if: (1) the compounded substance is prepared by a licensed individual in response to a valid prescription, or, if prepared before receipt of a prescription, is made only in “limited quantities” and based upon a preexisting relationship between the parties; (2) the compounded substance is made from approved ingredients that meet manufacturing and safety standards, and the substance does not appear on an FDA list of drug products found to be unsafe or ineffective; (3) the individual compounding the drug does not “compound regularly or in inordinate amounts . . . any drug products that are essentially copies of a commercially available drug product”; (4) the compounded substance is not identified by the FDA as a drug product that presents demonstrable difficulties for compounding in terms of safety or effectiveness; and (5) for States that have not entered into a memorandum of understanding with the FDA, the compounding entity or individual does not distribute compounded drugs out of state in quantities exceeding five percent of the total prescription orders.

The only prerequisite not satisfied by the facial provisions of the Substitute is the first—whether preparation and purchase of a compounded substance, absent a prescription, would remove that preparation from the compounding exemption in § 353a, thereby triggering the “new drug” restrictions codified elsewhere in the Act. The resolution of the two questions presented by the FDCA therefore result in a single inquiry: does the preparation, purchase, and use of a compounded substance, prepared for purposes of lethal injection, violate the FDCA if obtained in the absence of a valid prescription?

In my opinion, courts would likely answer this question in the negative. First, no court has ever invalidated a state’s lethal injection protocol or drug procurement on the grounds that the substances to be used were obtained

31 Id.; see also id. at 406 (“If and only if the compounded drugs satisfy § 353a’s conditions, those drugs are exempt from the requirements of §§ 351(a)(2)(B), 352(f)(1), and 355.”).
without a prescription. Second, it is settled law that use of drugs in the lethal injection context does not constitute the practice of medicine, rendering a prescription both unnecessary and unavailable. Third, concluding that the procurement process for lethal-injection drugs violates the FDCA because those drugs were obtained without a prescription would, functionally, invalidate the lethal injection process itself, a method-of-execution employed by approximately thirty-three states and the federal government. There is no indication that Congress intended the FDCA to be applied to constructively abolish the process of execution by lethal injection, particularly given that the

33 However, one court has held that the FDCA prohibits state departments of corrections from importing lethal injection substances from a foreign country, where the company selling the substance was not registered with the FDA and, therefore, the imports were “misbranded.” See Cook v. FDA, 733 F.3d 1 (D.C. Cir. 2013). This case dealt with the restrictions on importing foreign drugs, rather than the compounding or domestic procurement of lethal injection substances from a duly-registered entity.

34 See VA. CODE ANN. § 54.1-3300 (2013) (defining “practice of pharmacy” as “the personal health service that is concerned with the art and science of selecting, procuring, recommending, administering, preparing, compounding, packaging and dispensing of drugs, medicines, and devices used in the diagnosis, treatment, or prevention of disease”); VA. CODE ANN. § 54.1-2900 (Supp. 2015) (defining “practice of medicine” as “the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities”); Shapiro v. Dep’t of Corr., No. CL12-1894-03 (Richmond Cir. Ct. Sept. 21, 2012) (“[T]he Court rules that execution by lethal injection by the Commonwealth of Virginia is not the regulated practice of medicine, pharmacy, or anesthesiology.”), appeal refused, Record No. 122176 (Va. Apr. 23, 2013); see also Emmett v. Johnson, 511 F. Supp. 2d 634, 642 (E.D. Va. 2007) (“[S]urgery and execution have the polar opposite medical objectives.”); Walker v. Johnson, 448 F. Supp. 2d 719, 723 (E.D. Va. 2006) (“An execution by lethal injection is not a medical procedure and does not require the same standard of care as one.”); Abdur’Rahman v. Bredesen, 181 S.W.3d 292, 313 (Tenn. 2005) (holding that, because the lethal injection process did not involve the practice of medicine, “the lethal injection protocol falls outside of licensing statutes applicable to physicians and healthcare providers”).

35 See 21 C.F.R. § 1306.04(a) (“A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”).

federal government has, itself, adopted lethal injection as the accepted method of execution.\textsuperscript{37}

Fourth, applying the FDCA as a bar to the preparation, purchase, and use of lethal-injection substances would not further the purposes of that Act. “[W]ith an emphasis on trade regulation, the FDCA’s main purpose is to ‘prohibit the movement in interstate commerce of adulterated and misbranded foods, drugs, devices and cosmetics’” in the interest of public health and safety.\textsuperscript{38} To effectuate this purpose, “the Act generally requires the FDA to prevent the marketing of any drug or device where the ‘potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit.’”\textsuperscript{39} The public health and safety purposes underlying the FDCA are by their very nature inapposite to the purchase and use of drugs for capital punishment.\textsuperscript{40} For this reason, a court would likely hold that the compounding of lethal injection drugs falls outside the scope of subject matter that the FDA has authority to regulate under the FDCA.\textsuperscript{41}

\textsuperscript{37} See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”).


\textsuperscript{40} See, e.g., Deputy, A.2d at 419 (“The Court is unaware of any judicial authority construing either the DAPCA or FDCA’s purpose to include the prevention of lawful executions of inmates.”); see also Chaney v. Heckler, 718 F.2d 1174, 1200 (D.C. Cir. 1983) (Scalia, J., dissenting) (opining that the FDA’s refusal to regulate lethal injection drugs likely stemmed from the agency’s “proper[ly refus[al]] to permit its powers and the laws it is charged with enforcing from being wrongfully enlisted in a cause that has less to do with assuring safe and effective drugs than with preventing the states’ constitutionally permissible imposition of capital punishment”), rev’d, 470 U.S. 821 (1985).

\textsuperscript{41} See, e.g., Brown & Williamson, 529 U.S. at 140-43 (concluding that the FDA lacked authority to regulate cigarettes under the FDCA because, in order for an item to fall within the purview of the agency, “the FDA must determine that there is a reasonable assurance that the product’s therapeutic benefits outweigh the risk of harm to the consumer,” and, “if tobacco products were within the FDA’s jurisdiction, the Act would require the FDA to remove them from the market entirely,” an action that would contradict other provisions of federal law); see also Abdur’Rahman v. Bredesen, 181 S.W.3d 292, 313 (Tenn. 2005) (“[T]he Drug Control Act and the Pharmacy Practice Act were designed to prevent the illegal sale or distribution of controlled substances and to provide a system...
Fifth, the FDA has, itself, disclaimed any intent to regulate or approve substances for use in lethal injection. In *Heckler v. Chaney*, a group of death row inmates unsuccessfully challenged the FDA’s refusal to enforce the FDCA against states obtaining lethal injection drugs for use in executions. The Court held that the FDA’s decision not to take enforcement action was not subject to judicial review under the Administrative Procedure Act. Although the Court focused on the unreviewable nature of the agency’s decision not to act, it also acknowledged the FDA Commissioner’s statement that, even if the FDA had jurisdiction in the area of regulating lethal injection drugs, the agency would decline to exercise that authority. Specifically, the Commissioner stated that enforcement proceedings “are initiated only when there is a serious danger to the public health or a blatant scheme to defraud,” and “those dangers are [not] present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions . . . .”

Because *Heckler* was decided on other grounds, the Court did not need to decide what it called “the thorny question of the FDA’s jurisdiction.” Notably, however, the FDA took the position in *Heckler* that “FDA jurisdiction in the area was generally unclear but in any event should not be exercised to interfere with this particular aspect of state criminal justice systems.” The *Heckler* suit was filed in 1980 and decided in 1985. For the past 36 years, the FDA has consistently declined to regulate or act in this area. Considering the long-standing interpretation of its agency mission, it is unlikely that the FDA could—or would—assert regulatory authority over the compounding of drugs for use in lethal injections. Indeed, courts generally defer to an agency’s reasonable interpretation of the scope of its authority.

for drug abuse control. These purposes would not be served or advanced by a strained interpretation making them applicable to the lethal injection statutes or to the lethal injection protocol.”)

43 Id. at 837-38.
44 Id. at 824-25; see also Ringo v. Lombardi, No. 2:09cv04095, 2011 U.S. Dist. LEXIS 90679, at *16 (W.D. Mo. Aug. 15, 2011) (“The FDA has expressed the position that it does not regulate or approve chemicals for use in executions by lethal injections.”), vacated as moot, 677 F.3d 793 (8th Cir. 2012).
45 *Heckler*, 470 U.S. at 828.
46 Id. at 824 (emphasis added).
Finally, the Act does not appear to provide any enforcement mechanism against a state government or agency. That is, the civil and criminal penalties established in the FDCA are directed against any “person” who violates the terms of the Act. The term “person” is statutorily defined as “an individual, partnership, corporation, and association,” and does not, by its language, encompass any branch of state government. Considering this absence of remedies, the general directives of the FDCA may not apply to state—as opposed to private—action.

Weighing these considerations, it is my opinion that a compounding pharmacy would not violate the FDCA by dispensing a compounded drug to the Virginia Department of Corrections without a prescription—but in accordance with state law—for use in the lethal injection process. It is also my opinion that the Virginia Department of Corrections would not violate the FDCA by purchasing a compounded drug for use in a lethal injection, as this is a matter that falls outside the scope and purpose of the federal act.

b. The Controlled Substances Act

The second federal statute potentially implicated by the Substitute is the Controlled Substances Act (“CSA”). “The stated purpose of the CSA is to provide increased research into, and prevention of, drug abuse and drug dependence... and to strengthen existing law enforcement authority in the field

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50 See, e.g., Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 208-09 (1998) (“Absent an unmistakably clear expression of intent to alter the usual constitutional balance between the States and the Federal Government, we will interpret a statute to preserve rather than destroy the States’ substantial sovereign powers.”); Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989) (“To temper Congress’ acknowledged powers of abrogation with due concern for the Eleventh Amendment’s rule as an essential component of our constitutional structure, we have applied a simple but stringent test: Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.” (internal quotations omitted)).
51 21 U.S.C. §§ 801 to 971.
of drug abuse.” To facilitate this aim, “the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act’s five schedules.”

Under the CSA, “it is unlawful to prescribe or dispense controlled substances without a federal registration.” Upon registration, the individual or entity is “authorized to possess, manufacture, distribute, or dispense [controlled] substances or chemicals . . . to the extent authorized by their registration.”

The Virginia Department of Corrections possesses a Controlled Substance Registration Certificate from the Drug Enforcement Agency. For this reason, the Department’s possession or dispensation of controlled substances, obtained from a compounding pharmacy for lethal injection purposes, would not violate the registration requirement of the CSA.

As with the FDCA, the CSA also prohibits the dispensation of Schedule II, III, IV, and V controlled substances without the written prescription of a practitioner. Accordingly, the remaining inquiry is whether the procurement of a lethal injection drug from a compounding pharmacy, absent a prescription, would violate the CSA.

For the same reasons discussed above, it is my opinion that the dispensing of lethal injection drugs, without a prescription, would not violate the CSA. “The CSA expressly limits federal authority under the Act to the ‘field of drug abuse.’” For this reason, “[v]iewed in context, the prescription requirement is

52 Oregon v. Ashcroft, 368 F.3d 1118, 1121 (9th Cir. 2004) (internal quotations omitted), aff’d sub nom Gonzales v. Oregon, 546 U.S. 243 (2006); see also 21 U.S.C. § 801.
53 Gonzales, 546 U.S. at 250.
54 Ashcroft, 368 F.3d at 1121; see also 21 U.S.C. § 841(a)(1), § 823(f), § 822(a)(2).
56 21 U.S.C. § 829; see also 21 C.F.R. § 1306.11.
57 Ashcroft, 368 F.3d at 1125-26 (striking down a directive declaring that a physician who wrote a prescription for lethal substances for the purposes of physician-assisted suicide was in violation of the CSA, reasoning that “physician assisted suicide is not a form of drug ‘abuse’ that Congress intended the CSA to cover,” but is, instead, “an unrelated, general medical practice to be regulated by state lawmakers in the first instance”).
better understood as a provision that ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse,” and, “[a]s a corollary, . . . also bars doctors from peddling to patients who crave the drugs for those prohibited purposes.”

Applying the CSA’s prescription provision to bar a state agency from obtaining lethal injection drugs would advance none of these statutory objectives. As with the FDCA, it would also produce the incongruous result of eliminating the federal government’s ability to procure lethal injection substances for its own use. Moreover, “[t]he CSA explicitly contemplates a role for the States in regulating controlled substances.” Here, state law would expressly permit the procurement of a controlled substance, by a state agency, for use in a lethal injection.

Because there is no indication in the language or purpose of the CSA that Congress intended for this Act to apply to state agencies in the process of obtaining lethal injection drugs, it is my opinion that the prescription-requirement provisions of the CSA do not apply in this context. Accordingly, persons or entities acting in accordance with the Substitute would not violate the CSA.

2. Whether the restrictions on discovery implicate a habeas petitioner’s “right” to gather evidence

In a separate request, Senator Surovell and Delegate Simon have asked whether the Substitute’s provisions protecting the identity of the compounding

58 Gonzales, 546 U.S. at 274.
59 See Zink v. Lombardi, No. 2:12cv4209, 2013 U.S. Dist. LEXIS 175467, at *17 (W.D. Mo. Dec. 11, 2013) ("[The inmate] has failed to establish a likelihood that the ‘medically legitimate purpose’ requirement of the FDAC and CSA was intended to control a state’s interest in carrying out executions by the administration of lethal drugs.").
60 Gonzales, 546 U.S. at 251.
61 See generally id. at 270 ("Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate [state practice] generally. The silence is understandable given the structure and limitations of federalism . . . .").
pharmacy or outsourcing facility, its officers and employees, and the supply sources it employs would violate a habeas petitioner’s right to gather evidence. It is my opinion that the language of the Substitute does not violate any constitutional protection or other federal law and it is, therefore, for the General Assembly to decide whether such limitations on disclosure are in the public interest.

The language of the Substitute permits a would-be litigant to discover, and make use of, the names of the drugs that would be used in an execution by lethal injection, as well as the protocol under which those drugs would be administered.

To clarify, however, a suit challenging the manner in which an individual is to be executed does not challenge the validity of the underlying conviction or sentence. As such, a method-of-execution suit is not a habeas corpus proceeding. As the U.S. Supreme Court recently confirmed, “a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner’s conviction or death sentence.” Accordingly, a prospective method-of-execution suit would be appropriately filed as a civil rights action under 42 U.S.C. § 1983. With respect to your particular question regarding habeas corpus proceedings, the Substitute’s “good cause” requirement is congruent with the federal rules governing federal habeas corpus proceedings, which already require a showing of “good cause” before any discovery is permitted.

65 See Rule 9, RULES GOVERNING SECTION 2254 CASES IN THE U.S. DIST. COURTS.
Upon a showing of good cause, a judge presiding over either civil proceeding has the authority and discretion to fashion appropriate safeguards to allow for access to relevant information by party litigants. It is, therefore, my opinion that enactment of the Substitute would not impermissibly obstruct a civil litigant’s ability to discover evidence for purposes of challenging the legality of the manner of a prospective execution.

3. Whether the Virginia Department of Corrections is prohibited from studying or adopting alternate lethal-injection protocols

Senator Surovell and Delegate Simon, have also asked two separate, but related questions: (1) whether there are “any provisions of Virginia law prohibiting the Department of Corrections from studying alternative drug[] protocols pending further executions,” and (2) whether “there are any provision[s] of Virginia law prohibiting a one-drug protocol or adopting an alternate protocol to the one presently utilized.” The answer to both questions is no.

Under § 53.1-234 of the Code of Virginia, “[e]xecution by lethal injection shall be permitted in accordance with procedures developed by the Department [of Corrections].” There are no further statutory or administrative code provisions that govern the consideration or adoption of alternative lethal-injection drugs or alternative lethal-injection protocols. Because development of

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66 FED. R. CIV. PRO. 26c.

67 See West v. Schofield, 460 S.W.3d 113, 125 (Tenn. 2015) (plaintiff seeking relief under 42 U.S.C. § 1983) ("[T]here is neither a statutory nor a constitutional barrier to the adoption of a common-law privilege that would prohibit the disclosure in civil litigation of the identities of those persons involved in the execution of condemned inmates."); see also Owens v. Hill, 758 S.E.2d 794 (Ga. 2014) (holding that a state statute shielding the identities of persons and entities involved in executions, including the drug manufacturers, did not violate any provision of the state or federal constitution), cert. denied, 135 S. Ct. 449 (2014); 2015 Op. S.C. Att’y Gen. LEXIS 62 (July 27, 2015) (discussing the state’s interest in the anonymity of members of execution teams, including suppliers of lethal injection compounds).

68 VA. CODE ANN. § 53.1-234; see also Emmett, 532 F.3d at 293 ("[T]he statutory scheme leaves the development and implementation of the specific procedures for lethal injection to the discretion of the Director and those he appoints to assist him."); 1994 Op. Va. Att’y Gen. 81 (discussing, generally, the 1994 amendments to § 53.1-234 of the Code, and concluding that the alterations did not violate the ex post facto clauses of the Virginia and federal constitutions).
the lethal-injection protocol is committed to the discretion of the Director of the Virginia Department of Corrections, there is no statutory bar to the consideration or adoption of alternative lethal-injection drugs or protocols. Furthermore, the Department of Corrections does study alternative drug protocols. In fact, the Department of Corrections has changed its protocol twice, once in 2011 and again in 2014, to permit the use of a different first chemical as the chemicals have become unavailable. The Department of Corrections actively monitors the other states and the federal government with regard to how each implements the death penalty.

4. Whether the Department of Corrections may postpone executions until the 2017 General Assembly Session

Senator Surovell and Delegate Simon have also asked whether “there is any provision of Virginia law which would prohibit the Department of Corrections from delaying executions until the General Assembly has time to meet next year to gather more information and further study this issue.” Because the Department of Corrections has no authority to schedule or postpone executions, it is my opinion that Virginia law prohibits the Department of Corrections from unilaterally delaying executions for any reason, or for any period of time.

Under § 53.1-232 of the Code of Virginia, the sentencing court is vested with the sole authority to “fix a day when the execution shall occur.” The sentencing court sets the execution date “when it is notified in writing by the Attorney General or the attorney for the Commonwealth” that at least one of four procedural requirements has been met. Within ten days following receipt of the written notification, “[t]he trial court shall conduct a proceeding to set the [execution] date,” which “shall be no later than sixty days after the date of the proceeding.” And, “[o]nce an execution date is scheduled, a stay of execution

69 This opinion does not address whether there are any policies or procedures adopted by the Department of Corrections that might govern whether and when alterations to the lethal-injection protocol should be considered or implemented.


72 Id.
may be granted by the trial court or the Supreme Court of Virginia only upon a showing of substantial grounds for habeas corpus relief.”73

Because the Department of Corrections cannot exercise authority it does not have, the Department cannot “delay[] executions until the General Assembly has time to meet next year.”

5. Would the Commonwealth of Virginia be liable for using lethal-injection drugs in a manner other than that recommended by the manufacturer?

Next, Senator Surovell and Delegate Simon have asked whether “the Commonwealth of Virginia including any of its agents or employees face any potential civil liability or consequences if [they] continue[] to use [lethal injection] drugs in violation of manufacturers’ instructions . . . .”

The question is asked after stating that “multiple drug manufacturers have threatened Virginia.” However, the nature of the threat is not stated but implies that it would entail civil liability. Without more facts, or knowing what the nature of the threatened litigation might be, it is impossible to opine on the merits of such a threat. However, I note generally that, absent any express contractual provision to the contrary, a vendor cannot unilaterally impose obligations upon a purchaser following consummation of a sale. In particular with drugs regulated by the FDA, “off-label drug usage is not unlawful,” and the FDA “generally contemplates that approved drugs will be used in off-label ways.”74 For these reasons, and in the absence of additional facts to inform this response, it does not currently appear that Virginia would face any potential civil liability for use of a lethal-injection drug contrary to the wishes of its manufacturer.

CONCLUSION

For the reasons set forth above it is my opinion that the FDCA and the CSA do not prohibit the procurement of compounded drugs for use in the lethal injection process, and entities and individuals acting in accordance with the Substitute would not violate federal law. Also, it is my opinion that, whether the

73 Id.

74 United States v. Caronia, 703 F.3d 149, 166 (2d Cir. 2012).
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case is a habeas corpus proceeding or manner-of-execution challenge under
42 U.S.C. § 1983, the Substitute’s limitation on disclosure of the identities of
compounding pharmacies and their employees would not violate the
constitutional rights of a civil litigant, nor any federal law. Also, although the
Virginia Department of Corrections may consider or adopt alternative lethal-
injection drugs or protocols without further statutory authorization, the
Department has no authority to suspend or stay executions. Finally, the facts
you recite do not appear to support the imposition of any potential civil liability
for using a lethal-injection drug against the wishes of its manufacturer.

Decisions related to the process by which the Commonwealth carries out a
court-imposed sentence of death deserve the greatest deliberation and
consideration, as this is among the most solemn and consequential powers
exercised by the state. In an effort to help inform your deliberations on the
Substitute, I am providing this opinion as an explanation of the current state of
the law related to procurement of drugs for use in carrying out a court-imposed
sentence of death by lethal injection. I trust this information will be of use as
you and your colleagues in the General Assembly carefully weigh the wisdom
and merits of any policy in this area.

OP. NO. 15-070

ADMINISTRATION OF GOVERNMENT: VIRGINIA HUMAN RIGHTS ACT

The Virginia Human Rights Act (the “VHRA”) and Virginia’s other anti-discrimination
statutes most likely prohibit discriminatory conduct against LGBT Virginians when that
conduct is based on sex-stereotyping or on treating them less favorably because of their sex.
That conclusion is particularly well-founded with respect to the VHRA, the scope of which
includes all discriminatory conduct prohibited under federal law. Additionally, while a strong
argument could be made that discrimination on the basis of gender identity or sexual
orientation is always sex discrimination within the meaning of Virginia’s anti-discrimination
statutes, the Supreme Court of Virginia has not considered and resolved that question.

THE HONORABLE THOMAS A. GARRETT JR.
MEMBER, SENATE OF VIRGINIA

THE HONORABLE DAVE A. LaROCK
MEMBER, VIRGINIA HOUSE OF DELEGATES
I am responding to your requests for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia. Given the similarity of the questions you ask, I have consolidated my response into a single opinion.

ISSUES PRESENTED

Senator Garrett and Delegate LaRock have each asked whether Virginia’s anti-discrimination statutes, by prohibiting discrimination on the basis of “sex,” thereby also proscribe discrimination on the basis of sexual orientation and gender identity. They state that their inquiry is prompted by recent rulings by the U.S. Equal Employment Opportunity Commission (“EEOC”), which they characterize as holding that the term “sex” includes both sexual orientation and gender identity for purposes of determining violations of Title VII of the Civil Rights Act. Specifically, they ask whether that conclusion is true with respect to use of the term “sex” in § 2.2-3901 of the Code of Virginia—part of the Virginia Human Rights Act—as well as other anti-discrimination provisions in the Code of Virginia. If my response to their first question is in the affirmative, Senator Garrett and Delegate LaRock additionally ask how the terms “sexual orientation” and “gender identity” are defined for the purposes of applying Virginia’s various statutes prohibiting sex discrimination. Delegate Plum also requested an opinion regarding, generally, whether gender-identity and sexual-orientation discrimination are prohibited under Virginia’s various anti-discrimination statutes.

BACKGROUND

The General Assembly has repeatedly enacted legislation to prohibit discrimination based on “sex.” The Virginia Human Rights Act (“VHRA” or the “Act”) declares that it is the “policy of the Commonwealth” to:

Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including
educational institutions and in real estate transactions [and] in employment . . . [1]

To that end, the Act generally prohibits discrimination on the basis of “sex,” among other characteristics. Although the Act does not define the term “sex,” it specifically provides that “[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of . . . sex . . . shall be an ‘unlawful discriminatory practice’ for the purposes of” the Act.2 The General Assembly also directed that the provisions of the Act “shall be construed liberally for the accomplishment of its policies.”3 In interpreting the Act, the Supreme Court of Virginia has recognized that “[t]he General Assembly has declared this Commonwealth’s strong public policy against employment discrimination based upon race or gender.”4

Without question, it is the public policy of this Commonwealth that all individuals within this Commonwealth are entitled to pursue employment free of discrimination based on race or gender. Indeed, racial or gender discrimination practiced in the work place is not only an invidious violation of the rights of the individual, but such discrimination also affects the property rights, personal freedoms, and welfare of the people in general.[5]

A number of other provisions in the Code of Virginia prohibit sex discrimination in specific areas. For instance, the Virginia Fair Housing Law states that it “is the policy of the Commonwealth of Virginia to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of . . . sex,”

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1 VA. CODE ANN. § 2.2-3900(B) (2014). The VRHA does not create an independent or private cause of action to enforce its provisions, except as specifically provided in § 2.2-3903(B) and (C) of the Code. VA. CODE ANN. § 2.2-3903(A) (2014). Among other things, those subsections prohibit an employer employing “more than five but less than 15 persons” from discharging an employee on the basis of sex, and permit a discharged employee to bring an action in a general district court or circuit court with jurisdiction over the employer. VA. CODE ANN. § 2.2-3903(B)-(C) (2014).

2 VA. CODE ANN. § 2.2-3901 (2014).

3 VA. CODE ANN. § 2.2-3902 (2014).


5 Id. See also Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 125 (1997) (“That it is the strongly held public policy of this Commonwealth to protect employees against employment discrimination based upon race or gender is beyond debate or challenge.”).
and that law prohibits “discriminatory practices with respect to residential housing by any person or group of persons.” 6 The Fair Employment Contracting Act likewise declares that it is the “policy of the Commonwealth to eliminate all discrimination on account of . . . sex . . . from the employment practices of the Commonwealth, its agencies, and government contractors.” 7

The Virginia Public Procurement Act (“VPPA”) forbids discrimination “[i]n the solicitation or awarding of contracts” and provides that “no public body shall discriminate against a bidder or offeror because of . . . sex.” 8 The State Grievance Procedure states that a grievance qualifies for a hearing if it relates to “discrimination on the basis of . . . sex.” 9 And the Virginia Equal Credit Opportunity Act makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction” on the basis of sex. 10 The term “sex” is not defined in any of these statutes.

6 VA. CODE ANN. § 36-96.1 (2014). See also id. § 36-96.3(A) (2014) (defining unlawful discriminatory housing practices based on sex); § 36-96.4(A) (2014) (prohibiting sex-based discrimination by “any person or other entity, including any lending institution, whose business includes engaging in residential real estate-related transactions”); § 36-96.6 (2014) (prohibiting restrictive covenants that restrict occupancy or ownership of property on the basis of sex). The Fair Housing Law provides that “[n]othing in this chapter shall abridge the federal Fair Housing Act of 1968 (42 U.S.C. § 3601 et seq.) as amended.” VA. CODE ANN. § 36-96.23 (2014).

7 VA. CODE ANN. § 2.2-4200(A) (2014). See also id. § 15.2-1604 (2012) (providing generally that it constitutes an unlawful employment practice for constitutional officers to make employment decisions based on sex). The Fair Employment Contracting Act requires generally that, as a condition of the contract, contractors agree not to discriminate on the basis of sex. See id. § 2.2-4201(1) (2014) (“The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin, except where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor.”).

8 VA. CODE ANN. § 2.2-4310(A) (Supp. 2015). Like the Fair Employment Contracting Act, the VPPA requires generally that, as a condition of the contract, contractors agree not to discriminate on the basis of sex. See id. § 2.2-4311(1)(a) (2014) (“The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor.”).

9 VA. CODE ANN. § 2.2-3004 (2014). See also id. § 15.2-1507 (2012) (grievance procedure for employees of localities required where complaint relates to discrimination on the basis of sex).

Like Virginia’s other anti-discrimination statutes that Senator Garrett and Delegate LaRock cite in their opinion requests, the Virginia Human Rights Act prohibits discrimination based on “sex.” Although the General Assembly did not define the term “sex” in the Act, it directed that the Act’s provisions “shall be construed liberally for the accomplishment of its policies.”

Also, unlike those other anti-discrimination statutes, the Act specifically provides that “[c]onduct that violates any . . . federal statute or regulation governing discrimination on the basis of . . . sex . . . shall be an ‘unlawful discriminatory practice’ for the purposes of” the Act. Thus, the General Assembly has instructed that the scope of discriminatory conduct prohibited by the Act includes all discriminatory conduct prohibited by federal law—or, as one court put it, “[t]he VHRA essentially makes any federal violation a violation of Virginia law as well.”

Consequently, answering Senator Garrett and Delegate LaRock’s first question with respect to the VHRA, in particular, requires determining whether sex discrimination on the basis of gender identity and sexual orientation is prohibited under federal law. I discuss that VHRA-specific analysis in the first section below. The second section of this opinion provides information applicable to Virginia’s other statutes prohibiting sex-based discrimination. The third section addresses their question regarding the definitions of “sexual orientation” and “gender identity.”

At the outset, I emphasize that the law in these areas continues to develop. A host of cases testing the limits of federal anti-discrimination law are pending in courts throughout the country, and decisions in those cases could shift the

11 VA. CODE ANN. § 2.2-3902.
12 VA. CODE ANN. § 2.2-3901. When it was first enacted in 1987, the Act provided that “[c]onduct which violates Virginia statute or regulation governing discrimination or Title 7 of the Civil Rights Act of 1964 as amended or the Fair Labor Standards Act on the basis of . . . sex . . . shall be an ‘unlawful discriminatory practice’ for the purposes” of the Act. 1987 Va. Acts ch. 581 (codified at former § 2.1-716). Four years later, the Act was amended to broaden the scope of covered conduct to that which violates “any Virginia or federal statute or regulation governing discrimination . . . on the basis of . . . sex” 1991 Va. Acts ch. 457 (codified at current § 2.2-3901).

legal landscape and directly or indirectly impact the analysis provided below. As federal and state courts create a more robust body of case law, the scope of discriminatory conduct prohibited under federal and state law should become clearer.

In the meantime, the discussion and analysis provided in this opinion are intended to describe the current state of the law. As more fully set forth below, a strong argument could be made that “sex” categorically includes “gender identity” and “sexual orientation” for purposes of applying federal anti-discrimination statutes, and therefore the VHRA, because gender-identity and sexual-orientation discrimination necessarily involves treating individuals less favorably on account of sex-based considerations. That argument has prevailed in a number of federal courts and has been affirmatively asserted by the EEOC in litigation. But the question has not yet been conclusively resolved by the Fourth Circuit or the Supreme Court of Virginia.

The limited precedent available similarly does not permit a definitive answer to Senator Garrett and Delegate LaRock’s question with respect to the scope of “sex” within Virginia’s other anti-discrimination statutes. Numerous federal courts have concluded, however, that discrimination against lesbian, gay, bisexual, and transgender (LGBT) individuals constitutes impermissible “sex” discrimination when it is based on sex-stereotyping or on treating those individuals less favorably on account of their gender. In light of those decisions and their reasoning, it is my opinion that courts interpreting the VHRA and Virginia’s other statutory prohibitions on sex discrimination would most likely conclude that discrimination against LGBT individuals constitutes impermissible sex discrimination when it is similarly based on sex-stereotyping or treating individuals less favorably on account of their gender.

1. The VHRA prohibits all sex-based discrimination prohibited by federal law, including, in certain circumstances, sexual-orientation discrimination and gender-identity discrimination.

Numerous federal statutes and regulations prohibit sex-based discrimination. For instance, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of “sex.”14 The

14 See 42 U.S.C. § 2000e-2 (providing that it constitutes an unlawful employment practice to discriminate based on an “individual’s race, color, religion, sex, or national origin”).
federal Fair Housing Act of 1968, as amended, prohibits discrimination in housing practices on the basis of sex.15 Title IX of the Education Amendments of 1972 provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”16 And the Equal Credit Opportunity Act makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . sex.”17 Other federal statutes and regulations prohibit sex discrimination in a variety of other areas. Like their corresponding provisions in Virginia law, these federal statutes do not define the term “sex.”

The Virginia Human Rights Act makes clear that, to the extent discriminatory conduct is prohibited by federal law, it is also prohibited by the VHRA. As discussed below, the law is unsettled whether “sex,” as used in federal anti-discrimination statutes, includes “gender identity” or “sexual orientation” as a categorical matter. Consequently, the scope of that term for purposes of applying the VHRA is likewise unsettled.

But while it would be premature at this time to offer a definitive opinion on the question whether sex discrimination categorically includes sexual-orientation and gender-identity discrimination, I note that the unmistakable trend in federal courts is towards construing anti-sex-discrimination statutes to prohibit discrimination against LGBT individuals in many circumstances. As described below, in the first decades after the enactment of Title VII and Title IX,18 some courts were skeptical that prohibitions on “sex” discrimination could

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18 Title IX’s language prohibiting discrimination “on the basis of sex” is interpreted by courts in the same manner as similar language in Title VII. See Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”) (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999); Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 74 (1992)); Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 248-49 (2d Cir. 1995) (noting the Supreme Court’s citation to a Title VII case in discussing the standard of liability in a Title IX case). The scope of the Fair Housing Act may also be interpreted through case law on Title VII. See, e.g., Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982) (in Fair Housing Act case, importing and
also ban such discriminatory conduct. But more recently, a growing number of federal courts have held, drawing on the reasoning of Supreme Court cases, that discrimination against LGBT individuals is prohibited when the conduct depends on impermissible sex-stereotyping, or on treating the individuals less favorably because of their sex. What changed was not an expansion of the definition of “sex,” but courts’ understanding of how conduct can be “based on” sex. While it would be impossible to identify all factual circumstances in which discrimination against LGBT individuals may violate sex-discrimination bans under federal law—and therefore under the VHRA—the cases discussed below provide some illustrative examples.

a. To the extent gender-identity discrimination is prohibited by federal law, it is likewise prohibited by the VHRA.

Neither the Supreme Court nor the Fourth Circuit has decided whether Title VII’s prohibition on sex-based discrimination per se bars discrimination based on gender identity.19 But a number of federal courts, including within the Fourth Circuit, have held that federal law prohibits gender-identity discrimination when it relies on impermissible sex-stereotyping of the kind rejected by the Supreme Court in its 1989 decision Price Waterhouse v. Hopkins.20

In Price Waterhouse, the Supreme Court found a Title VII violation where a woman was denied entry into the partnership of an accounting firm based on her nonconformance with traditional sex stereotypes. In a plurality opinion, the Court held that its conclusion as to the plaintiff’s burden of proof in a Title VII action was dictated by the statute’s plain text: “Congress’ intent to forbid

applying standard for demonstrating Title VII violation because “the anti-discrimination objectives of Title VIII are parallel to the goals of Title VII”).


20 490 U.S. 228 (1989).
employers to take gender into account in making employment decisions appears on the face of the statute.“\(^{21}\) Concluding that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” \(^{22}\) the Court noted that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”\(^{23}\)

Nine years later, a unanimous Supreme Court held in \textit{Oncale v. Sundowner Offshore Services, Inc.}, that “sex-related, humiliating actions” by one man against another was discriminatory conduct actionable under Title VII. \(^{24}\) Writing for the Court, Justice Scalia underscored that the scope of Title VII’s prohibition on sex discrimination is defined by its text, rather than legislative intent:

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.\(^{25}\)

In the wake of those decisions, lower courts began recognizing that Title VII and other anti-discrimination statutes forbid sex discrimination based on an individual’s nonconformance with stereotypical gender norms.\(^{26}\) The reasoning

\(^{21}\) Id. at 239 (plurality opinion).

\(^{22}\) Id. at 251.


\(^{25}\) Id. at 79.

\(^{26}\) See, e.g., Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (Title VII violation where harassment was “based upon the perception that [the male plaintiff] is effeminate”); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) (basis for sex-discrimination claim where “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); Doe v. City of Belleville, 119 F.3d 563, 581 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998) (“In the same way that Hopkins had stated a sex-discrimination claim against Price Waterhouse based on harassment
of *Price Waterhouse* undermined the decisions by some courts that Title VII did not protect transgender individuals from sex discrimination.27 Indeed, courts since then have recognized that “the approach in [those cases was] eviscerated by *Price Waterhouse.*”28 The Sixth Circuit summarized well the resulting legal landscape:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.29

Federal courts now regularly hold that transgender plaintiffs can bring claims under Title VII and other federal statutes barring sex-based discrimination when the claims allege impermissible sex-stereotyping.

For instance, the First Circuit has held that a transsexual loan applicant stated a claim under the Equal Credit Opportunity Act when it could reasonably be inferred that he did not “receive the loan application because he was a man, for appearing unacceptably ‘masculine’], a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.”).

27 *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktx., Inc., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).

28 Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004). *See also, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (“The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse.*”); Finkle v. Howard Cty., 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“In light of *Price Waterhouse*, it is unclear what, if any, significance to ascribe to the conclusion that ‘transsexuals are not protected under Title VII as transsexuals.’ Indeed, it would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII’s proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse.*” (citation omitted) (quoting Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 n.2 (10th Cir. 2007))).

29 *City of Salem*, 378 F.3d at 574.
whereas a similarly situated woman would have received the loan application” and that “the Bank [had] treat[ed], for credit purposes, a woman who dresses like a man differently than a man who dresses like a woman.” The Sixth Circuit has likewise ruled in a Title VII case that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman.” The Ninth Circuit has held that a transsexual plaintiff can state a sex-based discrimination claim under the Gender Motivated Violence Act because discrimination against transgender females—“anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity”—is discrimination “because of sex.” And the Eleventh Circuit relied in part on Title VII jurisprudence for its conclusion that “a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.” It further explained that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether [it is] described as being on the basis of sex or gender.”

30 Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000). See id. at 215 (“In interpreting the ECOA, this court looks to Title VII case law, that is, to federal employment discrimination law.”).

31 City of Salem, 378 F.3d at 575. See also id. (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (following City of Salem; holding that transsexual police officer stated a claim for sex discrimination by alleging adverse employment decision for his non-conformity with sex stereotypes).

32 Schwenk, 204 F.3d at 1201-02. See also id. at 1200-01 (“Congress intended” a claim under the Act “to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII.”).

33 Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

34 Id. at 1317. See also id. at 1316 (acknowledging a “congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms”).
Federal district courts around the country, including in a majority of federal judicial circuits, have similarly allowed sex-discrimination claims by transgender plaintiffs to proceed based on a sex-stereotyping theory. Below, for your reference, are some of those authorities:

**Second Circuit**

- *Fabian v. Hospital of Central Connecticut* ("On the basis of the plain language of the statute, and especially in light of the interpretation of that language evident in *Price Waterhouse’s* acknowledgement that gender-stereotyping discrimination is discrimination ‘because of sex,’ I conclude that discrimination on the basis of transgender identity is cognizable under Title VII.").35

- *Tronetti v. TLC HealthNet Lakeshore Hospital* ("Transsexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex . . . . Accordingly, Tronetti’s Title VII claim—based on the alleged discrimination for failing to ‘act like a man’—is actionable.").36

**Third Circuit**

- *Mitchell v. Axcan Scandipharm, Inc.* ("Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions, [the transsexual] plaintiff has sufficiently pleaded claims of gender discrimination.").37

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36 No. 03-CV-0375E, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003); cf. Miles v. N.Y. Univ., 979 F. Supp. 248, 250 (S.D.N.Y. 1997) (in case where biological male was subject to discriminatory sex-based conduct while perceived as a female, holding that conduct “related to sex and sex alone. Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved”).

Fourth Circuit

- *Finkle v. Howard County* ("[O]n the basis of the Supreme Court’s holding in *Price Waterhouse*, and after careful consideration of its sister courts’ reasoned opinions, this Court finds that Plaintiff’s claim that she was discriminated against ‘because of her obvious transgendered status’ is a cognizable claim of sex discrimination under Title VII.").

Fifth Circuit

- *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.* ("Lopez’s transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.").

Sixth Circuit

- *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.* (concluding that, “having alleged that [the transgender plaintiff’s] failure to conform to sex stereotypes was the driving force behind the Funeral Home’s decision to fire [the plaintiff], the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII.").

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38 12 F. Supp. 3d 780, 788 (D. Md. 2014); see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, 2016 WL 1567467, at *12 (4th Cir. Apr. 19, 2016) (Davis, J., concurring) ("In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination ‘on the basis of sex’ in the context of analogous statutes . . . , G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim."); cf. Hart v. Lew, 973 F. Supp. 2d 561, 579 (D. Md. 2013) (because employer defendant did not contend that transsexual plaintiff was not protected by Title VII, assuming without deciding that plaintiff’s claim of sex-based discrimination was “within Title VII’s aegis”).


Tenth Circuit

- *Michaels v. Akal Security, Inc.* (assuming without deciding that “a *Price Waterhouse* gender stereotyping claim is available” under Title VII to transgender plaintiff, and declining to dismiss claims relating to gender stereotyping).  

Eleventh Circuit

- *Parris v. Keystone Foods, LLC* (recognizing that “Title VII covers [the transgender plaintiff’s] claim[]” that she was discharged “because she failed to adhere to conventional gender roles and stereotypes” but concluding that the plaintiff “failed to present evidence to establish her prima facie case”).  

D.C. Circuit

- *Schroer v. Billington* (“Even if the decisions that define the word ‘sex’ in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach has been eviscerated by *Price Waterhouse*—the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of . . . sex.’”).  

As Senator Garrett and Delegate LaRock note in their opinion requests, the Equal Employment Opportunity Commission has also issued decisions in this area. The EEOC—whose reasonable interpretation of Title VII is entitled to deference  

—has agreed with the “steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of

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44 E.E.O.C. v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (“It is axiomatic that the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC’s interpretation of ambiguous language need only be reasonable to be entitled to deference.”).
sex stereotyping constitutes discrimination because of sex.”45 But the EEOC has also gone further, explaining in its 2012 decision Macy v. Holder that “evidence of gender stereotyping is simply one means of proving sex discrimination” based on transgender status.46

[A] transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job . . . because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job . . . is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.[47]

On this reasoning, the EEOC concluded that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”48 Federal courts continue to debate whether the EEOC’s

46 Id. at *10.
47 Id.
48 Id. at *11. The EEOC reiterated that conclusion last year in Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015), where it reversed an agency decision denying a
position is the correct one: some courts have declined to allow transgender plaintiffs to bring sex-based discrimination claims that do not depend on sex-stereotyping, while others have concluded that gender-identity discrimination is *per se* discrimination “based on sex.”\textsuperscript{50} As noted above, the Fourth Circuit has yet to resolve that issue, but litigation currently pending within the Fourth Circuit could lead to more settled law.\textsuperscript{51}

transgender employee’s access to the common women’s bathroom and ruled that the denial of access had been “on account of her gender identity [and] violated Title VII.” \textit{Id.} at *10.

\textsuperscript{49} See, \textit{e.g.}, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that “transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual”; assuming without deciding that a sex-stereotyping “claim is available”); Johnston v. Univ. of Pittsburgh of Commm. Sys. of Higher Educ., 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015) (“Plaintiff has not alleged that Defendants discriminated against him because of the way he looked, acted or spoke. Instead, Plaintiff alleges only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex. Such an allegation is insufficient to state a claim for discrimination under a sex stereotyping theory.”), \textit{appeal pending}, No. 15-2022 (3d Cir.); Eure v. Sage Corp., 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014) (declining to “extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because [of] the plaintiff’s status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity”).

\textsuperscript{50} See, \textit{e.g.}, Finkle v. Howard Cty., 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“[I]t would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII’s proscription of discrimination on the basis of sex as interpreted by \textit{Price Waterhouse}.’’); Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (“[T]he Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was \textit{literally} discrimination ‘because of . . . sex.’’”).

\textsuperscript{51} For instance, just yesterday the U.S. Department of Justice filed an action against North Carolina, the North Carolina Department of Public Safety, the University of North Carolina, and various State officials asserting that the State’s implementation of 2016 legislation restricting transgender individuals’ access to restrooms consistent with their gender identity violates Title VII, Title IX, and the Violence Against Women Reauthorization Act of 2013. \textit{See} Complaint, United States v. North Carolina, Case No. 1:16-cv-00425 (M.D.N.C. May 9, 2016), ECF No. 1. North Carolina’s Governor and its Secretary of Public Safety have also brought a declaratory judgment action challenging the validity of the Department of Justice’s interpretation. \textit{See} Complaint for Declaratory Judgment, McCrory v. United States, Case No. 5:16-cv-00238-BO (E.D.N.C. May 9, 2016), ECF No. 1. \textit{See also} Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, G.G. \textit{ex rel.} Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056 (4th Cir. Oct. 28, 2015), ECF No. 25-1 (advocating position that a school district violates Title IX’s prohibition on sex-based
In the absence of binding case law, it is unsettled whether the term “sex,” as used in federal anti-discrimination statutes, categorically includes “gender identity.” Nonetheless, as set forth above, a growing number of federal courts have concluded that prohibitions on sex discrimination do, in many circumstances, prohibit discrimination against transgender individuals. Given the General Assembly’s express intent that the VHRA reach any discriminatory conduct proscribed by federal statutes or regulations, and its direction that the terms of the VHRA be “construed liberally” to further its objectives, it is my opinion that courts applying the VHRA would most likely conclude that discrimination against transgender individuals is prohibited to the extent that it is based on sex-stereotyping or on treating those individuals less favorably on account of their sex, and may well conclude that gender-identity discrimination is per se discrimination on the basis of sex.

b. To the extent sexual-orientation discrimination is prohibited by federal law, it is likewise prohibited by the VHRA.

Whether sexual-orientation discrimination is categorically prohibited by the VHRA also remains an open question, for the same reasons described with respect to gender-identity discrimination. I am not aware of any Supreme Court or Fourth Circuit decision concluding that Title VII’s prohibition on sex-based discrimination necessarily bars discrimination on the basis of sexual orientation. Indeed, a handful of courts have held that Title VII does not per se prohibit sexual-orientation discrimination. But as with gender-identity discrimination when it bars a student from accessing the restrooms that correspond to his gender identity because he is transgender).

52 See Lewis v. High Point Reg’l Health Sys., 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015) (“High Point is correct in that neither the United States Supreme Court nor [t]he Fourth Circuit Court of Appeals has recognized Title VII as protecting individuals because of their sexual orientation.”).

53 See, e.g., Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (rejecting sex-stereotyping claim that “would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination”; noting that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices”); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (“Title VII does not afford a cause of action for discrimination based on sexual orientation . . . .”); Henderson v. Labor Finders of Va., Inc., No. 3:12cv600, 2013 WL 1352158, at *5-6 & n.4 (E.D. Va. Apr. 2, 2013) (noting that Title VII does not prohibit sexual-orientation discrimination, but permitting a claim by a heterosexual plaintiff who was subject to “obviously gendered epithets (e.g. ‘bitch’ and ‘woman’) as well as those more traditionally
discrimination, more and more courts around the country have applied *Price Waterhouse*’s sex-stereotyping analysis in cases involving discriminatory conduct against gay and lesbian individuals, concluding that such conduct constitutes sex discrimination:

- In *Heller v. Columbia Edgewater Country Club*, the U.S. District Court for the District of Oregon ruled that a lesbian plaintiff had stated a claim under Title VII where she alleged discharge because she “did not conform to [the employer’s] stereotype of how a woman ought to behave. [She was] attracted to and dates other women, whereas [the employer] believe[d] that a woman should be attracted to and date only men.”

- In *Koren v. Ohio Bell Telephone Co.*, the U.S. District Court for the Northern District of Ohio denied the defendant’s motion for summary judgment where a gay employee had alleged he was discriminated against because he “took his husband’s last name—failing to conform with the male stereotype,” which “is a claim of discrimination because of sex.”

- In *Boutillier v. Hartford Public Schools*, the U.S. District Court for the District of Connecticut permitted a claim under Title VII to proceed where a plaintiff claimed she was “subjected to sexual stereotyping . . . on the basis of her sexual orientation”; the court found she had set forth a plausible claim of discrimination “based on her non-conforming gender behavior.”

- In *Terveer v. Billington*, the U.S. District Court for the District of Columbia denied a motion to dismiss where a plaintiff alleged sex discrimination because he was “a homosexual

male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles.” 57 The court concluded that, because the plaintiff had pleaded that he was denied promotions because of his “nonconformity with male sex stereotypes,” he had adequately made out a sex-discrimination claim. 58

Other case law also supports the same conclusion. 59

Some federal courts have recognized that discriminatory conduct targeting gay and lesbian individuals can be a form of sex discrimination not just when it relies on sex stereotypes, but when it involves treating individuals less favorably because of their sex. For instance, in Hall v. BNSF Railway Co., the U.S. District Court for the Western District of Washington allowed a plaintiff’s sex-discrimination claim under Title VII to proceed because the plaintiff had alleged discrimination in the denial of a spousal health benefit to his same-sex spouse. The court reasoned, “‘[i]f Michael Hall were female, the benefit would be provided; BNSF provides it to female employees who are married to males but denied it to Hall[,] who is married to a male.’” 60 Most recently, in Videckis v.


58 Id.

59 See, e.g., Deneffe v. Skywest, Inc., No. 14-cv-00348, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (homosexual plaintiff’s claim under Title VII permitted to proceed where he alleged discrimination based on his “failure to conform to male stereotypes,” such as by designating his male domestic partner as a recipient of benefits); Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014) (in case holding that same-sex-marriage bans in Idaho and Nevada violated Equal Protection Clause, noting that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendants’ theory”); id. at 495 (Reinhardt & Berzon, JJ., concurring) (“[S]ocial exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”); Centola v. Potter, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002) (denying summary judgment to an employer where a plaintiff was discriminated against “because he failed to meet . . . gender stereotypes of what a man should look like, or act like”; concluding that if his “co-workers leapt to the conclusion that [he] ‘must’ be gay because they found him to be effeminate, Title VII’s protections should not disappear”; noting in dicta that “stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women”).

Pepperdine University, the U.S. District Court for the Central District of California likewise held that, under Title IX, sexual-orientation discrimination “is a form of sex or gender discrimination” on both grounds described above.

It is impossible to categorically separate “sexual orientation discrimination” from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.

The court explained that the plaintiffs, lesbian members of a basketball team, had stated “a straightforward claim of sex discrimination” because they alleged they had been told that “‘lesbianism’ would not be tolerated on the team. If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment.”

Those decisions by federal courts are in line with the recent EEOC decision referenced in Senator Garrett and Delegate LaRock’s opinion request, Baldwin v. Foxx. There the EEOC concluded that sexual-orientation discrimination constitutes discrimination based on sex:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.

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62 Id. at *7.
63 Id. at *7.
64 Id. at *8.
66 Id. at *4.
The EEOC went on to explain that “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms,” and therefore “‘[s]exual orientation’ as a concept cannot be defined or understood without reference to sex.”67 In recent months, the EEOC has followed on its Baldwin decision by filing two lawsuits in federal courts alleging discrimination on the basis of sexual orientation.68 Those cases remain pending.

Thus, there are strong arguments that discrimination against gays and lesbians is always on account of “sex.” But most courts that have permitted sexual-orientation claims to proceed under federal anti-sex-discrimination statutes have not done so because they have concluded that “sex” should be read to include “sexual orientation” as a categorical matter. Rather, that remains an open question in the courts.

But the decisions cited above demonstrate that discriminatory conduct against gay and lesbian individuals can constitute sex discrimination under federal law when the conduct relies on impermissible sex-stereotyping or on treating victims less favorably on account of their sex. Given the General Assembly’s determination that such conduct is “an ‘unlawful discriminatory practice’ for the purposes of” the VHRA69—and its additional direction that the terms of the VHRA be liberally construed to further the VHRA’s objectives70—it is my opinion that courts applying the VHRA would most likely conclude that the VHRA prohibits discrimination against gay and lesbian individuals when such discrimination is based on sex-stereotyping or on treating them less favorably on account of their sex. Courts may well conclude too that sexual-orientation discrimination is per se discrimination on the basis of sex.

67 Id. at *5. See also Isaacs v. Felder Servs. LLC, No. 2:13cv693, 2015 WL 6560655, at *4 (M.D. Ala. Oct. 29, 2015) (citing Baldwin and agreeing that “[t]o the extent that sexual orientation discrimination occurs not because of the targeted individual’s romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from ‘heterosexually defined gender norms,’ this, too, is sex discrimination, of the gender-stereotyping variety”).


69 VA. CODE ANN. § 2.2-3901.

70 VA. CODE ANN. § 2.2-3902.
2. Although it is also not settled whether “sex” categorically includes “gender identity” or “sexual orientation” in Virginia’s other anti-discrimination statutes, in many circumstances discriminatory conduct against LGBT Virginians is already prohibited by those statutes’ bans on sex-based discrimination.

Unlike with the VHRA, the General Assembly did not expressly provide that Virginia’s other anti-discrimination statutes reach any discriminatory conduct prohibited under federal law. Nonetheless, in the absence of relevant Virginia case law, the reasoning and growing weight of decisions interpreting the reach of federal anti-discrimination statutes, discussed above, is persuasive authority. Although Virginia courts have not yet held that gender-identity discrimination and sexual-orientation discrimination are per se prohibited, they could well reach that conclusion—and, in any event, they would be likely to find that discriminatory conduct against LGBT individuals violates Virginia’s anti-discrimination laws in many circumstances.

a. Gender-identity discrimination

Although the Supreme Court of Virginia has determined “beyond debate or challenge” that “it is the strongly held public policy of this Commonwealth to protect employees against employment discrimination based upon . . . gender,” I am not aware of Virginia case law addressing whether “sex” includes “gender identity” as a categorical matter. I note, however, that in many circumstances, discriminatory conduct against transgender individuals may, under current law, be prohibited by Virginia’s anti-discrimination statutes.

Those statutes include the Virginia Fair Housing Law, the Fair Employment Contracting Act, the Public Procurement Act, the State Grievance Procedure, and the Virginia Equal Credit Opportunity Act. Given that the VHRA makes it the policy of the Commonwealth to safeguard all individuals from sex-based discrimination in places of public accommodation, education, real estate transactions, and employment, VA. CODE ANN. § 2.2-3900, the VHRA may itself prohibit much of the same discriminatory conduct prohibited under those statutes.

Thus, even if the VHRA did not specifically prohibit “[c]onduct that violates any . . . federal statute or regulation governing discrimination on the basis of . . . sex,” VA. CODE ANN. § 2.2-3901—the basis for the analysis set forth in Section 1—my overall conclusion would be the same with respect to the VHRA.

First, it is obvious that when an employer takes adverse action against an individual on the basis of the individual’s gender, that is “literally discrimination ‘because of . . . sex.’” Anti-discrimination statutes do not just prohibit “discrimination against men because they are men, and discrimination against women because they are women”; such a reading would “represent an elevation of ‘judge-supposed legislative intent over clear statutory text,’” which “is no longer a tenable approach to statutory construction.” If an entity were to refuse to hire an individual simply because she plans to “change her anatomical sex by undergoing sex reassignment surgery” to reflect her gender identity, a Virginia court may well agree that is prohibited discrimination.

One federal court faced with that scenario explained that discrimination “because of sex” could be analogized to discrimination “because of religion.” It reasoned that, if an employer harbored bias against employees who had converted from one religion to another, “[t]hat would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination ‘because of religion’ easily encompasses discrimination because of a change of religion.” Under the same logic, discrimination against individuals because they have changed their sex is discrimination “on the basis of” sex.

Second, discrimination against transgender individuals is prohibited when it relies on impermissible sex-stereotyping of the kind rejected by the Supreme Court of the United States in Price Waterhouse. The Court’s assessment there cannot be gainsaid: “[w]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated

74 Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008). See also Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *10 (Apr. 20, 2012) (“[I]f Complainant can prove that the reason that she did not get the job . . . is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex.”).

75 Schroer, 577 F. Supp. 2d at 307 (internal citations and footnotes omitted).

76 Id. at 308.

77 Id. at 306. See also Macy, 2012 WL 1435995, at *11 (Apr. 20, 2012) (also analogizing religious discrimination and sex discrimination; noting that it would be impermissible for an employer to terminate an employee because she has chosen a different religion from her parents: “No one would doubt that such an employer discriminated on the basis of religion.”).
with their group.”78 If presented with such a case, a Virginia court may well find persuasive the reasoning of the Sixth Circuit:

[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior . . . .”79

Under that theory, when discriminatory conduct stems from a belief that, e.g., “a man who ‘failed to act like’ one,” that is discrimination “related to the sex of the victim.”80 Thus, “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether [it is] described as being on the basis of sex or gender.”81

For either or both of those reasons, in an appropriate case a Virginia court could well conclude that discrimination on account of an individual’s transgender status is an impermissible form of sex discrimination that violates Virginia’s public policy and various anti-discrimination statutes.82

b. Sexual-orientation discrimination

I am also not aware of any Virginia case law yet that holds that the definition of “sex” in Virginia’s anti-discrimination statutes includes “sexual orientation” as a categorical matter. But I note that, in two ways, many

79 Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).
80 Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000). See also the cases cited in nn.30-43, supra.
81 Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011).
82 See Lewis v. High Point Reg’l Health Sys., 79 F. Supp. 3d 588, 590 (E.D.N.C. 2015); Finkle v. Howard Cty., 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“Plaintiff’s claim that she was discriminated against ‘because of her obvious transgendered status’ is a cognizable claim of sex discrimination . . . . To hold otherwise would be to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.”) (some internal citations and punctuation omitted).
instances of discrimination against gay and lesbian Virginians may already be violations of the Commonwealth’s prohibitions on sex discrimination.

First, as a number of courts have recognized, discrimination against gay and lesbian individuals often involves treating a similarly situated individual less favorably on account of the individual’s sex. For instance, if an employer provides a benefit to a male employee who is married to a woman, but withholds the benefit from an otherwise similarly situated woman employee who is married to a woman, a court may consider that discrimination on the basis of sex. Likewise, if individuals “would not have been subjected to the alleged different treatment” if they had been “males dating females, instead of females dating females,” that is discrimination on the basis of sex.

Second, many courts have concluded that sexual-orientation discrimination is a form of sex discrimination when it relies on impermissible sex-stereotyping. They reason that discrimination on the basis of an individual’s sexual orientation rests on gender-specific assumptions about how a person should behave. For example, discrimination against a female employee for dating other females, or a male employee for taking his male partner’s last name, is often based on faulty stereotypes about gender-conforming behavior. To the extent such a claim relies on impermissible sex-stereotypes, it “is a claim of discrimination because of sex.” Federal courts not only have acknowledged that the line between discrimination based on gender stereotyping and sexual-orientation...
discrimination is blurry;\textsuperscript{89} they have begun to recognize that the supposed line is “illusory and artificial.”\textsuperscript{90}

For those reasons, it is my opinion that a Virginia court faced with the issue would likely find that discriminatory conduct against gay and lesbian Virginians based on sex-stereotyping or on treating them less favorably on account of their sex violates the Commonwealth’s anti-discrimination statutes.

c. Definitions

Senator Garrett and Delegate LaRock have also specifically asked how the terms “gender identity” and “sexual orientation” are defined for the purposes of applying Virginia’s anti-discrimination statutes. As noted above, the General Assembly has not defined the term “sex” in the context of the VHRA and Virginia’s other anti-discrimination statutes—let alone the terms “gender identity” and “sexual orientation.” The Supreme Court of Virginia has not defined those terms in this context, either, but it has characterized the VHRA, with its ban on “sex”-based discrimination, as prohibiting discrimination based on “gender.”\textsuperscript{91} Similarly, \textit{Black’s Law Dictionary} treats “gender” as one meaning of “sex,” which it defines as “[t]he sum of the peculiarities of structure

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\textsuperscript{89} See, e.g., Christiansen v. Omnicom Grp., Inc., No. 15 Civ. 3440 (KPF), 2016 WL 951581, at *15 (S.D.N.Y. Mar. 9, 2016) (“In light of the EEOC’s recent decision on Title VII’s scope [\textit{Baldwin v. Foxx}], and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask—and, lest there be any doubt, this Court is asking—whether that line should be erased.”); Henderson v. Labor Finders of Va., No. 3:12cv600, 2013 WL 1352158, at *4 (E.D. Va. Apr. 2, 2013) (“Of course, it is often difficult to draw the distinction between discrimination on the basis of gender stereotyping and discrimination on the basis of sexual orientation.”); \textit{Centola}, 183 F. Supp. 2d at 408 (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).


\textsuperscript{91} Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 125 (1997) (“That it is the strongly held public policy of this Commonwealth to protect employees against employment discrimination based upon race or gender is beyond debate or challenge.”); Lockhart v. Commonwealth Educ. Sys. Corp., 247 Va. 98, 105 (1994) (“Without question, it is the public policy of this Commonwealth that all individuals within this Commonwealth are entitled to pursue employment free of discrimination based on race or gender.”).\end{flushleft}
and function that distinguish a male from a female organism,” 92 and states that “gender identity” is “a person’s internal sense of gender.” 93 *Black’s Law Dictionary* also defines “sexual orientation” as a “person’s predisposition or inclination towards sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality.” 94 Other definitions of those terms, including those that may be adopted by courts, could also be accurate.

**CONCLUSION**

For more than a quarter-century, since the General Assembly enacted the Virginia Human Rights Act, it has been our Commonwealth’s policy to protect all individuals within the Commonwealth from unlawful discrimination on the basis of sex. Numerous other Virginia statutes also prohibit sex-based discrimination in areas such as employment, housing, and contracting. For the reasons set forth above, I conclude that those statutes most likely prohibit discriminatory conduct against LGBT Virginians when that conduct is based on sex-stereotyping or on treating them less favorably on account of their gender. That conclusion is particularly well-founded with respect to the Virginia Human Rights Act, the scope of which includes all discriminatory conduct prohibited under federal law. Additionally, while a strong argument could be made that discrimination on the basis of gender identity or sexual orientation is always sex discrimination within the meaning of Virginia’s anti-discrimination statutes, the Supreme Court of Virginia has not considered and resolved that question.

I am aware that some persons argue that those who enacted the Commonwealth’s anti-discrimination statutes did not intend for their prohibitions on sex-based discrimination to protect LGBT individuals. But as the late Justice Scalia noted in *Oncale v. Sundowner Offshore Services, Inc.*, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” 95 Many

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92 Id. at 1583. *See also id.* at 567 (stating that “sex discrimination” is “[a]lso termed *gender discrimination*”).


94 Id. at 1584.

95 523 U.S. 75, 79 (1998). For those same reasons, it is irrelevant that the General Assembly has on numerous occasions in the last 20 years considered revising Virginia’s anti-discrimination statutes to expressly prohibit discrimination on the basis of “sexual orientation” but has not done so. *See* 2006
federal courts have followed that reasoning and concluded that prohibitions against sex-based discrimination in many cases protect LGBT individuals from discrimination. What has expanded is not the definition of “sex,” but instead courts’ recognition that many instances of discriminatory conduct against LGBT individuals are fundamentally “based on” sex.

As to Senator Garrett and Delegate LaRock’s second question, Black’s Law Dictionary defines “gender identity” as a person’s internal sense of gender, and “sexual orientation” as an individual’s predisposition or inclination towards sexual activity or behavior with other males or females, such as heterosexuality, homosexuality, or bisexuality, but other definitions may also be accurate.

**OP. NO. 15-049**

**INDIAN COUNTRY: AUTHORITY OF STATE AND LOCAL LAW ENFORCEMENT**

Despite federal recognition of the Pamunkey tribe, Virginia state and local law-enforcement agencies retain the same authority on the Pamunkey reservation as elsewhere in the


Thus, it is unnecessary to resolve what meaning to ascribe to that legislative inaction. Compare Tabler v. Bd. of Sup’rs of Fairfax Cty., 221 Va. 200, 202 (1980) (“In determining legislative intent, we have looked both to legislation adopted and bills rejected by the General Assembly.”), with Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, (1990) (“[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” (internal citations and quotation marks omitted)), and Fabian v. Hosp. of Cent. Conn., No. 3:12-cv-1154, 2016 WL 1089178, at *14 n.12 (D. Conn. Mar. 18, 2016) (interpreting language in a Connecticut anti-discrimination statute the same way as Title VII, and noting that the legislature’s addition of “gender identity or expression” to the list of protected classes “does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute’s scope rather than solely to expand it”).
Commonwealth to serve legal process, arrest warrants and subpoenas, and to investigate misdemeanors and felonies. The same conclusion with respect to criminal jurisdiction applies to the Mattaponi reservation, where there has been no federal recognition.

COLONEL W.S. FLAHERTY
SUPERINTENDENT, VIRGINIA DEPARTMENT OF STATE POLICE

JUNE 3, 2016

ISSUES PRESENTED

You ask whether federal recognition of the Pamunkey Tribe alters the analysis and conclusions of a 2001 opinion of the Attorney General relating to the authority of state and local law-enforcement to serve legal process, arrest warrants, and subpoenas, and investigate alleged misdemeanors and felonies, on the Pamunkey reservation. You also ask about law-enforcement authority for the Mattaponi reservation. The federal government has not recognized the Mattaponi Tribe.

BACKGROUND

As you note, in 2001 this Office issued an opinion concluding that the King William Sheriff’s Office has the same law-enforcement authority on these reservations as elsewhere in the county. That opinion was premised, at least in part, on the fact that neither tribe at the time had been granted federal recognition. Because the tribes had a relationship with the Commonwealth only, the opinion found that state law governed the inquiry, and federal laws such as the Indian Country Crimes Act and the Indian Country Major Crimes Act did not apply.

The opinion noted that the Commonwealth’s relationship with the tribes is rooted in the Indian Treaty of 1677, to which the Commonwealth stands as successor to the British Crown. Pursuant to the Treaty, lands within the reservations are held in fee simple by the Commonwealth, subject to the exclusive use and occupancy of the tribes. The Treaty, as well as subsequent actions of the General Assembly, imposes an obligation on the Commonwealth to “extend the same protections of the law . . . to members of the tribes as are

extended to nonmembers.”

Furthermore, nothing in the Treaty or other state law serves to limit the authority of law-enforcement on lands within the reservations. Accordingly, the opinion found that local law-enforcement has the same authority on the reservations as elsewhere in the locality.

On October 6, 2015, the United States Department of the Interior officially acknowledged the Pamunkey Tribe as an Indian tribe within the meaning of federal law. You ask whether this federal recognition limits the authority of state and local law-enforcement agencies on the Mattaponi and Pamunkey Indian reservations.

**APPLICABLE LAW AND DISCUSSION**

Generally, primary jurisdiction over land classified as “Indian country” rests “with the federal government and the Indian tribe inhabiting it, and not with the States.” Under federal statute, the term “Indian country” includes

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

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2 *Id.* at 38.

3 *Id.* at 39.


6 18 U.S.C. § 1151; see also COHEN’S HANDBOOK, supra note 5, at § 3.04[2][c][ii] (stating that the modifying phrase “under the jurisdiction of the United States Government” in subsection (a) was “likely added to exclude from the scope of the statute Indian reservations governed by certain states and thus not under federal protection”) (emphasis added); United States v. Ramsey, 271 U.S. 467, 470-72 (1926) (discussing the two types of Indian allotments, neither of which applies here).
This statutory definition of “Indian country” originated in early twentieth-century United States Supreme Court decisions. In these cases, the Supreme Court “relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country,” and, as a result, “that it was permissible for the Federal Government to exercise jurisdiction over them.”

Congress’s codification of the Supreme Court’s definition of the term “does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in [the Court’s] prior cases: Indian reservations; dependent Indian communities; and allotments.” Therefore, lands occupied by Native Americans qualify as “Indian country” under federal law only in cases where 1) the land was set aside for Indian use by the federal government, and 2) the land remains subject to “federal superintendence.” The Mattaponi and Pamunkey Indian reservations meet neither of these requirements. The lands were set aside by the Crown in the Indian Treaty of 1677, and the lands themselves remain under the superintendence of the Commonwealth, not the federal government.

Importantly, in Alaska v. Native Village of Venetie Tribal Government, the Supreme Court unanimously rejected the argument that “Indian country exists wherever land is owned by a federally recognized Tribe.” According to the Court, “[t]his argument ignores [the Court’s] Indian country precedents, which indicate both that the Federal Government must take some action setting apart the land for the use of the Indians ‘as such,’ and that it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government.” In addition, the Court noted that the “health, education, and welfare benefits” available to federally recognized

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8 Id. at 530 (emphasis added).
9 Id. (citations omitted).
10 Id.
12 Venetie, 522 U.S. at 530 n.5.
13 Id. (citing McGowan, 302 U.S. at 539, and Pelican, 232 U.S. at 449).
tribes do not alone constitute “active federal control over the Tribe’s land sufficient to support a finding of federal superintendence.”

CONCLUSION

Accordingly, it is my opinion that the Pamunkey Indian reservation does not qualify as “Indian country” for federal purposes, despite federal recognition of the Pamunkey Tribe. My opinion is the same for the Mattaponi Indian reservation, where there has not been federal recognition of that tribe. Thus, Virginia state and local law-enforcement agencies retain the same authority on the Pamunkey and Mattaponi Indian reservations as elsewhere in the Commonwealth to serve legal process, arrest warrants, and subpoenas, and to investigate misdemeanors and felonies.

OP. NO. 16-004

EDUCATION: LICENSURE REQUIRED OF TEACHERS

CONSTITUTION OF VIRGINIA: EXPENDITURE OF PUBLIC FUNDS FOR EDUCATIONAL PURPOSES

Teachers in private preschools must possess teacher licenses in order to be paid with public funds. Lottery proceeds legally may be used to fund the Virginia Preschool Initiative in all nonsectarian preschools, subject only to such restrictions and requirements as may apply to public funding of those preschools.

THE HONORABLE R. STEVEN LANDES
MEMBER, VIRGINIA HOUSE OF DELEGATES

JUNE 3, 2016

ISSUES PRESENTED

You ask whether early childhood teachers in private child care facilities must be licensed as teachers by the Virginia Department of Education. You also ask whether lottery funds that are distributed to localities may be used to help fund the Virginia Preschool Initiative.

14 Id. at 534.
BACKGROUND

You relate that the state-funded Virginia Preschool Initiative (the “VPI”), which provides funds for at-risk children, is interested in engaging both public schools and private child care facilities. Funds from the program would be provided to support preschool services for at-risk children. The Virginia Department of Education (“VDOE”) takes the position that preschool teachers paid with public funds must hold a baccalaureate degree and have a VDOE-approved teacher license (a “teacher license”).

While preschool teachers in public preschools have teacher licenses, that is not necessarily true for preschool teachers in private child care facilities. Preschool teachers in private settings have a professional development system different from that of preschool teachers in public settings. Many private preschool teachers have a Child Development Associate credential, a Career Studies Certificate, or an Associate Degree, rather than a baccalaureate degree. Their credentials often are earned from Virginia community colleges with programs established to teach the specialized skills required for effectively teaching young children. You relate that these educational credentials do not qualify the holder for a teacher license.

APPLICABLE LAW AND DISCUSSION

1. Applicability of VDOE Licensure Requirements to Preschool Teachers in Private Child Care Facilities

The Virginia State Board of Education has not issued any regulations requiring licensure for teachers at private preschool facilities. However, § 22.1-299 of the Code of Virginia requires, in relevant part, that all teachers paid from public funds must have teacher licenses, with the sole exception of substitute teachers hired to meet an emergency:

No teacher shall be . . . paid from public funds unless such teacher holds a license or provisional license issued by the Board of Education . . . . In accordance with regulations prescribed by the Board, a person not meeting the requirements for a license or provisional license may be employed and paid from public funds by a
school board temporarily as a substitute teacher to meet an emergency.\footnote{1}

A regulation duly promulgated by the State Board of Education defines a “teacher” as “a person who (i) is regularly employed full time as a teacher, visiting teacher/school social worker, guidance counselor, or librarian, and (ii) who holds a valid teaching license.”\footnote{2} One of the requirements for being licensed as a teacher is to have a baccalaureate degree.\footnote{3}

Based on the foregoing, I conclude that, so long as they are paid solely from private funds, teachers in private child care facilities are not required to have a teacher license. However, if they are paid from public funds, the Code of Virginia requires that they have a teacher license. A baccalaureate degree is required in order to receive a teacher license. The credentials you have described as being typical of many private preschool teachers do not qualify as a baccalaureate degree.

2. Use of Lottery Funds to Help Fund the VPI

The VPI is a partially-state-funded, local-match VDOE program under which VDOE disburses payments “from the Lottery Proceeds Fund . . . to schools and community-based organizations to provide quality preschool programs for at-risk four-year-olds unserved by [the federal] Head Start program funding.”\footnote{4} VPI funds appropriated by the General Assembly are “state funds.”\footnote{5}

Article VIII, § 10 of the Constitution of Virginia allows the expenditure of public funds for “educational purposes,” including in “nonsectarian private schools and institutions of learning.”\footnote{6} It thus implicitly recognizes that nonsectarian private schools can perform an “educational purpose.” This provision was found in the Constitution of 1971 as originally ratified. Approximately two decades later, the General Assembly in 1999 and 2000

\begin{footnotes}
\footnote{1}{VA. CODE ANN. § 22.1-299 (Supp. 2015).}
\footnote{2}{8 VA. ADMIN. CODE § 20-440-10.}
\footnote{3}{8 VA. ADMIN. CODE § 20-22-40(A) (“Applicants for licensure must . . . [h]ave earned a baccalaureate degree . . . from a regionally accredited institution of higher education . . . .”).}
\footnote{5}{Id., Item 136(C)(14)(a)(2).}
\footnote{6}{VA. CONST. art. VIII, § 10}
\end{footnotes}
proposed a constitutional amendment dealing with the Lottery and expenditure of Lottery Proceeds.\(^7\) The voters ratified the amendment on November 7, 2000, and it became effective July 1, 2001.\(^8\) It is now Article X, § 7-A of the Constitution of Virginia. In relevant part, it provides generally that “Lottery proceeds shall be appropriated from the [Lottery Proceeds] Fund to the Commonwealth’s counties, cities, and towns, and the school divisions thereof, to be expended for the purposes of public education.”\(^9\) A similar requirement is contained in § 58.1-4022(D) of the Code, which states, in relevant part,

In addition to such other funds as may be appropriated, 100 percent of the lottery revenues transferred to the Lottery Proceeds Fund shall be appropriated entirely and solely for the purpose of public education in the Commonwealth unless otherwise redirected pursuant to Article X, Section 7-A of the Constitution of Virginia. The additional appropriation of lottery revenues to local school divisions for public education purposes consistent with this provision shall be used for operating, capital outlay, or debt service expenses, as determined by the appropriation act.\(^[10]\)

The precise question thus presented is whether the General Assembly’s appropriations to the VPI are for “public education,” since lottery proceeds may be used only for that purpose, barring any redirection made pursuant to Article X, § 7-A of the Constitution.

In answering this question, it is first critical to note that at the time the General Assembly recommended Article X, § 7-A to the voters, it was aware of the existing language in Article VIII, § 10 recognizing that nonsectarian private schools may perform “educational purposes” that may permissibly be supported by public funds. This fact alone strongly supports a conclusion that the VPI is “public education,” even when the education is occasionally provided in the setting of private preschool facilities.


\(^{8}\) VA. CONST. art. VIII, § 10, http://law.lis.virginia.gov/constitution/article10/section7-A/ (detailing the date of ratification and date amendment became effective).

\(^{9}\) VA. CONST. art. X, § 7-A.

\(^{10}\) VA. CODE ANN. § 58.1-4022(D) (Supp. 2015).
Further support for this conclusion is that the VPI is overseen and administered by VDOE. VDOE is a state agency, and its entire existence pertains to public education.11 Finally, the 2015 Appropriation Act12 contains Item No. 136 for “Distribution of Lottery Funds,” which provides an appropriation to the VPI, and Item No. 136(C)(14)(a)(1), which governs disbursement of “Virginia Preschool Initiative Payments” from the Lottery Fund “to schools and community-based organizations to provide quality preschool programs for at-risk four-year-olds unserved by [federal] Head Start funding.” Thus, the General Assembly’s Appropriation Act has determined the VPI to be a form of public education, and an act of the General Assembly is presumed to be constitutional.13

For those reasons, I conclude that funding the VPI with the Lottery Proceeds Fund is legally permissible because it is a form of public education.

CONCLUSION

For the reasons stated, it is my opinion that teachers in private preschools must have teacher licenses in order to be paid with public funds, which include the Lottery Proceeds Fund. It is my further opinion that the Lottery Proceeds Fund legally may be used to fund the VPI in all nonsectarian preschools, subject only to such restrictions and requirements as may apply to public funding of preschools.

11 VDOE also has a publication entitled “Overview of Virginia’s Foundation Blocks for Early Learning.” In relevant part, it states, “The value of early education is imperative to the future academic success and the growth of children’s intellectual development . . . . The purpose of this document is to provide early childhood educators a set of minimum standards in literacy, mathematics, science, history and social science, health and physical development, personal and social development, music, and the visual arts, with indicators of success for entering kindergarten that are derived from scientifically-based research. The standards reflect a consensus of children’s conceptual learning, acquisition of basic knowledge, and participation in meaningful and relevant learning experiences. The standards are aligned with ‘Virginia’s Kindergarten Standards of Learning (SOL) and Virginia’s Phonological Awareness Literacy Screening (PALS).’”


13 Terry v. Mazur, 234 Va. 442, 449 (1987) (“[A]n act of the General Assembly is presumed to be constitutional, and every reasonable doubt must be resolved in favor of the act’s constitutionality” (citing Almond v. Gilmer, 188 Va. 822, 834 (1949))).
A “term jury” list, or list of potential jurors for a term of court as described in § 8.01-351 of the Code of Virginia, is not subject to public inspection. It may be inspected only by counsel of record in cases that are to be tried by a jury during the term. Copying of the list by counsel may be permitted only by leave of the court upon a showing of good cause.

THE HONORABLE JEFF SMALL
CLERK, CITY OF FREDERICKSBURG CIRCUIT COURT

JUNE 3, 2016

ISSUE PRESENTED

You ask whether a “term jury list,” or list of potential jurors for a term of court as described in § 8.01-351 of the Code of Virginia, may be made available for public review, and whether the list may be copied.

APPLICABLE LAW AND DISCUSSION

The Virginia Freedom of Information Act (“FOIA”) provides that public records generally be made available to citizens of the Commonwealth for inspection and copying. However, jury lists are excluded from the scope of FOIA.

Three types of jury lists are used by clerks for trials in Virginia’s circuit courts: master jury lists, term jury lists, and panel jury lists. Each list is prepared at a separate stage in the jury selection process.

1 VA. CODE ANN. § 2.2-3704(A) (2014) (providing that “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records”).
2 See Archer v. Mayes, 213 Va. 633, 641 (1973) (“The jury list is not an ‘official record’ within the intent and meaning of the provisions of the Freedom of Information Act”).
With respect to term jury lists, which are the focus of your inquiry, § 8.01-351 provides that a clerk shall prepare a list of potential jurors for civil and criminal cases pending in an upcoming term of court. It states that the list “shall be available in the clerk’s office for inspection by counsel in any case to be tried by a jury during the term.” There is no other statute either authorizing or requiring disclosure of this list. Therefore, the list may be made available for viewing only by counsel in jury cases held during the term. Any litigant who is preceding pro se in a jury case enjoys this same right, and any reference in this opinion to “counsel” shall also include pro se litigants.

The other question posed by your inquiry is whether counsel of record may copy a term jury list in addition to inspecting it. Section 8.01-351 requires that term jury lists be available “for inspection by counsel.” It does not require the list to be available for copying by counsel. In contrast, FOIA requires that “public records shall be open to inspection and copying.” The statutory canon of expressio unius est exclusio alterius means that the express mention of one thing excludes all others. The General Assembly could have provided a right to copy a jury list in § 8.01-351 as it did in FOIA. It chose not to do so. I must therefore conclude that the General Assembly, in enacting § 8.01-351, did not intend to give counsel the right to copy a term jury list.

In the case of Archer v. Mayes, the Supreme Court of Virginia articulated the policy considerations affecting disclosure of a master jury list, stating, “[e]xposure of the list to the public could lead to tampering with and harassment of potential jurors and seriously affect their impartiality and the proper administration of justice.” The Court further held that the “jury list be kept secret . . . unless good cause be shown.”


4 Section 8.01-351.
5 Id. (emphasis added).
6 VA. CODE ANN. § 2.2-3704(A) (2014) (emphasis added).
9 Id. at 640-41; see also Prieto v. Commonwealth, 283 Va. 149, 184-85 (2012), cert. denied, 133 S. Ct. 244 (2012) (observing the “good cause” standard pertinent to the release of a master jury list and holding, in part, that a circuit court did not err in denying a criminal defendant access to certain
While Archer involved master jury lists, not the term jury lists which are the subject of your inquiry, its rationale—protecting the integrity of the jury system by judicial control of access to juror information—lends further support to the conclusion that § 8.01-351 authorizes only review of a term list by counsel, but not copying, unless a court finds good cause to permit copying.  

CONCLUSION

For the foregoing reasons, it is my opinion that only counsel of record has the right to view a term jury list. Copying of the list by counsel is permitted only by leave of court upon a showing of good cause.

OP. NO. 15-084

CRIMINAL PROCEDURE: COURT-APPOINTED COUNSEL

The authority to determine whether a court-appointed attorney requesting payment for services has provided a detailed accounting of the time expended for representation lies with the court and not the circuit clerk. The role of the clerk is limited to determining whether the attorney’s request form has been fully and correctly completed.

expired master jury lists). The Prieto decision also states, at 185, “The disclosure of an expired jury list does not raise the same tampering or harassment concerns that the disclosure of a current jury list does, but it still raises privacy concerns. A jury list contains sensitive information that should be protected. We thus believe that a good-cause standard is appropriate for the release of both a current and expired jury list.”

Consistent with the Archer decision, a 1997 opinion of this Office opined that a circuit clerk may not release information contained in a master jury list or jury commissioner’s questionnaires regarding potential jurors to law enforcement or the Department of Motor Vehicles without the Circuit Court finding good cause to do so. 1997 Op. Va. Att’y Gen. 27. I note that the Circuit Court Clerk’s Manual (the “Manual”), issued by the Office of the Executive Secretary of the Supreme Court of Virginia, discusses access to panel jury lists in civil and criminal jury trials. Because this opinion deals only with term jury lists, it does not affect the guidance provided by the Manual for panel jury lists. See OFFICE OF THE EXEC. SEC’Y, VA. SUPREME COURT, CIRCUIT COURT CLERK’S MANUAL—CRIMINAL, at 7–22 (rev. July 2015). In addition, I note that § 17.1-208 of the Code restricts the means of copying of records, stating, “No person shall be permitted to use the [Circuit Court] clerk’s office for the purpose of making copies of records in such manner, or to such extent, as will, in the determination of the clerk, interfere with the business of the office or with its reasonable use by the general public.”
ISSUES PRESENTED

You ask several questions related to the powers and responsibilities of a clerk of circuit court with respect to reviewing requests for payment from court-appointed counsel to determine whether they have provided a “detailed accounting” of the time expended for representation, as required by § 19.2-163 of the Code of Virginia.

APPLICABLE LAW AND DISCUSSION

Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk’s duties “shall be prescribed by general law or special act.”1 “As a general rule, clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.”2 As constitutional officers, clerks are subject to the Dillon Rule of strict construction, which limits their powers to those that are “expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”3

The Code of Virginia provides that court-appointed counsel shall be compensated for their services on an hourly basis, subject to certain fee caps and waivers provided for in statute.4 Section 19.2-163 sets forth the procedures whereby court-appointed counsel may request payment for their services. Among other things, the statute requires that court-appointed counsel submit “a detailed accounting of the time expended for [the] representation” along with

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1 VA. CONST. art. VII, § 4.
each request for payment. The statute makes clear that the power to approve or disapprove any such request for payment lies with the presiding judge, or—in certain circumstances where an additional waiver is requested—the chief judge of the circuit. It makes no reference to the clerk approving, disapproving, or rejecting a request for payment.

For amounts that are to be paid from the State Treasury, the Supreme Court of Virginia has provided forms—primarily the DC-40 or “List of Allowances”—for counsel to use to record their time expended and to make a request for payment. In addition to a space for the judge’s signature, the DC-40 form contains a block for the clerk to sign certifying that “[s]aid account has been duly examined . . . and appears to be correct and unpaid.” Since the applicable statute gives the presiding (or the chief judge) authority to approve payment, with no co-equal power in the clerk, the clerk’s certification on the form must necessarily mean that the clerk is approving the form only as to it being fully and correctly completed as a request for payment not already made, not approval by the clerk that the amount requested is supported by adequate or sufficiently “detailed” documentation. A form promulgated by a government agency may not modify in any way powers and limitations set out by statute. Once the judge has authorized payment and the clerk has certified the form, the clerk must forward the request to the Supreme Court of Virginia for payment.

Previously, this Office responded to a request for an opinion on whether a clerk was authorized to refuse to record certain survey plats that had not been approved by local planning officials. After citing the above principles, the opinion stated:

5 Id.
6 “The [circuit] court in its discretion, and subject to the guidelines issued by the Executive Secretary of the Supreme Court, may waive the limitation of fees [up to certain limits] . . . .” Id., subsection 2. For additional waivers, approval of the chief judge is required. Id. In addition, the circuit court is authorized to “direct the payment of such reasonable expenses incurred by such court-appointed counsel as it deems appropriate under the circumstances of the case.” Id.
7 See Commonwealth v. Appalachian Electric Power Co., 193 Va. 37, 45 (1951) (The doctrine of administrative interpretation, while broad, may not override the plain meaning of a statute.).
8 “Any statement submitted by an attorney for payments due him for indigent representation or for representation of a child pursuant to § 16.1-266 shall, after the submission of the statement, be forwarded forthwith by the clerk to the Commonwealth, county, city or town, as the case may be, responsible for payment.” VA. CODE ANN. § 19.2-163.
As a general rule, a clerk is not responsible for determining if an instrument to be recorded is sufficient to meet the requirements of any particular provision of law . . . . I find no statutory provision authorizing a circuit court clerk to refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials.\[9\]

The conclusion I reach herein is consistent with the principle that the duties of a clerk related to filing and lodging of court papers are ministerial.\[10\] As in the above-referenced opinion, there is here no statutory authority for the clerk to refuse any applications deemed deficient in the required accounting or to refuse to submit applications for payment to the court. The circuit court, rather than the clerk, is tasked with determining whether court-appointed counsel has provided “a detailed accounting of time expended for representation.”

CONCLUSION

Accordingly, it is my opinion that a circuit court clerk’s role in the process by which court-appointed counsel may request payment for their services is limited to determining whether the form is correctly and completely filled out. The clerk must forward the applications to the Supreme Court of Virginia after they have been approved by the circuit court judge.

OP. NO. 15-063

HOTELS, RESTAURANTS, SUMMER CAMPS, AND CAMPGROUNDS

A private kitchen in a home or church is not subject to the food preparation and service requirements of the State Health Commissioner or a local government when the kitchen is used to prepare food for donation to a charitable organization that distributes it to the needy. However, the Board of Health may issue advisory guidelines, which reasonably should be considered by those preparing the food in question.

THE HONORABLE MARK D. SICKLES
MEMBER, VIRGINIA HOUSE OF DELEGATES

JULY 22, 2016


ISSUE PRESENTED

You ask whether certain kitchens are subject to inspection under state and local laws and regulations governing food preparation.

BACKGROUND

You state that a homeless shelter in Arlington County requested that members of a local church prepare food in their private homes or in the kitchen of the church and donate it to the shelter. You ask whether their doing so would subject the church’s kitchen, or the members’ home kitchens, to health inspection under state and local laws.

APPLICABLE LAW AND DISCUSSION

The State Health Commissioner (the “Commissioner”) has certain authority under statute to enforce the standards for food preparation in the Commonwealth. To carry out this authority, the Commissioner administers licensing requirements for “restaurants” in the Commonwealth. Section 35.1-1 of the Code defines the term “restaurant” generally to include “[a]ny place where food is prepared for service to the public on or off the premises, or any place where food is served.” Each restaurant is required to submit to periodic health inspections carried out by the Commissioner or his designee, and failure to pass an inspection may result in the Commissioner revoking or suspending its license.

Although the private kitchens that are the subject of your inquiry prepare food for public consumption at an off-premises location, they are exempt from

2 Section 35.1-18; 35.1-20; 35.1-22.
3 Section 35.1-1(9) (2014).
4 Section § 35.1-22. I note that the Virginia Department of Agriculture and Consumer Services (“VADACS”) also has certain designated authority over food inspections in the Commonwealth, but its authority generally is limited to establishments that process or offer food for retail sale. See § 3.2-5102 (2008); 3.2-5130 (Supp. 2015); 2 VA. ADMIN. CODE § 5-585-40 (defining the terms “food establishment” and “food processing plant”). Because the private kitchens in question do not process or offer food for retail sale, they are excluded at the outset from inspection by VADACS.
state regulations governing food preparation and service. Specifically, § 35.1-14.2 provides that “[c]haritable organizations engaged in food distribution programs for needy persons shall be deemed exempt from state and local regulations and local ordinances that govern food service and preparation.”

The statute further provides that “such organizations may accept food prepared by their employees or volunteers in private homes or in facilities not otherwise licensed as provided in this chapter.” A homeless shelter such as the one described in your request is a “charitable organization” for purposes of the statutory exception. Accordingly, it may accept food prepared by volunteers in private homes, without those private homes being subjected to the licensure and inspection requirements normally applicable to “restaurants” in the Commonwealth.

I note, however, that the Board of Health is authorized to “issue advisory standards for the safe preparation, handling, protection, and preservation of food by the organizations exempted in” § 35.1-14.2(B). Those guidelines may be beneficial for protecting public health, and, while not mandatory, reasonably should be considered by the persons who operate the kitchens in question.

Regarding application of Arlington County’s Food and Food Handling Code, please be advised that the statute exempting charities from food regulations extends that exemption to “local regulations and local ordinances that govern food preparation” in addition to state regulations.

7 See id. (“For the purposes of this subsection, ‘charitable organizations’ shall include nonprofit homeless shelters and hunger prevention programs.”).
8 I note, however, that nothing in this opinion is intended to affect the lawful exercise of the State Health Commissioner’s authority to address health emergencies, or the lawful exercise of VDACS’ authority to enforce laws relative to the adulteration and misbranding of food. See §§ 3.2-5100; 3.2-5126; 32.1-13; 35.1-10.
9 See VA. CODE ANN. § 35.1-14.2(C) (2011). Kitchens preparing food for donation to charitable organizations have additional protection under the Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791.
10 VA. CODE ANN. § 35.1-14.2(B).
CONCLUSION

Accordingly, it is my opinion that a private kitchen in a home or a church is not subject to food preparation and service requirements of the State Health Commissioner or Arlington County when the kitchen is used to prepare food to donate to a charitable organization, where the charitable organization is engaged in a food distribution program for the needy. However, the Board of Health may issue advisory guidelines, which reasonably should be considered by those preparing the food in question.

OP. NO. 16-027

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT

Section 2.2-4321.2 of the Code of Virginia, a provision of the Virginia Public Procurement Act, does not apply to contracts awarded under Virginia’s Public-Private Transportation Act of 1995.

THE HONORABLE JENNIFER B. BOYSKO
MEMBER, VIRGINIA HOUSE OF DELEGATES

AUGUST 10, 2016

ISSUE PRESENTED

Section 2.2-4321.2 of the Code of Virginia governs the use of labor agreements for certain public projects. You ask whether it applies to projects authorized under Virginia’s Public-Private Transportation Act of 1995 (the “PPTA”).

1 This opinion assumes the term “authorized under” to mean “awarded under.” Many public contracts could be construed as authorized under the PPTA, but in actuality are awarded by some other statutory procurement vehicle such as the Virginia Public Procurement Act. In such a case, the provisions of the Procurement Act would govern the procurement, regardless of whether the contract is arguably authorized under the PPTA.

Section 2.2-4321.2\(^3\) is a provision of the Virginia Public Procurement Act\(^4\) (the “Procurement Act”). It governs the use of project-specific agreements with labor organizations for a defined class of public works contracts. These project-specific agreements with labor organizations are colloquially known as project labor agreements (“PLAs”).

In general, the statute establishes three broad rules that apply to the use of PLAs on public works contracts. First, a state agency cannot require the use of a PLA on a public works contract.\(^5\) Second, a state agency cannot prohibit the use of a PLA on a public works contract.\(^6\) Finally, within a public works contract, discrimination is prohibited against certain individuals or entities on the basis of whether that individual or entity has signed or agreed to adhere to a PLA.\(^7\) These three broad rules apply both when the state agency is the actual purchasing entity and when it is simply issuing grants, providing financial assistance, or entering into a cooperative agreement.\(^8\) Thus, the statute ensures that the use of a PLA remains voluntary on public works contracts, and it prohibits discrimination against an individual or entity based on its PLA status.

Pursuant to § 33.2-1819 of the PPTA, the General Assembly expressly exempted the PPTA from most, but not all, provisions of the Procurement Act.\(^9\) For example, one exception is that the PPTA expressly requires public entities to adopt PPTA guidelines that are consistent with certain principles of competitive procurement established within the Procurement Act.\(^10\) However, there is nothing that excepts § 2.2-4321.2 (the PLA statute) from the general rule that the Procurement Act “shall not apply”\(^11\) to the PPTA. Accordingly, it is my opinion that § 2.2-4321.2 does not apply to contracts awarded under the PPTA.

\(^5\) See § 2.2-4321.2(B)(1) and (C)(1) (2014).
\(^6\) Id.
\(^7\) See § 2.2-4321.2(B)(2) and (C)(2).
\(^8\) See § 2.2-4321.2(B) and (C).
\(^9\) See § 33.2-1819 (2014) (providing that the Procurement Act “shall not apply to” the PPTA).
\(^10\) See, e.g., § 33.2-1819(1) through (5).
\(^11\) Section 33.2-1819.
You allude to an apparent tension in the law between two statutes on this subject. On the one hand, § 33.2-1819 provides that the Procurement Act “shall not apply” to the PPTA. On the other hand, § 2.2-4321.2(F)(1) exempts a defined class of public-private agreements from § 2.2-4321.2 (the PLA statute).

At first glance, when read together, these two provisions do invite the following question: why is the exemption of § 2.2-4321.2(F)(1) necessary when contracts awarded under the PPTA already are generally exempt from the provisions of the Procurement Act under § 33.2-1819? However, the statutes can be read in harmony without strain because not all public-private agreements fall under the PPTA. As stated above, all contracts awarded under the PPTA are exempt from § 2.2-4321.2 by virtue of § 33.2-1819. Also, all public-private agreements meeting the conditions of § 2.2-4321.2(F)(1) are exempt from § 2.2-4321.2, even when not awarded under the PPTA. It is well accepted that statutes relating to the same subject should not be read in isolation. Such statutes should be read in pari materia.

CONCLUSION

Accordingly, it is my opinion that § 2.2-4321.2 does not apply to contracts awarded under the PPTA.

OP. NO. 16-043

SCHOOL BOARDS: QUALIFICATIONS OF MEMBERS

In determining the eligibility of individuals who seek to stand for election to the City of Richmond’s school board, 1) the City’s Electoral Board and General Registrar are required to

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12 As a general rule of statutory construction, where two statutes are in apparent conflict they must be read in harmony to the extent possible to give full force and effect to each. See, e.g., Boynton v. Kilgore, 271 Va. 220, 229 (2006).
13 It is important to note that the term “public-private agreements” is not defined within the Procurement Act or within the Code of Virginia, at large.
15 See also 2012 Op. Va. Att’y Gen. 9, 11 (opining that § 2.2-4321.2 does not apply to the Metropolitan Washington Airports Authority because it is exempt from the Procurement Act under § 5.1-174 of the Code of Virginia).
determine, as a factual matter, whether a candidate meets the statutory qualifications for office at the time of the November 8 election; and 2) the City’s Electoral Board is not legally required to reexamine the signatures on all petitions submitted by candidates for office due to later changes in status of the voters who signed those petitions.

MS. CHERLYN STARLET STEVENS
CHAIR, CITY OF RICHMOND ELECTORAL BOARD

AUGUST 26, 2016

I am in receipt of your August 23, 2016 letter, requesting my opinion on four questions related to the Electoral Board’s duties “with respect to determining the eligibility of two individuals who seek to stand for election on November 8 to local offices in the City” of Richmond in light of the Supreme Court of Virginia’s July 22, 2016 order in the matter of Howell v. McAuliffe.1 Specifically, your letter requests guidance with respect to two factual scenarios.2 I will respond to your questions in the order in which they are set forth in your August 23 letter.3 Please note that your questions require fact-specific analysis;

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1 No. 160784, 2016 Va. LEXIS 107 (July 22, 2016).

2 According to your letter, the first factual scenario is as follows: Candidate A was previously convicted of a felony, had his rights purportedly restored by the Governor’s Executive Orders, and subsequently registered to vote and qualified as a candidate for the School Board of the City of Richmond. After Candidate A qualified to appear on the ballot, the Supreme Court of Virginia found the Governor’s Executive Orders unconstitutional in Howell v. McAuliffe, and Candidate A’s voter registration was cancelled pursuant to the Court’s Order.

Your second factual scenario is as follows: Candidate B seeks election to the office of Mayor of the City of Richmond. Candidate B submitted, among other required qualification documents, a petition containing a sufficient number of voter signatures and qualified as a candidate. Your letter notes that “[i]t has been reported by the media that the petition submitted by Candidate B contain[s] exactly 50 signatures from one of the nine election districts [in the City of Richmond] and that one such signature is that of a person whose restoration of civil rights was invalidated by the Virginia Supreme Court’s decision, whose registration to vote was accordingly cancelled, and whose civil rights have now apparently been restored once again.”

3 You note that, with respect to Candidate A, you first sought guidance from the Department of Elections, and your letter references this guidance, in part, as advising that the Electoral Board “seek legal counsel prior to removing a candidate certified as qualified by your office . . . .” Please note that this opinion is provided pursuant to the Attorney General’s authority to issue official opinions as provided by § 2.2-505 of the Code of Virginia, and not in a capacity as counsel to the Electoral
accordingly, you and your Electoral Board must review the facts in light of the information provided in this letter to determine how to proceed in each case.

**Question 1:** You inquire whether the Electoral Board is “legally required to remove the name of Candidate A from the ballot because his registration to vote was invalid at the time he filed his statement of qualification[,] or for any other reason.”

Section 22.1-29 of the *Code of Virginia* establishes the qualifications for membership on a school board. Pursuant to the statute, “[e]ach person appointed or elected to a school board shall, *at the time of his appointment or election*, be a qualified voter and a bona fide resident of the district from which he is selected if appointment or election is by district or of the school division if appointment or election is at large . . . .”

In light of this statutory language, Candidate A will meet the requirements for election to the City of Richmond School Board if, at the time of the November 8 general election, Candidate A is (1) a qualified voter and (2) a bona fide resident of the appropriate district or school division. This is a factual, and not a legal determination, and the Electoral Board and General Registrar must ascertain whether Candidate A meets these requirements. In the event that the Electoral Board and General Registrar conclude that Candidate A meets these requirements, the Board is not required to remove Candidate A’s name from the ballot.

**Question 2:** You inquire whether the Electoral Board “legally [is] required to reexamine the signatures on all petitions submitted by candidates for office who are required by law to file with the general registrar of the City of Richmond.”

As noted in § 10.2.5.9 of the General Registrar and Electoral Board Handbook, a “person who signs a candidate’s petition must be a registered
Numerous factors can lead to a change in voter registration status after candidates file petitions under § 24.2-506 of the Code of Virginia, and to require general registrars and electoral boards to review the registration status of voters who signed these petitions for all possible registration changes following the initial certification under § 24.2-506 would place both election officials and candidates in an ongoing state of uncertainty until election day arrived. Where the Electoral Board has examined the petitions submitted by candidates for office and concluded that these petitions contained the signatures of a sufficient number of registered voters, the Electoral Board is not legally required to reexamine the signatures due to later changes in status of the voters who signed those petitions.

Consistent with your request, because the answers to Questions 1 and 2 are not in the affirmative, it is not necessary for me to answer Questions 3 or 4. Additionally, as the answers to both Question 3 and 4 require the Electoral Board to consider factual information specific to the scenarios you have presented, I can express no opinion about the status of any individual candidate.

**OP. NO. 15-085**

**TAXATION: TANGIBLE PERSONAL PROPERTY**

Counties have no authority to impose a license fee on boats in lieu of personal property taxes.

**THE HONORABLE PRISCILLA J. DAVENPORT**

COMMISSIONER OF THE REVENUE, MIDDLESEX COUNTY

**SEPTEMBER 1, 2016**


ISSUE PRESENTED

You ask whether counties in Virginia have the authority to impose a license fee on boats in lieu of a personal property tax.

BACKGROUND

You state that the County of Middlesex is considering imposing a license fee in lieu of personal property taxes on boats. You relate that another locality already has eliminated personal property taxes on boats and has replaced such taxes with a license fee.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia provides that tangible personal property is segregated for, and made subject to, local taxation only.1 Section 58.1-3500 of the Code defines “tangible personal property” to include “all personal property not otherwise classified by (i) § 58.1-1100 as intangible personal property, (ii) § 58.1-3510 as merchants’ capital, or (iii) § 58.1-3510.4 as short-term rental property.”2 Boats are included in the definition of “tangible personal property” and are divided by statute into various classifications for purposes of valuation and taxation.3

With respect to the power of localities to assess license fees on boats, I note that Virginia adheres to the Dillon Rule, which provides that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”4 Unlike the power of the State legislature, the power of a locality “must be exercised [in accordance] with an express grant of authority.”5 The General Assembly has expressly conferred upon localities the authority to levy a local license fee on motor vehicles, trailers, and semitrailers as part of the local vehicle registration

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1 VA. CONST. art. X, § 4.
process. It has also specifically authorized localities to license bicycles, electric power-assisted bicycles, electric personal assistance mobility devices, and mopeds and impose a license fee on such vehicles. The General Assembly has not, however, authorized localities to impose a license fee upon boats. Rather, the sole authority for administering and assessing boat license fees lies with the Department (and Board) of Game and Inland Fisheries.

**CONCLUSION**

Accordingly, it is my opinion that counties in Virginia do not have the authority to impose a license fee on boats in lieu of personal property taxes.

**OP. NO. 16-009**

**AGRICULTURE, ANIMAL CARE, AND FOOD: CONTROL OF DANGEROUS DOGS; PENALTIES**

Where an animal control officer has an objective reason to believe that a dog has bitten, attacked, or inflicted injury on a person, he must apply to a magistrate for issuance of a summons for violation of the dangerous dog statute. Only a court, and not an animal control officer, can determine that such an act has occurred.

6 See VA. CODE ANN. § 46.2-752(A) (Supp. 2016); see generally VA. CODE ANN. Title 46, Chapter 6, Article 11 (prescribing the procedures and limitations that apply to local license fees on motor vehicles, trailers, and semitrailers).

7 VA. CODE ANN. § 15.2-1720 (Supp. 2016).

8 I note that § 15.2-1125 provides that “[w]henever in the judgment of the municipal corporation it is advisable in the exercise of any of its powers or in the enforcement of any ordinance or regulation, it may provide for the issuance of licenses of permits in connection therewith . . . [and] fix a fee to be charged the licensee or permittee . . . .” This provision, however, must be read in conjunction with the general principle that localities may not exercise their powers—including police powers—in a manner that is inconsistent with the general laws of the Commonwealth. See, e.g., VA. CODE ANN. §§ 1-248 (2014); 15.2-1200 (2012). By establishing specific instances in which a locality may assess license fees on vehicles, the General Assembly has indicated an intent that it not be done otherwise. See GEICO v. Hall, 260 Va. 349, 355 (2000) (citing the maxim of statutory construction known as *expressio unius est exclusio alterius*, which “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”). Therefore, under current law—and regardless of the provisions of § 15.2-1125—a locality may not assess a license fee on boats because so doing would be inconsistent with separate law.

officer, may determine, after consideration of the evidence, whether the exceptions and
defenses found in subsections A and C of § 3.2-6540 are applicable.

THE HONORABLE PAUL B. EBERT
COMMONWEALTH’S ATTORNEY, PRINCE WILLIAM COUNTY

SEPTEMBER 1, 2016

ISSUE PRESENTED

You inquire whether an animal control officer (an “ACO”) has discretion
as to whether to request a dangerous dog summons once he learns that a dog has
bitten, attacked, or inflicted injury on a person. The crux of your inquiry is
whether an ACO, through additional investigation, may determine that even if
the dog has engaged in such behavior, a summons will not be requested because
of one of several statutory exceptions or defenses.

APPLICABLE LAW AND DISCUSSION

Section 3.2-6540 of the Code of Virginia, a statute in Title 3.2, Chapter 65
(“Comprehensive Animal Care”), 1 governs the control of dangerous dogs. 2
With an exception for a police dog engaged in the performance of its duties, 3
subsection A of the statute defines the term “dangerous dog” as “a canine or
 canine crossbreed that has bitten, attacked, or inflicted injury on a person or
 companion animal that is a dog or cat, or killed a companion animal that is a dog
 or cat.” 4

Under subsection B of the statute, any ACO “who has reason to believe
that a canine or canine crossbreed within his jurisdiction is a dangerous dog
shall apply to a magistrate serving the jurisdiction for the issuance of a
summons requiring the owner or custodian, if known, to appear before a general
district court at a specified time.” 5 The use of the word “shall” in a statute

1 VA. CODE ANN. §§ 3.2-6500 to 6590 (2016).
2 See VA. CODE ANN. § 3.2-6540.
3 VA. CODE ANN. § 3.2-6540(C).
4 VA. CODE ANN. § 3.2-6540(A).
5 VA. CODE ANN. § 3.2-6540(B) (emphasis added).
generally indicates that the procedures are mandatory, rather than permissive.\textsuperscript{6} Thus, once the ACO has an objective reason to believe \textsuperscript{7} the canine is a dangerous dog under the statutory definition in subsection A— that is, that the dog has bitten a person or displayed one of the other behaviors listed—all discretion is removed, and the ACO must go to the magistrate and request a summons.\textsuperscript{8}

There are, however, a number of statutory exceptions in subsection A to the general definition of “dangerous dog.”\textsuperscript{9} One is if the dog has not caused serious injury to a dog or cat “as determined by a licensed veterinarian.” Another is “for other good cause as determined by the court.”\textsuperscript{10} The express language of these exceptions indicates that their application may not be determined by an ACO: one is to be determined by a licensed veterinarian—presumably in evidence presented to the court—and the other is to be determined only by the court. The doctrine of \textit{in pari materia} means that statutes—or parts of a statute—that have the same general or common purpose

\textsuperscript{7} See Rector & Visitors of the Univ. of Va. v. Cuccinelli, 80 Va. Cir. 657, 659 (Va Cir. Ct. 2010) (“In order for the Attorney General to have a “reason to believe,” he has to have some objective basis to [act] . . . which the Court has the power to review.”).
\textsuperscript{8} This conclusion is consistent with the applicable legislative history. There have been numerous amendments of the “dangerous dog” statute over the years. One amendment was in 2006, and it enacted the requirement that an ACO “shall” request a summons when he learns of what may be a “dangerous dog.” The 2006 Department of Planning and Budget Fiscal Impact Statement for the bill in question (H.B. 340) states, “The proposed legislation expands the authority to petition a court to find a dog dangerous to any law enforcement officer \textit{and makes the petition mandatory}.” (Emphasis added.)
\textsuperscript{9} “When a dog attacks or bites a companion animal that is a dog or cat, the attacking or biting dog shall not be deemed dangerous (i) if no serious physical injury as determined by a licensed veterinarian has occurred to the dog or cat as a result of the attack or bite; (ii) if both animals are owned by the same person; (iii) if such attack occurs on the property of the attacking or biting dog’s owner or custodian; or (iv) for other good cause as determined by the court. No dog shall be found to be a dangerous dog as a result of biting, attacking, or inflicting injury on a dog or cat while engaged with an owner or custodian as part of lawful hunting or participating in an organized, lawful dog handling event. No dog that has bitten, attacked, or inflicted injury on a person shall be found to be a dangerous dog if the court determines, based on the totality of the evidence before it, that the dog is not dangerous or a threat to the community.” VA. CODE ANN. § 3.2-6540 (A).
\textsuperscript{10} Id.
or are parts of the same general plan are to be read as a whole.\textsuperscript{11} It is also well-established that the several parts of a statute should be interpreted as a consistent and harmonious whole so as to effectuate the legislative goal.\textsuperscript{12} It would be inconsistent to say that some of the statutory exceptions may be applied by an ACO while others may not. For this reason, I conclude that application of all the statutory exceptions listed in subsection A are intended to be determined solely by the court after consideration of the evidence. Put differently, the statute does not authorize an ACO to determine if they apply before deciding whether to request a summons from a magistrate.

In addition to the exceptions in subsection A of § 3.2-6540, there are also certain defenses in subsection C of that statute to a dangerous dog charge. In setting forth the defenses, the statute provides, “No canine or canine crossbreed shall be found to be a dangerous dog” based on certain factual situations.\textsuperscript{13} The word “finding” refers to “finding of fact,” which is defined as “[a] determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record, [usually] presented at the trial or hearing.”\textsuperscript{14} The requirement of a “finding” thus indicates that this determination is to be made by the court after consideration of all relevant facts, not an ACO before deciding whether to request a summons. Thus, as with the exceptions to the definition of “dangerous dog,” set forth in subsection A, I conclude that the defenses set forth in subsection C may be applied only by the court, not by an ACO.

\textsuperscript{11} See, e.g., Prillaman v. Commonwealth, 199 Va. 401, 405 (1957).
\textsuperscript{13} Emphasis added. “No canine or canine crossbreed shall be found to be a dangerous dog solely because it is a particular breed, nor is the ownership of a particular breed of canine or canine crossbreed prohibited. No animal shall be found to be a dangerous dog if the threat, injury, or damage was sustained by a person who was (i) committing, at the time, a crime upon the premises occupied by the animal’s owner or custodian; (ii) committing, at the time, a willful trespass upon the premises occupied by the animal’s owner or custodian; or (iii) provoking, tormenting, or physically abusing the animal, or can be shown to have repeatedly provoked, tormented, abused, or assaulted the animal at other times. . . . No animal that, at the time of the acts complained of, was responding to pain or injury, or was protecting itself, its kennel, its offspring, a person, or its owner’s or custodian’s property, shall be found to be a dangerous dog.” VA. CODE ANN. § 3.2-6540 (C).
\textsuperscript{14} See BLACK’S LAW DICTIONARY 749 (Bryan A. Garner et al. eds., 10th ed. 2014).
CONCLUSION

Accordingly, it is my opinion that where an ACO has an objective reason to believe that a dog has bitten, attacked, or inflicted injury on a person, he must apply to a magistrate for issuance of a summons for violation of the dangerous dog statute. It is my further opinion that only a court, and not an ACO, may determine, after consideration of the evidence, whether the exceptions and defenses found in subsections A and C of § 3.2-6540 are applicable.

OP. NO. 15-081

TAXATION: STATE RECORDATION TAX

Deeds of trust and leases are “deeds” for purposes of § 58.1-817 of the Code of Virginia, which imposes an additional one dollar fee for the Virginia Outdoors Foundation for recordation of deeds in jurisdictions in which the Foundation holds open-space easements.

MS. BRETT C. GLYMPH
EXECUTIVE DIRECTOR, VIRGINIA OUTDOORS FOUNDATION

SEPTEMBER 1, 2016

ISSUE PRESENTED

You ask whether the term “deed” as used in § 58.1-817 of the Code of Virginia should be construed to include any instrument conveying an interest in real property, including deeds of trust and leases for purposes of determining when certain fees imposed upon deed recordation are proper.

APPLICABLE LAW AND DISCUSSION

Section 58.1-817, a provision of the Virginia Recordation Tax Act, establishes a $1 fee to help provide state funding for open-space preservation. This fee is imposed on “every deed admitted to record in those jurisdictions in which open-space easements are held by the Virginia Outdoors Foundation”
When a deed is recorded in one of these jurisdictions, the circuit clerk collects the fee, which is later distributed to the VOF for the agency to “accept, hold and administer . . . in accordance with its purposes and powers.”

While it imposes an open-space preservation fee on “deeds” recorded in certain jurisdictions, § 58.1-817 does not define that term. It is well-established, however, that “[w]hen a word which has a known legal meaning is used in a statute[,] it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent.” The Supreme Court of Appeals of Virginia has stated, “A deed is the method by which title of real estate is transferred from one person to another.” Black’s Law Dictionary defines a deed as “[a] written instrument by which land is conveyed [or] any written instrument that is signed, sealed, and delivered and that conveys some interest in property.” Under the Restatement of Property, a “deed” is a written instrument that transfers some form of interest (or “title”) to real estate, whether the interest conveyed constitutes the full bundle of sticks commonly conceived of as full ownership of real property, or only a portion thereof.

With respect to a deed of trust, about which you inquired, I note that, as a loan security instrument, it conveys legal title in real property from a borrower.

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1 VA. CODE ANN. § 58.1-817 (2013). I note that the Virginia Outdoors Foundation is a body politic “established to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.” VA. CODE ANN. § 10.1-1800 (2012).

2 VA. CODE ANN. § 58.1-817.

3 THE AM. & ENGLISH ENCYCLOPEDIA OF LAW 607 (David S. Garland & Lucius P. McGehee eds., 2nd ed. 1904); see also, e.g., Roberson v. Wampler, 104 Va. 380, 382 (1905) (discussing the “well-settled rule of construction that . . . unless [a contrary intention is manifest], . . . words of a definite legal signification are to be understood as used in their definite legal sense”).


5 BLACK’S LAW DICTIONARY 501 (Bryan A. Garner et al. eds., 10th ed. 2014) (emphasis added); see also 2002 Op. Va. Att’y Gen. 18, 22 n.3 (“A ‘deed’ is defined at common law as ‘any written instrument that is signed, sealed, and delivered and that conveys some interest in property.’”).

6 See, e.g., RESTATEMENT (FIRST) OF PROP. § 10, note on the use of the word “title” in the Restatement (discussing “title” generally as a term used to denote the existence of a specified interest in land) (AM. LAW INST. 1936); Am. Net & Twine Co. v. Mayo, 97 Va. 182, 186 (1899) (stating a deed “is the method by which the title of real estate is transferred”).
to a trustee, who holds the title on behalf of the lender until the loan is repaid,\(^7\) with the borrower retaining equitable title.\(^8\)

The Supreme Court of Virginia’s recent decision in *Deutsche Bank v. Arrington*\(^9\) considered whether deeds of trust constitute “deeds” for purposes of § 55-52, Virginia’s after-acquired property statute. In holding that they do constitute deeds, the Court cited Black’s Law Dictionary approvingly for the proposition that a “deed” includes “‘any written instrument that is signed, sealed, and delivered and that conveys some interest in property,’”\(^10\) further noting that nothing in the relevant chapter of the *Code* “indicates that the General Assembly intended to restrict the meaning of the word ‘deed’ . . . to exclude deeds of trust.”\(^11\) It is thus established under Virginia law that a deed of trust is a type of “deed.”

With respect to leases, that term is defined in Black’s Law Dictionary as “a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration.”\(^12\) Section 55-57 of the *Code of Virginia* provides the form for a “deed of lease.” It is thus evident that a lease falls within the definition of “deed,” as set forth above, in that it is a “written instrument that conveys some interest in property.”\(^13\)

Finally, whether any other instrument should be deemed a “deed” under § 58.1-817 is a question determined by applying the established legal definition of “deed” set forth above to the terms of the particular instrument. It is, therefore, a question of fact. Attorneys General consistently have declined to render official opinions on specific factual matters.\(^14\)

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\(^10\) Id. at 116 (quoting BLACK’S LAW DICTIONARY 501 (Bryan A. Garner et al. eds., 10th ed. 2014)).

\(^11\) Id.

\(^12\) BLACK’S LAW DICTIONARY 1024 (Bryan A. Garner et al. eds., 10th ed. 2014).

\(^13\) See supra note 5.

Accordingly, it is my opinion that the term “deed” as used in § 58.1-817 should be construed to include deeds of trust and leases, so long as the instruments are recorded in a jurisdiction in which open-space easements are held by the Virginia Outdoors Foundation. I express no opinion about whether any other type of instrument is a “deed” for this purpose.

OP. NO. 15-044

COURTS NOT OF RECORD: DISTRICT COURTS

COURT OF RECORD: GENERAL PROVISIONS

DOMESTIC RELATIONS: MARRIAGE GENERALLY

A retired judge who has voluntarily removed himself from the recall list of the Supreme Court of Virginia, after years of honorable active and recall list service, may celebrate the rites of marriage without necessity of bond or order of authorization.

THE HONORABLE COLLEEN K. KILLILEA
JUDGE, WILLIAMSBURG / JAMES CITY COUNTY GENERAL DISTRICT COURT

SEPTEMBER 1, 2016

ISSUE PRESENTED

You ask whether a retired judge, who has voluntarily removed himself from the recall list of the Supreme Court of Virginia, after years of honorable active and recall list service, may celebrate the rites of marriage under § 20-25 of the Code of Virginia without necessity of bond or order of authorization.

APPLICABLE LAW AND DISCUSSION

In Virginia, a judge who has retired under the Judicial Retirement System\(^1\) may offer to perform recall service to hear certain cases or perform other

judicial duties on a temporary basis. 2 Pursuant to § 16.1-69.35 of the Code, the Executive Secretary of the Supreme Court of Virginia maintains a list of such retired judges who have offered their services and are eligible for recall duty. 3 Should a retired judge decide that he no longer desires to remain on the list, he may request that his name be removed. However, that judge still remains subject to possible recall at the discretion of the Chief Justice under the provisions of §§ 16.1-69.22:1 or 17.1-106.

Section 20-25 of the Code, which is the subject of your inquiry, provides that “retired judges” are authorized to celebrate the rites of marriage in Virginia without necessity of bond or order of authorization. That statute provides, in relevant part, that

[a]ny judge or justice of a court of record, any judge of a district court, any retired judge or justice of the Commonwealth, and any active, senior, or retired federal judge or justice who is a resident of the Commonwealth may celebrate the rites of marriage anywhere in the Commonwealth without the necessity of bond or order of authorization.4

Prior to 1987, this provision of § 20-25 did not include “retired judges of the Commonwealth” in the list of individuals authorized to perform marriages without necessity of bond or order of authorization. Although the provision included “any judge or justice of a court of record and any judge of a district court,” 5 it was silent as to the authority of a retired judge. Interpreting that prior language of the provision, in 1985 the Attorney General issued an opinion concluding that a retired judge was not authorized to perform marriages without bond or order of authorization, unless he had been recalled by the Chief Justice and had thereby regained—on a temporary basis—all the “powers, duties[,] and privileges” of the position.6 In response to this opinion, the General Assembly amended the statute in 1987 to allow retired judges and justices of the

3 This list is approved by the Chief Justice of the Supreme Court of Virginia. See VA. CODE ANN. § 16.1-69.35.
6 See id.
Commonwealth to perform marriages with no bond or order of authorization—and with no requirement that a judge be on active recall status at the time.7

I conclude that the 1987 amendment indicates that a retired judge may perform marriages even if he has voluntarily had his name removed from the Supreme Court’s recall list. Such an individual is still a “retired judge” so long as he remains in good standing with the Supreme Court of Virginia, and is a “public official” in the limited sense that he remains subject to possible recall under §§ 16.1-69.22:1 or 17.1-106.8 Therefore, in light of his status, he may perform marriages in the Commonwealth without necessity of bond or order of authorization.9 This is so regardless of whether he is ever recalled to active service or whether he even remains on the recall list.

CONCLUSION

Accordingly, based on the language and legislative history of § 20-25, it is my opinion that a retired judge under the circumstances you describe may celebrate the rites of marriage in the Commonwealth without necessity of bond or order of authorization.10

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9 “The primary objective of statutory construction is to ascertain and give effect to legislative intent.” Melanson v. Commonwealth, 261 Va. 178, 183 (2001); see generally VA. CODE ANN. §§ 16.1-69.22:1(B), 17.1-106(B) (providing, in certain circumstances, for the obligatory recall of retired judges).

10 This conclusion is not intended to address situations in which a retired judge is removed from the recall list by the Supreme Court following disability or misconduct. Further, it is not intended to address situations in which a retired judge voluntarily has had himself removed from the recall list for reasons of disability (i.e., self-reporting of disability). Those scenarios are outside the scope of this opinion.
You inquire regarding the application of a recently-enacted personal property tax exemption for certain motor vehicles (the “new tax exemption law”), which became effective July 1 of this year, and how it should be applied in localities that pro rate personal property taxes. You ask first whether the exemption applies for any portion of this year to qualifying vehicles that were sited within the locality as of January 1 of this year; second, whether it applies for any portion of this year to qualifying vehicles that acquired a situs within the locality on a date after January 1 of this year; and third, if the constitutional requirement of uniform taxation would be violated if the exemption applies this year to some vehicles but not to others, based solely on the date the vehicle first came to be sited within the locality.

As requested, the analysis and conclusions of this opinion pertain to application of the exemption this year in localities that pro rate taxes.
BACKGROUND

Section 58.1-3524 of the Code of Virginia provides certain personal property tax relief for “qualifying vehicles.” A “qualifying vehicle” under the Code includes “any . . . pickup or panel truck . . . as those terms are defined in § 46.2-100,” subject to certain additional restrictions.1 The new tax exemption law amended the definition of “pickup or panel truck” in § 46.2-100 so that it now includes “every motor vehicle registered for personal use, designed to transport property on its own structure independent of any other vehicle, and having a registered gross weight in excess of 7,500 pounds but not in excess of 10,000 pounds.” 2 That class of vehicle was not previously included in the statutory definition and thus did not previously qualify for personal property tax relief. In short, beginning on July 1, 2016, the new tax exemption law provides certain personal property tax relief for pickup or panel trucks within certain weight limits.

APPLICABLE LAW AND DISCUSSION

1. Qualifying vehicles sited within the taxing jurisdiction as of January 1, 2016

Section 58.1-3515 of the Code of Virginia addresses your question of whether the new tax exemption law applies to qualifying vehicles that were sited within a pro rata taxation locality as of January 1, 2016. In relevant part, it provides:

Except as provided under § 58.1-3010, and except as provided by ordinance or special act in localities authorized to tax certain property on a proportional monthly or quarterly basis, tangible personal property, machinery and tools and merchants’ capital shall be returned for taxation as of January 1 of each year, which date shall be known as the effective date of assessment or the tax day. The status of all persons, firms, corporations and other taxpayers liable for taxation on any of such property shall be fixed as of the date

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aforesaid in each year and the value of all such property shall be taken as of such date [ . . . ]\(^3\)

This long-established statute fixes the status of all taxpayers liable for taxation as of January 1 of each year. It makes that date “tax day.” Because the new tax exemption law does not amend it, the “tax day” statute remains in effect, and thus the new statute does not allow vehicles that were made taxable for the entire year as of this past January 1 to become tax exempt beginning July 1, 2016.\(^4\)

I therefore conclude that the new tax exemption law does not apply for any portion of 2016 to qualifying vehicles that were taxable in the locality as of January 1, 2016. Those vehicles remain fully taxable for the entire remainder of calendar year 2016 during which they remain sited in the locality.\(^5\)

2. Qualifying vehicles not sited within the taxing jurisdiction until some date after January 1, 2016

Your next question is whether the new exemption law applies to a qualifying vehicle that acquires a situs within the locality some date after January 1, 2016.

Authority to pro rate taxes is provided by § 58.1-3516. That statute allows localities “to provide by ordinance for the levy and collection of personal property tax on motor vehicles . . . which have acquired a situs within such locality after the tax day for the balance of the tax year. \textit{Such tax shall be}

\(^3\) Emphasis added.

\(^4\) Because the vehicles in question became fully taxable for the entire year on January 1, interpreting the new statute so as to have these vehicles become tax exempt beginning July 1 would effectively grant a retrospective tax exemption. “Retroactive laws are not favored, and a statute is always construed to operate prospectively, unless a contrary legislative intent is manifest.” Berner v. Mills, 265 Va. 408, 413 (2003).

\(^5\) \textit{See generally} § 58.1-3516 (2013) (prescribing procedures for the pro rating of personal property taxes).
prorated on a monthly basis.” 6 The use of the word “shall” in a statute generally indicates that the procedures are mandatory, rather than permissive. 7

Because your second question involves qualifying vehicles that acquire a situs within the locality after January 1, the “tax day” statute does not apply. Rather, a locality that pro rates personal property taxes is required by the mandatory language of § 58.1-3516 to determine such a vehicle’s tax status on a pro rata basis, starting with the month the vehicle acquired a situs there. Thus, qualifying vehicles acquiring a situs within the locality after January 1, 2016 are entitled to the new tax exemption, beginning on July 1, 2016, the date the exemption became effective.

3. The Constitutional requirement of equal taxation

As discussed above, the new tax exemption law does not apply for any portion of 2016 to qualifying vehicles that were sited within the locality as of January 1, 2016, but it does apply, effective July 1, 2016, to qualifying vehicles that acquired a situs within the locality after that date. Your final question is whether this result violates the constitutional requirement of equal taxation.

The equal taxation requirement is contained in Article X, § 1 of the Constitution of Virginia:

All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . . . The General Assembly may define and classify taxable subjects.

This requirement was discussed by the Supreme Court of Virginia in Alderson v. County of Alleghany. 8 That case involved an independent city that had reverted to town status. During the transitional year, an Act of Assembly provided that city residents would have two “short tax years”—for the first half of the year, they would pay personal property taxes to the city; for the second half of the year, they would pay personal property taxes to the county and also to

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6 Emphasis added.
the town. County residents who were not within the new town would continue to have a single tax year, with taxes payable only to the county. Certain town residents asserted that this Act of Assembly was an unconstitutional imposition of unequal taxation.

In upholding the transitional taxation scheme, the Court cited an earlier decision for the proposition that “[t]he dominant purpose of [this constitutional provision] is to distribute the burden of taxation, so far as is practical, evenly and equitably.”9 The standard applied by the Court was not rigid, absolute equality of taxation, but even and equitable distribution of tax burdens “so far as is practical.”10 The Court in Alderson also noted, “It is clear that the determination of situs and ‘tax day’ is within the power of the General Assembly.”11 Here, the General Assembly has determined that ‘tax day’ for determining tax status is January 1.

The conclusion I have reached for vehicles sited in a locality as of January 1 is mandated by § 58.1-3515. The different conclusion I have reached for vehicles acquiring a situs in a locality after that date is mandated by § 58.1-3516. All statutes enacted by the General Assembly are presumed to be constitutional.12 Because the standard for uniformity of taxation is not rigid or absolute, but must be applied only “so far as is practical,” I conclude that the different outcomes imposed by these two different statutes do not violate the constitutional requirement of uniformity of taxation.

CONCLUSION

Accordingly, it is my opinion that the new tax exemption law does not apply for any portion of 2016 to qualifying vehicles that were taxable in the locality as of January 1, 2016. Those vehicles remain fully taxable for the entire portion of this year during which they remain within the locality. However, the exemption applies beginning July 1, 2016 to any qualifying vehicle that acquired

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9 Id. at 339.
10 Id.
11 Id. at 340. See also R. Cross, Inc. v. City of Newport News, 217 Va. 202 (1976) (holding that it was not unconstitutional unequal taxation for a locality to assess car rental businesses at a different and higher effective tax rate than other tangible personal property).
a situs within the locality on some date after January 1, 2016. Applying the new exemption law in this manner does not violate the constitutional requirement of equal taxation.

**OP. NO. 15-035**

**TAXATION: MISCELLANEOUS TAXES**

If a beer growler is “factory sealed,” meaning that it is sealed and sold by a brewery, and if it is sold for off-premises consumption, then state law makes it exempt from local excise or meals taxes. Whether any particular sale of a growler satisfies these conditions is a factual determination to be made by the Commissioner of the Revenue or other appropriate tax official. In making this determination, any doubt must be resolved against the exemption and in favor of taxation.

**THE HONORABLE DOUGLAS S. WALDRON**

**COMMISSIONER OF THE REVENUE, CITY OF MANASSAS**

**SEPTEMBER 1, 2016**

**ISSUE PRESENTED**

You ask whether growlers—reusable beer containers with hand-closed ceramic stoppers—are considered factory-sealed containers and thus exempt from the excise tax imposed by the City of Manassas Code of Ordinances § 110-282(B)(3). Respecting the longstanding practice of Attorneys General, I decline to address the interpretation of a local ordinance or the fact-specific application of such an ordinance. I address only the question of the circumstances under which growlers are exempt as a matter of state law from local taxation.

**APPLICABLE LAW AND DISCUSSION**

Section 58.1-3840 of the *Code of Virginia* authorizes a locality to impose an excise tax on various items, including meals. However, the meals tax may not be imposed on “alcoholic beverages sold in factory sealed containers and purchased for off-premises consumption.”1 Virginia Alcoholic Beverage Control

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Board (the “ABC Board”) regulations define a “growler” as “a reusable glass, ceramic, or metal container having a capacity of not more than 64 fluid ounces (or two liters if a metric-sized container) that has a resealable closure.” For application of the excise tax exemption at § 58.1-3840(B), the question of whether the resealing of a growler is “factory sealed” is determinative. However, “factory sealed” is not defined in the Code of Virginia or in regulations of the ABC Board.

“Ordinarily, when a particular word in a statute is not defined therein, a court must give it its ordinary meaning.” The ordinary meaning of “factory-sealed container” is simply a container sealed in a factory. “Factory” has been defined as “a building or group of buildings with facilities for the manufacture of goods,” “a building or group of buildings where products are made,” and “a building or buildings where people use machines to produce goods.” The Standard Industrial Classification of the United States Department of Labor describes “manufacturing” as “establishments engaged in the mechanical or chemical transformation of materials or substances into new products. These establishments are usually described as plants, factories, or mills . . . .” A malt liquor brewing company has been characterized without question as being a manufacturer by the Supreme Court of Appeals of Virginia.

For beer manufacturing, the manufacturing establishment or “factory” is the brewery. Thus, a growler is “factory-sealed”—and its contents thereby exempt from local excise taxes—only if it is sealed and sold by a brewery. If it

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2 See 3 VA. ADMIN. CODE § 5-40-30(B).
8 Virginia Brewing Co. v. Commonwealth, 113 Va. 145, 146 (1912).
is sealed and sold by any other business, it may be “sealed,” but it is not “factory-sealed,” and therefore, not exempt from local taxation.

Whether a growler sold at a particular location for off-premises consumption is “factory-sealed” and tax-exempt is thus a factual determination. Attorneys General historically have declined to render official opinions on specific factual matters.9 I do note that, in making this determination, Virginia law requires that “[i]f there is any doubt concerning the exemption, [such] doubt must be resolved against the party claiming the exemption.”10

CONCLUSION

Accordingly, it is my opinion that if a growler is factory sealed, meaning in this context that it is sealed and sold by a brewery, and if it is sold for off-premises consumption, then state law makes it exempt from local excise or meals taxes. Whether any particular sale of a growler satisfies these conditions is a factual determination to be made by the Commissioner of the Revenue or other appropriate tax official. In making this determination, any doubt must be resolved against the exemption and in favor of taxation.

OP. NO. 15-035

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES

The Virginia Compensation Board is required to reimburse local correctional facilities for the medical costs of all inmates who are “State Responsible” while those inmates are in the temporary custody of a local correctional facility, beginning on the sixty-first day after notice of the commitment order is provided.

THE HONORABLE C.T. WOODY JR.
SHERIFF, CITY OF RICHMOND

SEPTEMBER 1, 2016


You ask whether the Virginia Compensation Board (the “Compensation Board”) must reimburse sheriffs, jail superintendents, or localities for unbudgeted medical costs of inmates who are “State Responsible” as defined in the Budget Appropriations Act. You ask this question because the Compensation Board’s Policy and Procedure Manual provides that the Compensation Board will only reimburse the medical costs for inmates who are “State Responsible” and more than ninety days past their final sentence date.1

**APPLICABLE LAW AND DISCUSSION**

All correctional facilities, whether local or state, must provide medical care for inmates in accordance with law.2 For local inmates, § 53.1-126 of the Code of Virginia requires sheriffs and jail superintendents to provide necessary medical services to inmates.3 For state inmates, § 53.1-32(A) similarly requires state correctional facilities “to provide . . . medical . . . care and treatment” for “prisoners committed or transferred thereto.”4 These are costs of incarceration.

There are two circumstances under which a state inmate may be housed in a local correctional facility. First, § 53.1-21 of the Code allows for certain inmates who are confined in a state or local correctional facility to be transferred to another state or local correctional facility upon the direction of the Director of the Department of Corrections.5 Second, § 53.1-20 provides that a convicted person who is to be confined in a state facility is to be transferred to the state system within sixty days of transmission of the final sentencing order to the Director of the Department of Corrections,6 subject to the ability of the

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1 COMPENSATION BOARD POLICY & PROCEDURE MANUAL, CB Form-20 (2014).
6 “Persons convicted of felonies committed on or after January 1, 1995, and sentenced to the Department or sentenced to confinement in jail for a year or more shall be placed in the custody of
Governor to restrict admission to the state system in the event of a threat to public safety.\textsuperscript{7}

Section 53.1-20.1 requires the Department of Corrections to compensate local jails for the cost of incarceration “as provided in the general appropriation act,” and it fixes a specific time at which that financial responsibility begins:

If the Director [of the Department of Corrections] is unable to accommodate in a state correctional facility any convicted felon sentenced to the Department for a felony committed before January 1, 1995, whose sentence totals more than two years or who is convicted of a felony committed on or after January 1, 1995, and who is required to serve a total period of one year or more in a state correctional facility, \textit{the Department of Corrections shall compensate local jails for the cost of incarceration as provided for in the general appropriation act beginning on the sixty-first day following the date of mailing by certified letter or electronic transmittal by the clerk of the committing court to the Director of the final order}.\textsuperscript{8}

The general appropriations act,\textsuperscript{9} in turn, provides funding for the state to compensate localities for unbudgeted medical costs incurred by local correctional facilities for state-responsible inmates.\textsuperscript{10}
In summary, § 53.1-20.1 imposes financial responsibility on the state beginning “on the sixty-first day” following transmission of the commitment order, thus making the local jail responsible for medical costs for the first sixty days. The Compensation Board’s policy of imposing that responsibility on the state beginning on the ninety-first day, thus making the local jail responsible for medical costs for the first ninety days, is inconsistent with this statute. A state agency has no authority to adopt a policy inconsistent with a statute.11

CONCLUSION

For the foregoing reasons, it is my opinion that the Compensation Board is required to reimburse local correctional facilities for the medical costs of all inmates who are “State Responsible” while those inmates are in the temporary custody of a local correctional facility, beginning on the sixty-first day after notice of the commitment order is provided.

OP. NO. 16-018

LIBRARIES: LOCAL AND REGIONAL LIBRARIES

LIBRARIES: STATE AND FEDERAL AID

LIBRARIES: STATE LIBRARY AND LIBRARY BOARD

Section 42.1-35 of the Code of Virginia, which requires that a local library board comprised of citizens appointed by the local governing body shall have management and control of the local library, is applicable to Roanoke County.

THE HONORABLE SANDRA GIOIA TREADWAY
LIBRARIAN OF VIRGINIA

SEPTEMBER 8, 2016

11 “Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of this Commonwealth.” VA. CODE ANN. § 1-248 (2014). “Regulations [of state agencies] . . . may not conflict with the authorizing statute.” Manassas Autocars, Inc. v. Couch, 274 Va. 82, 87 (2007).
ISSUE PRESENTED

You ask whether the Roanoke County Public Library (the “County Library”) is subject to § 42.1-35 of the Code of Virginia, which requires that a local library board comprised of citizens appointed by the local governing body have management and control of the local library (i.e., that it be a “managing board” of the library).

BACKGROUND

The Library Board of the Library of Virginia (the “State Library Board”) is authorized to award grants to local libraries, provided they qualify under standards set by that body.1 One such standard is that a local library “must be organized under the appropriate section of the Code of Virginia.”2 If that standard is not met, the State Library Board may withhold funding. Thus, the question of whether the County Library must have a managing board appointed by the local governing body affects its eligibility for this type of state funding.

The question you pose was first raised by state officials in 1991, and the county responded by asserting that the county charter, a special act of the General Assembly enacted in 1986,3 prevails over the statute in question, which is a general law. The county interpreted the county charter as placing the ability to create a library department with the County Board of Supervisors, and as placing governing responsibility over all county departments—including the library department—with the County Administrator. For that reason, the county concluded that it was in compliance with special state law (its charter) and thus exempt from the general statute requiring a managing library board made up of citizens. The issue was raised again five years later, in 1996, and the county

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1 See VA. CODE ANN. § 42.1-48 (2013) (“In order to encourage the maintenance and development of proper standards, including personnel standards, and the combination of libraries or library systems into larger and more economical units of service, grants of state aid from funds available shall be made by the Board to any free public library or library system which qualifies under the standards set by the Board.”).


responded in the same way. The State Library has now raised the issue for a third time, and the county’s position remains the same.

**APPLICABLE LAW AND DISCUSSION**

The statute in question, § 42.1-35 of the *Code of Virginia*, provides for the creation of local library boards whose members are to be a managing board:

> The management and control of a free public library system shall be vested in a board of not less than five members or trustees. They shall be appointed by the governing body, chosen from the citizens at large with reference to their fitness for such office.\(^4\)

Several localities are exempted from the requirement to create a managing board by the following statute, § 42.1-36:

> The formation, creation or continued existence of boards shall in nowise be considered or construed in any manner as mandatory upon any city or town with a manager, or upon any county with a county manager, county executive, urban county manager or urban county executive form of government or the Counties of Chesterfield and Shenandoah, by virtue of this chapter.\(^5\)

The exemption statute does not, however, apply to Roanoke County: it is not one of the named exempt localities, and it has a county administrator form of government, which is not one of the named exempt forms of government.\(^6\)

> The county takes the position that it need not create a managing library board because of provisions in its charter providing that the Board of Supervisors “shall provide for the performance of all governmental functions of the county and to that end shall provide for and establish all departments of

\(^4\) VA. CODE ANN. § 42.1-35 (2013) (emphasis added).

\(^5\) VA. CODE ANN. § 42.1-36 (2013).

\(^6\) As to the various forms of county government referenced in this statute, counties with a “county manager” are Henrico and Arlington; counties with a “county executive” are Albemarle and Prince William; there are no counties with an “urban county manager”; and the sole county with an “urban county executive” is Fairfax County. Thus, Roanoke County, which has a county administrator, is not among the counties made exempt under this statute.
government that it deems necessary,” 7 and that “the county administrator [in general] shall appoint each superintendent or department head of each county department.” 8 According to the county, these provisions of the charter effectively create an exemption from § 42.1-35, such that the county is not required to establish a library managing board.

The legal error with this position is that laws empowering local governing bodies to establish departments are common, 9 as are laws giving the administrative head of government power to manage them. 10 The Supreme Court of Virginia has held that “specific provisions of [a] statute . . . cannot be regarded as having been repealed or modified by the general provisions of [a] charter.” 11 Here, the specific statutory requirement of a local library managing board “cannot be regarded as having been repealed or modified” by charter provisions authorizing the Board of Supervisors to establish departments and the County Administrator to manage them. 12

7 CHARTER FOR THE COUNTY OF ROANOKE, VA., § 3.02.
8 Id. at § 4.01. While the Roanoke County Code is subordinate to § 42.1-35 of the Code of Virginia, and thus could not modify or create an exemption to its requirement of having a managing local library board, I do note that—like the County Charter—the County Code does not address the characteristics of the County Library Board, or even mention it.
9 “Every locality shall provide for all the governmental functions of the locality, including . . . the organization of all departments . . . .” VA. CODE ANN. § 15.2-1500 (2012). “A municipal corporation may provide for the organization, conduct and operation of all departments, offices, boards, commissions and agencies of the municipal corporation, subject to such limitations as may be imposed by the charter or otherwise by law.” VA. CODE ANN. § 15.2-1107 (2012).
10 “Every chief administrative officer shall be the administrative head of the local government in which he is employed. He shall be responsible to the governing body for the proper management of all the affairs of the locality which the governing body has authority to control.” VA. CODE ANN. § 15.2-1541 (2012).
11 City of Roanoke v. Land, 137 Va. 89, 92-93 (1923) (“[W]e are of [the] opinion that the specific provisions of the statute . . . cannot be regarded as having been repealed or modified by the general provisions of the charter . . . .”) (holding that local ordinances enacted under general charter powers are void when they conflict with a specific statute); 2001 Op. Va. Att’y Gen. 161, 162-163; 1978-1979 Op. Va. Att’y Gen. 192, 193.
12 If allowing local governing bodies to establish departments and authorizing the chief administrative officer to manage them were deemed to create an exemption from the governing board statute (Section 42.1-35), then the vast majority—if not all—of Virginia counties, cities, and towns would be exempt from the general requirement of having a managing library board, to the
I find nothing else in the county charter showing that the General Assembly intended for it to exempt Roanoke County from the statutory requirement of having a governing library board.\(^{13}\)

I note further that when the charter was enacted in 1986, the General Assembly could easily have amended the exemption statute to include either “Roanoke County” or “any locality having the County Administrator form of government.” The General Assembly has added certain localities to this statute since it was first enacted in 1970.\(^{14}\) Its failure to do so in 1986 or subsequently for Roanoke County is a clear indication that it has never intended to exempt the county from the statutory requirement of having a managing library board.

I therefore conclude that the county charter’s general provisions regarding the power of the governing body to create departments and the power of the chief administrative officer to manage them, do not exempt the county from the specific statutory requirement of creating a managing library board appointed by the Board of Supervisors, as required by § 42.1-35. This conclusion is supported by the fact that the General Assembly has not amended § 42.1-36 so as to exempt the county from the requirement.

CONCLUSION

For the reasons stated, it is my opinion that § 42.1-35 of the Code of Virginia, which requires that a local library board be a managing board whose

\(^{13}\) The charter does contain a “grandfather clause” that continues the existence of then-existing “boards, committees, commissions, and authorities.” CHARTER FOR THE COUNTY OF ROANOKE, VA., § 18.07. While this clause does continue the existence of the library board, which had been previously established by Resolution No. 2474, “Establishing a plan of government for the County of Roanoke from and after January 1, 1980” (Minutes of a Jan. 2, 1980, meeting of the Roanoke County Board of Supervisors), the mere continued existence of the library board does not, without more, make the county exempt from the “managing board” statute in question.

\(^{14}\) Section 42.1-36, the “exemptions statute,” was first enacted in 1970. At that time it applied only to “any city or town with a manager, or upon any county with a county manager, county executive, urban county manager or urban county executive form of government.” 1970 Va. Acts ch. 606. In 1978, it was amended to include Chesterfield County. 1978 Va. Acts ch. 6. It was amended again in 2002 by adding Shenandoah County. 2002 Va. Acts ch. 111.
members are appointed by the local governing body, is applicable to Roanoke County.

**Op. No. 15-083**

**Commonwealth Public Safety: Department of Criminal Justice Services**

**Constitution of Virginia, Art. IV, § 12: Laws Embracing More than One Object**

**Criminal Procedure: Conservators of the Peace and Special Policemen**

The 2015 amendment to § 9.1-101 [2015 Va. Acts ch. 195] effectively confers law-enforcement authority to employees of authorized private police departments, but only if those employees comply with all applicable requirements of the Department of Criminal Justice Services. Further, this amendment does not violate the prohibition in Article IV, § 12 of the Virginia Constitution against laws embracing more than one object.

**The Honorable David J. Toscano**
**Member, Virginia House of Delegates**

**September 9, 2016**

**Issues Presented**

You ask generally whether the General Assembly may delegate law-enforcement authority to persons who meet the qualification and certification requirements for law-enforcement officers, but are employees of a private corporation.

More specifically, you ask whether Chapter 195 of the 2015 Acts of Assembly, which changed the definition of “law-enforcement officer” under § 9.1-101 of the Code of Virginia and added a definition of “private police department,” was sufficient to delegate law-enforcement authority to private police departments and their employees, or if the General Assembly must expressly delegate that authority by a separate statute.
Finally, you ask whether construing Chapter 195 as both defining and delegating law-enforcement authority to private police departments would mean that the act improperly embraces more than one object, in violation of Article IV, § 12 of the Virginia Constitution.

APPLICABLE LAW AND DISCUSSION

In response to your general question about whether the General Assembly may delegate law-enforcement authority to employees of private corporations, long-standing precedent of the Supreme Court of Virginia confirms that the General Assembly has the authority to delegate specific law-enforcement authority to employees of private businesses.¹

A response to your specific question whether the 2015 amendment to § 9.1-101 effectively granted law-enforcement authority to private police departments and their employees requires consideration of the process leading up to enactment of the amendment, as “[c]ourts look to a statute’s contemporary history and historical background as aids to interpretation.”²

For decades, the Virginia Department of Criminal Justice Services (“DCJS”) has recognized nine “private police departments” in Virginia.³ The established practice for granting law-enforcement powers to the officers of those


³ VIRGINIA STATE CRIME COMMISSION, “Special Conservators of the Peace and Private Police Departments,” at 3 (2014), http://vscc.virginia.gov/SCOP.pdf (last viewed Sept. 9, 2016) (naming Aquia Harbor Police Department, Babcock & Wilcox Police Department, Bridgewater Airpark Police Department, Carillion Clinic Police and Security Services Department, Kings Dominion Park Police Department, Kingsmill Police Department, Lake Monticello Police Department, Massanutten Police Department, and Wintergreen Police Department). These nine private police departments were officially recognized by the General Assembly in an enactment clause of Chapter 224 of the 2015 Acts of Assembly (clause 3).
police forces has been for the officers to be designated “special conservators of the peace” (“SCOPs”) by order of a circuit court. The General Assembly has empowered circuit courts to appoint SCOPs with “all the powers, functions, duties, responsibilities and authority of any other conservator of the peace” within their jurisdictions, including the power to arrest. Nevertheless, SCOPs are not “law-enforcement officers” who, until recently, were defined solely as officers of certain specified governmental offices, agencies, and political subdivisions.

Some key differences between SCOPs and “law-enforcement officers” are that the minimum training requirements for law-enforcement officers are higher, and only law-enforcement officers (through their agencies) may be parties to mutual aid agreements with local law-enforcement agencies, contribute to the funding of regional criminal justice training academies, and have access to the Virginia State Police Criminal Information Network.

In a 2013 informal opinion, this Office concluded that DCJS could not legally recognize the nine private police departments as law-enforcement agencies without express legislative authority. The opinion raised concern in the law-enforcement community, where the nine departments had previously enjoyed much the same status as governmental law-enforcement agencies.

In the following 2014 legislative session, amid questions raised by the opinion and other persons regarding the scope of authority and jurisdiction of SCOPs employed by the private entities, the House of Delegates Militia and Police Committee requested that the Secretary of Public Safety and Homeland Security convene a task force to examine these issues. Later in 2014, the Virginia State Crime Commission endorsed draft legislation regarding private police departments following review of the findings and recommendations of the Secretary’s Task Force and presentations by the Virginia Association of Chiefs of Police, which sought to maintain the historically recognized status of the private departments as operational police departments.

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Against that background, and as recommended by the Crime Commission, the 2015 General Assembly enacted Chapter 195, now codified as an amendment to § 9.1-101 of the *Code of Virginia*. The 2015 amendment broadened the definition of “law-enforcement officer” so that it now includes certain employees of private police departments:

“Law-enforcement officer” means any full-time or part-time employee of a police department or sheriff’s office which is a part of or administered by the Commonwealth or any political subdivision thereof, or any full-time or part-time employee of a private police department, and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth [. . . .][8]

The 2015 amendment also added a definition of the term “private police department”:

“Private police department” means any police department, other than a department that employs police agents under the provisions of § 56-353, that employs private police officers operated by an entity authorized by statute or an act of assembly to establish a private police department. No entity is authorized to operate a private police department or represent that it is a private police department unless such entity has been authorized by statute or an act of assembly. . . . Any person employed as a private police officer pursuant to this section shall meet all requirements, including the minimum compulsory training requirements, for law-enforcement officers pursuant to this chapter. . . . Any private police department in existence on January 1, 2013, that was not otherwise established by statute or an act of assembly and whose status as a private police department was recognized by the Department at that time is hereby validated and may continue to operate as a private police department, provided it complies with the requirements set forth herein.[9]

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[9] *Id.*; see also 2016 Va. Acts ch. 618 (further amending the definition to include a “successor in interest” to an authorized private police department).
Enactment Clause 3 of the 2015 amendment specifically identifies the nine private police departments that were in existence on January 1, 2013, and recognized by the Department.

The enactment clause and the definitions quoted above—and the context in which they were enacted—are critical to a legal analysis of the questions you have asked.10

Here, the Crime Commission noted a study by the 2014 Task Force disclosing that employees of the nine private police departments in question received training that was “practically identical” to the training of government law-enforcement officers, even though their only source of law-enforcement authority was their status as SCOPs, for whom lesser training and qualification standards applied. In addition, this Office advised that those officers could not qualify as “law-enforcement officers” without legislation authorizing that status. The Crime Commission proposed the 2015 amendment to address that lack of authorizing legislation.

It was the intent of the General Assembly in enacting the 2015 amendment to give law-enforcement authority to qualified officers of authorized private police departments, thus filling a void noted by the 2014 Task Force and the Crime Commission. The justification and need for doing so were set forth in the report of the Crime Commission.11 The principal remaining question is whether the language of the 2015 amendment fulfilled this legislative intent. “When construing a statute, our primary objective is to ascertain and give effect to legislative intent, as expressed by the language used in the statute.”12

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10 There are a number of other requirements and limitations set for private police departments. They are not relevant to the questions you have asked. In the interest of brevity, they will not be discussed here.

11 “Recognizing the nine private police departments as a distinct category would ensure that they remain distinguishable from private security businesses and corporations that employ SCOPs. It was requested that the VACP [Virginia Association of Chiefs of Police] provide possible legislation for the Crime Commission to consider at its December meeting. . . . The Crime Commission voted unanimously to endorse the VACP proposed legislation.” VIRGINIA STATE CRIME COMMISSION, supra note 3, at 5-6.

12 Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425 (2012) (internal quotation marks and citation omitted).
Prior to the 2015 amendment, § 9.1-101 defined “law-enforcement officer” as a qualified person with a local police department or sheriff’s office, or with any of several different governmental entities. For each of those governmental entities, there was a separate statute granting law-enforcement powers. However, when the 2015 amendment added certain employees of private police departments to the definition of “law-enforcement officer,” it did not enact a separate statute comparable to those provided for the governmental entities. Instead, there is language in the 2015 amendment itself (i) describing the responsibilities of certain employees of a private police department who are deemed law-enforcement officers: specifically “any full-time or part-time employee of a private police department . . . who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth,” and (ii) expressly authorizing the nine private police departments to “continue to operate as . . . private police department[s].”

This descriptive language in the 2015 amendment broadened the definition of the term “law-enforcement officer” to include any employee of a private police department “who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth.” That language fairly describes law-enforcement authority. While the language could be interpreted as merely describing certain employees of private police departments (namely, those with law-enforcement powers), it could also be interpreted as granting law-enforcement authority to private police officers, especially when coupled with the express authorization of the nine private police departments to continue to operate as private police departments.

13 The nine entities, and their separate statutes granting law enforcement powers are as follows: special agents of the Department of Alcoholic Beverage and Control (VA. CODE ANN. § 4.1-105); railroad police agents (VA. CODE ANN. § 56-353); Virginia Marine Police officers (VA. CODE ANN. § 28.2-106); conservation police officers of the Department of Game and Inland Fisheries (VA. CODE ANN. § 29.1-205); Virginia State Lottery investigators (VA. CODE ANN. § 58.1-4006); commissioned conservation officers of the Department of Conservation and Recreation (VA. CODE ANN. § 10.1-117); certain Department of Motor Vehicles enforcement officers (VA. CODE ANN. § 46.2-217); certain animal protection police officers (VA. CODE ANN. § 15.2-632); and certain campus police officers (VA. CODE ANN. § 23-234).


15 Id.
I conclude that this language in the 2015 amendment does, in fact, grant law-enforcement powers to qualified employees of private police departments.

To conclude otherwise, *i.e.*, that the 2015 amendment merely *described* those employees without *empowering* them—where there is no other statute expressly empowering them—would mean that the 2015 amendment describes a class of persons that does not exist,¹⁶ and that the express authorization of the nine private police departments to continue to operate as private police departments would be nonsensical. The rules of statutory interpretation argue against reading a legislative enactment in a manner that will make a portion of it useless or absurd.¹⁷

The final remaining issue you have raised is whether the 2015 amendment is unconstitutional because it embraces more than one object. The applicable provision in the Constitution of Virginia is Article IV, § 12, which states, in relevant part, “[n]o law shall embrace more than one object, which shall be expressed in its title.” The Supreme Court of Virginia has long maintained that the single-object rule is “to be liberally construed and treated, so as to uphold the law, if practicable.”¹⁸ “[M]atters germane to the object, made manifest by its title, may be included. Those things are germane which are allied, relative or appropriate. Its construction must be liberal . . . .”¹⁹ Here, the 2015 amendment reasonably may be construed as embracing only one object, namely the law-enforcement powers of private police departments and their employees. For that reason, I conclude that it does not violate the constitutional ban on legislation embracing more than one object.

CONCLUSION

For the foregoing reasons, it is my opinion that the 2015 amendment effectively confers law-enforcement authority to employees of authorized private police departments, but only if those employees comply with all

¹⁶ Such an interpretation would also bring the 2015 amendment into direct conflict with § 19.2-13(A), which states that SCOPs are not law-enforcement officers within the definition of a “law-enforcement officer” under § 9.1-101.


¹⁹ Commonwealth v. Dodson, 176 Va. 281, 305 (1940).
applicable requirements of the Department of Criminal Justice Services. It is my further opinion that the 2015 amendment does not violate Article IV, § 12 of the Virginia Constitution.

**OP. NO. 16-054**

**CONSTITUTION OF VIRGINIA, ART. II, § 8: ELECTORAL BOARDS; REGISTRARS AND OFFICERS OF ELECTION**

**ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION**

A member of an electoral board cannot also serve as a part-time town attorney.

If a member of an electoral board accepts the position of part-time town attorney, by the acceptance of that position she vacates her membership on the electoral board and her seat becomes vacant.

Decisions made by an electoral board during the time of a vacancy due to a member’s acceptance of the position of part-time town attorney are valid under the *de facto* officer doctrine.

**THE HONORABLE JULIA H. SICHL**
**COMMONWEALTH’S ATTORNEY, WESTMORELAND COUNTY**

**SEPTEMBER 26, 2016**

I am in receipt of your letter of September 14, 2016, in which you ask three questions regarding the status of an individual who, while serving on the electoral board of a locality, has accepted a position as a part-time town attorney. In accordance with the Attorney General’s authority to issue official opinions as provided by § 2.2-505 of the *Code of Virginia*, I will respond to these questions in the order in which they are set forth in your September 14 letter.

**Question 1:** Can a member of an electoral board also serve as a part-time town attorney?

Both the Constitution of Virginia and the *Code of Virginia* establish limitations on membership on an electoral board. Article II, § 8 of the Constitution of Virginia provides, in relevant part:
No person, nor the deputy of any person, who is employed or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or general registrar.

The Code of Virginia restates this constitutional prohibition on dual office-holding in § 24.2-119.

Prior opinions of this Office have consistently interpreted this language to proscribe public officeholders from concurrently serving as a member of an electoral board.1 The office of town attorney, established by § 15.2-1542 of the Code of Virginia, is undoubtedly a public office.2 As a town attorney receives pecuniary gain in return for service as a public official, a town attorney is barred from simultaneous membership on an electoral board by operation of Article II, § 8 of the Constitution of Virginia and § 24.2-119 of the Code of Virginia.3 As a result, and in response to your first question, it is my opinion that a member of an electoral board cannot also serve as a part-time town attorney.

**Question 2:** If a member of the electoral board is not allowed to serve in both capacities, is the position considered vacant upon the acceptance of the conflicting position?

It is a long-held principle of Virginia law that the acceptance of a second incompatible position automatically vacates a prior incompatible position.4

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3 Prior opinions of this Office have also concluded that “[this] proscription applies regardless of the locality in which” a general registrar or electoral board member would be employed. 1982-1983 Op. Va. Att’y Gen. 236, 239.

4 Shell v. Cousins, 77 Va. 328, 331 (1883) (“The acceptance of an incompatible office actually vacates any other office which the officer may hold. The rule has been stated in broad and
Accordingly, if a member of an electoral board accepts the position of part-time town attorney, by the acceptance of that position she vacates her membership on the electoral board. Thus, I answer your second question in the affirmative; an individual’s seat on an electoral board becomes vacant upon that individual’s acceptance of the position of part-time town attorney.

**Question 3:** Are decisions made during the time of the vacancy valid?

This Office has previously concluded that where a member of a local governmental body vacates his position by acceptance of an incompatible office, the *de facto* officer doctrine applies to official acts taken by such an individual after he has vacated the first position.\(^5\) As “[v]acation of an office by qualification in a second incompatible office is within the *de facto* officer doctrine,”\(^6\) the decisions made by an electoral board following a member’s vacancy by acceptance of an incompatible office are valid decisions despite this vacancy. Accordingly, it is my opinion that decisions made by an electoral board during the time of a vacancy due to a member’s acceptance of the position of part-time town attorney are valid.

**OP. NO. 16-038**

**CONSTITUTION OF VIRGINIA, ART. II, § 3: FRANCHISE AND OFFICERS – METHOD OF VOTING**

**ELECTIONS: ELECTION OFFENSES GENERALLY; PENALTIES**

**ELECTIONS: THE ELECTION**

unqualified terms that the acceptance of an incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed . . . .”). See also 1982-1983 Op. Va. Att’y Gen. 229, 230 (“[T]he very acceptance of the part-time public employment in each instance causes the electoral board position to become vacant.”).

\(^5\) See 1981-1982 Op. Va. Att’y Gen. 294, 295 (“Under the *de facto* officer doctrine, the official acts of a public officer are valid even though the individual inadvertently vacates the office and continues to perform the duties of the office.”).

\(^6\) *Id.*
Regulatory language in 1 VA. ADMIN. CODE §§ 20-60-30 through 20-60-50 permitting voters to use cameras or audio or visual recording devices inside the polling place does not conflict with state law.

A voter is not permitted to use cameras or audio or visual recording devices inside the polling place to communicate with individuals outside the polling place in violation of § 24.2-1006 of the Code of Virginia.

Pursuant to 1 VA. ADMIN. CODE §§ 20-60-30 through 20-60-50, voters shall be permitted to take photographs or pictures within the polling place, where doing so does not constitute a violation of Title 24.2 of the Code of Virginia.

MR. WILLIAM A. BELL JR.
SECRETARY, ISLE OF WIGHT COUNTY ELECTORAL BOARD

MR. ROBIN R. LIND
SECRETARY, GOOCHLAND COUNTY ELECTORAL BOARD

SEPTEMBER 29, 2016

ISSUES PRESENTED

You have presented three questions concerning regulatory amendments adopted by the State Board of Elections (the “Board”). These amendments modify 1 VA. ADMIN. CODE §§ 20-60-30 through 20-60-50, and your questions are limited to consideration of the following language: “Voters are permitted to use cameras or audio or visual recording devices inside the polling place.”

Specifically, you have asked the following:

1. Whether the cited regulatory language conflicts with state law;

2. Whether voters shall “be permitted to use cameras or audio or visual recording devices inside the polling place which permits them to be in communication with ‘an other’ outside the polling place without signing a request, and without having ‘an other’ sign a statement . . . and [having] an Officer of Election record the name of the voter and the name and
address of the person assisting him” (emphasis in original); and

3. Whether voters shall “be permitted to take photographs or pictures of themselves, or of fellow voters, or make photographic copies of their ballot, within the polling place.”

BACKGROUND

You relate that the Board adopted regulatory amendments to 1 VA. ADMIN. CODE §§ 20-60-30 through 20-60-50 at its June 28, 2016, meeting. These amendments include the language cited above (“Voters are permitted to use cameras or audio or visual recording devices inside the polling place.”). You further represent that this language was not previously incorporated in the Virginia Administrative Code.

APPLICABLE LAW AND DISCUSSION

1. Whether the cited regulatory language conflicts with state law

The General Assembly has prohibited certain activities within polling places. Sections 24.2-604 and 24.2-607 of the Code of Virginia address this issue. Specifically,

[i]t shall be unlawful for any authorized representative, voter, or any other person in the room to (i) hinder or delay a qualified voter; (ii) give, tender, or exhibit any ballot, ticket, or other campaign material to any person; (iii) solicit or in any manner attempt to influence any person in casting his vote; (iv) hinder or delay any officer of election; (v) be in a position to see the marked ballot of any other voter; or (vi) otherwise impede the orderly conduct of the election.[1]

Subsection 24.2-604(E) also authorizes officers of election to “require any person who is found by a majority of the officers present to be in violation of

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this section to remain outside of the prohibited area” surrounding the entrances to the polling place.

Subsection 24.2-604(C) authorizes the presence of authorized representatives of political parties or candidates within polling places, and these authorized representatives shall be permitted “to use a handheld wireless communications device.” However, authorized representatives “shall not be allowed to use such a device to capture a digital image inside the polling place or central absentee voter precinct,” and “[t]he officers of election may prohibit the use of cellular telephones or other handheld wireless communications devices if such use will result in a violation of subsection A or D [of § 24.2-604] or § 24.2-607.”

Representatives of the news media may also enter polling places on election day, and are permitted “to visit and film or photograph inside the polling place for a reasonable and limited period of time while the polls are open.” However, the Code of Virginia specifies that the news media “shall not film or photograph any person who specifically asks the media representative at that time that he not be filmed or photographed”; “shall not film or photograph the voter or the ballot in such a way that it divulges how any individual voter is voting”; and “shall not film or photograph the voter list or any other voter record or material at the precinct in such a way that it divulges the name or other information concerning any individual voter.”

As this statutory language demonstrates, the Code of Virginia expressly authorizes the media to film or photograph the ballot, so long as a ballot is not filmed or photographed in a way that divulges a voter’s vote. The Code of Virginia also prohibits authorized representatives’ use of “handheld wireless communication devices” to capture digital images within a polling place. The Code of Virginia is silent, however, as to the use of such devices by individual voters at polling places. As the General Assembly has prescribed limits for the news media’s ability to film or photograph within polling places, and has proscribed authorized representatives’ use of handheld wireless devices “to capture a digital image” in polling places, but has not prohibited voters’ use of

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2 VA. CODE ANN. § 24.2-604(J).
3 VA. CODE ANN. § 24.2-604(J)(ii) through (iv).
“cameras or audio or visual recording devices” within a polling place, the cited regulatory language does not conflict with state law.  

2. Whether voters “shall ‘be permitted to use cameras or audio or visual recording devices inside the polling place which permits them to be in communication with ‘an other’ outside the polling place without signing a request, and without having ‘an other’ sign a statement . . . and [having] an Officer of Election record the name of the voter and the name and address of the person assisting him”

Article II, § 3 of the Constitution of Virginia provides that “[s]ecrecy in casting votes shall be maintained, except as provision may be made for assistance to handicapped voters, but the ballot box or voting machine shall be kept in public view and shall not be opened, nor the ballots canvassed nor the votes counted, in secret.”

Sections 24.2-649 and 24.2-1006 of the Code of Virginia address the manner in which certain voters may receive assistance while voting. As provided by § 24.2-649(B), “[a]ny qualified voter who requires assistance to vote by reason of physical disability or inability to read or write may, if he so requests, be assisted in voting.”

To the extent that the Code of Virginia prohibits the use of photography by certain classes of individuals, but does not prohibit voters from such behavior, principles of statutory construction do not permit the conclusion that photography by voters is proscribed. When the legislature omits language from one statute that it has included in another, courts may not construe the former statute to include that language, as doing so would ignore “an obvious manifestation of a contrary intention” of the legislature. See Halifax Corp. v. Wachovia Bank, 268 Va. 641, 654 (2004).

Section 24.2-649 also provides for two other methods of voter assistance: under § 24.2-649(A), a voter who is age 65 or older or physically disabled may vote outside of, but within 150 feet of the entrance to, the polling place; under § 24.2-649(C), a voter who requires assistance in a language other than English may receive assistance from an officer of election, a volunteer, or a candidate interpreter.

Section 24.2-649(B) provides that an officer of election or other individual providing this assistance shall not enter the booth with the voter unless (i) the voter signs a request stating that he requires assistance by reason of physical disability or inability to read or write and (ii) the officer of election or other person signs a statement that he is not the voter’s
24.2-1006 of the *Code of Virginia* provides that “[e]xcept as provided by § 24.2-649, no person shall directly or indirectly advise or assist any voter as to how he shall cast his ballot after the voter has entered the prohibited area at the polls,” and provides penalties for violations of this section. Accordingly, only the specific methods of voter assistance set out in § 24.2-649 are permitted under Virginia law.

The situation described in your second question, involving the use of a camera or audio or visual recording device to communicate with “an other” outside of the polling place for assistance in voting, is not a method of voter assistance permitted under § 24.2-649. Accordingly, the provision of assistance to a voter by means of communication by a camera or audio or visual recording device would constitute a violation of § 24.2-1006.7

3. Whether voters shall “be permitted to take photographs or pictures of themselves, or of fellow voters, or make photographic copies of their ballot, within the polling place”

The *Code of Virginia* does not prohibit an individual from divulging how he or she is voting. While § 24.2-1011 of the *Code of Virginia* provides that a voter may not carry a ballot away from a polling place or vote any ballot other than that provided by the officers of election, these prohibitions do not otherwise constitute a prohibition on photography of one’s own ballot. Where the media is permitted to photograph voters and ballots in polling places, within certain limits, to conclude that filming and photography are entirely prohibited in polling places would force an incongruous interpretation of the *Code of Virginia*.8 However, all relevant statutory and regulatory provisions governing conduct in the polling place remain in effect, and apply to the extent that officers

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7 It should be noted that 1 VA. ADMIN. CODE §§ 20-60-30 through 20-60-50, as amended, do not provide for such communications. As the Board is empowered to “make rules and regulations and issue instructions and provide information consistent with the election laws,” VA. CODE ANN. § 24.2-103(A), the amended regulatory language permits for the use of audio or visual recording devices only where such use comports with all relevant laws. Accordingly, my response to your second question does not modify or otherwise impact my response to your first question.

of election conclude an individual’s behavior impedes the orderly conduct of the election, as prohibited by § 24.2-604(A) of the Code of Virginia, or impinges upon another voter’s constitutional right to a secret ballot in violation of § 24.2-607, the officers of election may take appropriate action pursuant to § 24.2-604(E).

CONCLUSION

For the reasons set forth above it is my opinion that the regulatory language cited in your request, and included in 1 VA. ADMIN. CODE §§ 20-60-30 through 20-60-50 as amended by the Board on June 28, 2016, does not conflict with state law. It is also my opinion that a voter is not permitted to use cameras or audio or visual recording devices inside the polling place to communicate with individuals outside the polling place in violation of § 24.2-1006 of the Code of Virginia. Additionally, it is my opinion that pursuant to the regulatory amendments adopted by the Board on June 28, 2016, voters shall be permitted to take photographs or pictures within the polling place, where doing so does not constitute a violation of Title 24.2 of the Code of Virginia.

OP. NO. 16-046

ELECTIONS: LOCAL ELECTORAL BOARDS

Section 24.2-107 of the Code of Virginia requires local electoral boards to post on an official website both draft and final minutes.

MR. JAMES M. HEILMAN
SECRETARY, ALBEMARLE COUNTY ELECTORAL BOARD

NOVEMBER 3, 2016

ISSUE PRESENTED

You have asked for an interpretation of § 24.2-107 of the Code of Virginia, in light of the 2016 amendment to that statute. Specifically, you have asked whether local Electoral Boards must post on an official website draft minutes of their meetings.
BACKGROUND

The amendment at issue was enacted through Senate Bill 89 (2016 Session) and added the following paragraph to § 24.2-107:

Minutes of meetings that are required to be recorded pursuant to § 2.2-3707 shall be posted on the website of the electoral board or the official website for the county or city, when such means are available. Minutes of meetings shall be posted as soon as possible but no later than one week prior to the following meeting of the electoral board.[1]

You note that, in its original, introduced form, S.B. 89 made explicit reference to the posting of draft minutes, as follows:

Minutes of meetings that are required to be recorded pursuant to § 2.2-3707 shall be posted on the website of the electoral board or the official website for the county or city. Draft minutes of meetings shall be posted as soon as possible but no later than 10 working days after the conclusion of the meeting. Final approved meeting minutes shall be posted within three working days of final approval of the minutes.[2]

You further note that amendments during the legislative process eliminated the reference to draft minutes. You state that “the Albemarle County Electoral Board reads the legislative history of SB 89 as clearly indicating a legislative intent that draft minutes are not required to be posted, but that final approved minutes are required to be posted,” given that “the legislature saw fit to eliminate the requirement regarding draft minutes from the final version of the bill” and that “the legislative history reveals that there was nothing in any way

4 Emphasis in original.
partisan or contentious about the legislation,” which passed both houses of the General Assembly unanimously.⁵

Your question is solely about the affirmative obligation to post draft minutes on an official website. You are not questioning whether a local Electoral Board is required to release draft minutes, recordings, or other records of open meetings upon request, which is an issue expressly addressed and resolved in § 2.2-3707.⁶

**APPLICABLE LAW AND DISCUSSION**

The general framework for statutory interpretation in Virginia is well-settled:

When construing a statute, our primary objective is “to ascertain and give effect to legislative intent,” as expressed by the language used in the statute. “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.” And if the language of the statute “is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.”

In evaluating a statute, moreover, we have said that “consideration of the entire statute . . . to place its terms in context to ascertain their plain meaning does not offend the rule because ‘it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.’” Thus, “[a] statute is not to be construed by singling out a particular phrase.”[⁷]

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Related statutes should be construed together, particularly where one statute cross references another, and should be read to give full meaning, force, and effect to each.\(^8\)

Although legislative history may be consulted when interpreting an ambiguous statute, resort to legislative history and extrinsic facts generally is not permitted when examining an unambiguous statute because the statute’s words provide its meaning.\(^9\) Moreover, it can be difficult to divine legislative intent from somewhere other than the legislation itself,\(^10\) particularly given that “Virginia does not keep official legislative history, like that which can be found at the congressional level.”\(^11\)

Attempts to interpret statutes based on language the General Assembly did not adopt, as you suggest, are especially fraught with difficulty and uncertainty because the legislature’s decision not to enact particular language can often

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\(^8\) See, e.g., L.F. v. Breit, 285 Va. 163, 176 (2013) (expressly disagreeing with the argument “that when a statute is unambiguous, we must apply the plain meaning of that language without reference to related statutes” and stating that the assisted conception statute’s explicit cross reference to another part of the Code of Virginia “requires that [it] be read in conjunction with” the other Code section); Ainslie v. Inman, 265 Va. 347, 353 (2003) (“[I]t is a familiar rule of statutory construction that when a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each.”).

\(^9\) See Brown v. Lukhard, 229 Va. 316, 321 (1985); see also Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. ___, 133 S. Ct. 2517, 2528-29 (2013) (“What the legislative intention was, can be derived only from the words . . . used; and we cannot speculate beyond the reasonable import of these words.”) (quoting Gardner v. Collins, 27 U.S. 58, 93 (1829)).

\(^10\) See Div. of Legislative Servs. [DLS], “Legislative Reference Center” at http://dls.virginia.gov/lrc/leghist.htm (last visited Oct. 20, 2016) (explaining how to conduct legislative research in Virginia, and noting that “The intent of the General Assembly in passing the bill is generally not recorded, and if it is, it is printed on the face of the bill or referenced in the Code of Virginia.”).

\(^11\) Id. DLS is a legislative agency, charged by statute with helping General Assembly members in performing their legislative duties, including drafting bills. See Edwards v. Vesilind, No. 160643, 2016 Va. LEXIS 125, at *36-37 & n.13 (Va. Sept. 15, 2016); see generally Va. Code Ann. § 30-28.12 to § 30-28.18 (2015) (creating DLS and defining its duties). Although DLS’s position regarding what can be determined from drafting and legislative history is not binding, it is informative. See, e.g., LaCava v. Commonwealth, 283 Va. 465, 470 (2012) (discussing the need to consider agency decisions when they fall within an area of the agency’s specialized competence).
support multiple, differing conclusions. For example, one might as easily conclude from the legislative history of S.B. 89 that the General Assembly thought specific reference to draft minutes was unnecessary because the existing and enacted statutory language already was sufficient to include both draft and final minutes.

In this case, the paragraph added to § 24.2-107 states unambiguously that minutes of local electoral board meetings shall be posted. The paragraph cross references § 2.2-3707, subsection I of which sets forth the legal requirements for minutes under the Virginia Freedom of Information Act (“FOIA”). Although § 2.2-3707(I) often uses the term “minutes” without differentiation among different possible types of minutes, a key part of § 2.2-3707(I) expressly states that draft minutes are included in referencing “minutes.” Nowhere does the plain language of either § 24.2-107 or § 2.2-3707 exclude draft minutes or support ascribing more than one meaning to the word “minutes” as used in those statutes. Accordingly, the plain language of § 24.2-107 and § 2.2-3707 unambiguously encompasses both draft and final minutes.

Even if there were statutory ambiguity, the same conclusion would result. Reading “minutes” as encompassing whatever kinds of minutes public bodies keep, including both draft and final minutes, best carries out the intent that the General Assembly has expressed in the Code of Virginia. In the specific publication requirement added in 2016 to § 24.2-107, in § 2.2-3707(I)’s requirements for minutes, and in § 2.2-3700(B), the General Assembly has expressed a legislative intent that minutes of public meetings be open and available to the public. Interpreting the word “minutes” as including both draft

12 See, e.g., Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989) (noting, in light of the “unexplained disappearance of one word from an unenacted bill” in amendments to the bill, that “‘mute intermediate legislative maneuvers’ are not reliable indicators of congressional intent”) (quoting Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947)). The numerical vote on a particular bill also does not, by itself, provide any reliable indicator of legislative intent.

13 See Commonwealth v. Shifflett, 257 Va. 34, 44 n.1 (1999) (stating that the Court was not persuaded that the General Assembly’s failure to enact a bill was evidence that a statute should be interpreted in a restrictive manner because “the legislature may well have determined that such amendment was unnecessary because the statutory and case law already so provided”).

14 See VA. CODE ANN. § 2.2-3707 (Supp. 2016) (“Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.”).
and final minutes best effectuates such enacted legislative intent. Interpreting “minutes” broadly also ensures that the specific disclosure requirement of § 24.2-107 is meaningful regardless of how public bodies exercise their substantial discretion regarding minutes.

CONCLUSION

For the reasons set forth above, it is my opinion that § 24.2-107 of the Code of Virginia requires local electoral boards to post on an official website whatever kinds of minutes they keep, including both draft and final minutes.

OP. NO. 16-025

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY

A jail may be a “public place” for purposes of §§ 18.2-387 and 18.2-387.1, provided the conduct in question occurs in an area of the jail or under circumstances where an inmate does not have a reasonable expectation of privacy due to the foreseeability of a non-consenting public witness.

THE HONORABLE ROBERT J. McCABE
SHERIFF, CITY OF NORFOLK

NOVEMBER 10, 2016

ISSUE PRESENTED

You ask whether a jail is a “public place” for purposes of §§ 18.2-387 and 18.2-387.1 of the Code of Virginia, provisions prohibiting indecent exposure and obscene sexual display, respectively. Specifically, you ask whether an

15 Minimum requirements for minutes have been the subject of both legislation and guidance, but public bodies retain substantial discretion regarding matters such as the process by which minutes are produced and finalized, whether and how to use recordings, and the level of detail to include in minutes. See VA. CODE ANN. § 2.2-3707(I) (Supp. 2016) (requiring written minutes and setting forth certain required content); Va. Freedom of Info. Advisory Council Op. AO-05-15 (June 10, 2015), available at http://foia council.dls.virginia.gov/ops/15/AO_05_15.htm (assessing the sufficiency of planning commission minutes and quoting an opinion of this Office, 1977-78 Op. Va. Att’y Gen. 39).
inmate may be charged with indecent exposure or obscene sexual display for certain acts that take place inside a jail.

**APPLICABLE LAW AND DISCUSSION**

Although the Supreme Court of Virginia has not addressed the issue you present, the Court of Appeals of Virginia has held in two cases addressing conduct occurring while an inmate was in jail that a “public place” as used in §§ 18.2-387 and 18.2-387.1 “comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of a non-consenting public witness.”\(^1\)

There may be certain places or circumstances within the jail setting in which an inmate has an expectation of privacy. However, where there is no such expectation of privacy due to the foreseeability of a non-consenting public witness, an inmate may be charged with violating §§ 18.2-387 or 18.2-387.1, provided the other elements of the pertinent offense are present.\(^2\)

**CONCLUSION**

Accordingly, it is my opinion that a jail may be a “public place” for purposes of §§ 18.2-387 and 18.2-387.1, provided the conduct in question occurs in an area of the jail or under circumstances where an inmate does not have a reasonable expectation of privacy due to the foreseeability of a non-consenting public witness.

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\(^{2}\) I note that Attorneys General have historically declined to issue opinions on matters requiring factual determination. See 2008 Op. Va. Att’y Gen. 3, 5. Further, “prior opinions of the Attorney General have concluded that the application of various elements of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth’s Attorney, the grand jury, and the trier of fact . . . .” Id. Thus, this opinion is intended to provide general guidance only as to the current state of the law.
The decision whether to repair a retaining wall adjacent to a public road and a privately owned national historic property is in the discretion of the Virginia Department of Transportation and, if repaired, decisions regarding any need for compliance with historic preservation requirements are the responsibility of the federal government.

THE HONORABLE J. RANDALL MINCHEW
MEMBER, VIRGINIA HOUSE OF DELEGATES

NOVEMBER 10, 2016

ISSUES PRESENTED

You ask whether the Virginia Department of Transportation ("VDOT") is required to repair and maintain an historic brick retaining wall (the "Structure") located along U.S. Route 50. If repair and maintenance are required, you further ask whether the work must conform with the Secretary of the Interior’s Standards for Rehabilitation under Section 106 of the National Historic Preservation Act of 1966 (the “NHPA”).

BACKGROUND

You have related that the Structure is within VDOT’s right-of-way in or near the town of Aldie, located within the Aldie Mill Historic District and that it originally may have been part of an adjacent historic building that is now privately owned. You have not indicated that the Structure creates a hazard to the public or a dangerous condition to motorists, or that it is a nuisance.

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1 Based on the facts presented, it is unclear whether the Structure is entirely within the VDOT right-of-way and whether the Structure is owned by VDOT.

APPLICABLE LAW AND DISCUSSION

Absent a statute or regulation to the contrary, any decision about maintenance or repair within a VDOT right-of-way is within VDOT’s exclusive administrative powers. The Supreme Court of Virginia has specifically held that, “the legislature has delegated broad powers to the highway officials of this state and has vested them with wide discretion in the discharge of their duties with respect to the construction, improvement, and maintenance of highways.”

We have discovered nothing in any applicable federal or state laws, regulations, or manuals that specifically obligates VDOT to restore the Structure.

Further, there is nothing contained in the NHPA that obligates VDOT, as a state agency, to repair or maintain the Structure. Section 306108 [formerly Section 106] of the NHPA applies only when a federal agency is involved, directly or indirectly, with an undertaking affecting historic property. The Structure lies within the Aldie Mill Historic District, which makes it part of an “historic property” for purposes of the NHPA. The repair and maintenance of the Structure would be considered an undertaking under the NHPA where such work involves a federal agency, federal funding, or federal permitting.

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3 Ord v. Fugate, 207 Va. 752, 759 (1967) (citing VA. CODE ANN. § 33-46, now replaced by § 33.2-317 (2014)).
4 VDOT’s activities with respect to the construction, maintenance, and repair of its highways are regulated by Title 33.2 of the Code of Virginia; Title 24, Agency 30 of the Virginia Administrative Code; various VDOT manuals; Titles 23 and 49 of the United States Code; and Titles 23 and 49 of the Code of Federal Regulations.
5 “The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [Advisory] Council [on Historic Preservation] a reasonable opportunity to comment with regard to the undertaking.” 54 U.S.C. § 306108.
6 “[T]he term “historic property” means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” 54 U.S.C. § 300308.
7 “[T]he term “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those
Therefore, if VDOT, in its discretion, were to replace or maintain the Structure, § 306108 [formerly Section 106] of the NHPA would apply only if such repair or maintenance were accomplished with the use of federal funds, in this case funds provided by the Federal Highway Administration (the “FHWA”) or required federal permits.

The “Section 106 process” is the procedure used to outline how federal agencies comply with the requirements of § 306108 [formerly Section 106] of the NHPA.

The [S]ection 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

Once a federal agency has complied with the procedural requirements of the Section 106 process, it can proceed with any course of action it believes to be appropriate with respect to the undertaking. Such course of action may or may requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. 54 U.S.C. § 300320.

8 36 C.F.R. §§ 800.3-800.13 (2015).
10 36 C.F.R. § 60.2 (2015). “While Advisory Council comments must be taken into account and integrated into the decision making process, program decisions rest with the agency implementing the undertaking.” Id. It should be noted that a Programmatic Agreement Among the Federal Highway Administration, the U.S. Army Corps of Engineers, Norfolk District, the Tennessee Valley Authority, the Advisory Council on Historic Preservation, the Virginia State Historic Preservation Officer, and the Virginia Department of Transportation Regarding Transportation Undertakings Subject to Section 106 of the National Historic Preservation Act of 1966, was entered into in August 2016. The Section 106 process allows a federal agency to enter into a memorandum of agreement with its consulting parties, and a memorandum of agreement created in accordance with the procedures of the Section 106 process will govern the particular undertaking and all of its parts. See 36 C.F.R. § 800.6(b) (2015). Without more information we are unable to determine at this time whether this Programmatic Agreement would apply to the repair and maintenance of the Structure.
not include a FHWA requirement that VDOT’s work conform with the Secretary of the Interior’s Standards for Rehabilitation.\textsuperscript{11}

\textbf{CONCLUSION}

For the foregoing reasons, it is my opinion that, under the facts you have presented, VDOT is not required to repair and maintain the Structure, and any decision about this matter is within VDOT’s sole administrative discretion. It is my further opinion that if VDOT makes a discretionary decision in the future to repair the Structure, and federal funds or federal permits are involved, any decisions to require compliance with federal requirements for historic preservation must be made by the FHWA.

\textbf{OP. NO. 16-026}

\textbf{TRADE AND COMMERCE: ENTERPRISE ZONE GRANT PROGRAM}

Bedford County may adopt a local enterprise zone development tax reduction program for the enterprise zone located within the Town of Bedford. The town’s previous status as an independent city at the time of the initial enterprise zone designation does not limit or otherwise affect this authority.

\textbf{PATRICK J. SKELLEY II, ESQUIRE \hspace{1em} COUNTY ATTORNEY, BEDFORD COUNTY}

\textbf{NOVEMBER 17, 2016}

\textbf{ISSUE PRESENTED}

You inquire whether a county may establish a local enterprise zone development taxation program (a “program”) in an enterprise zone located in a town within the county, where the town was a city when the enterprise zone was first established, and the city has since reverted to the status of a town.

\textsuperscript{11} The Secretary of the Interior’s Standards for Rehabilitation have been used by Federal agencies to guide them in carrying out their historic preservation responsibilities. See W. Brown Morton III et al., The Secretary of the Interior’s Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings, at \textsuperscript{v} (U.S. Department of the Interior, National Park Service Heritage Preservation Services 1997).
BACKGROUND

According to the information you provided, an area within what was then the City of Bedford received enterprise zone designation in 2009, pursuant to § 59.1-542 of the Code of Virginia. Because it was an independent city, it was not part of the County of Bedford, which surrounded it. In 2013, it reverted to town status, and it is now the Town of Bedford. Because towns, unlike cities, are part of the counties in which they are located, the Town of Bedford is part of Bedford County.

The Commonwealth renewed the enterprise zone designation in 2014, the year after the former city reverted to town status. The county now seeks to adopt a program in order to incentivize economic revitalization in the enterprise zone.

APPLICABLE LAW AND DISCUSSION

Localities use enterprise zones to revitalize distressed areas and combat unemployment.\(^1\) They are areas designated by the Governor as eligible for the benefits of the Enterprise Zone Grant Act (the “EZGA”).\(^2\) Upon the periodic announcement of competitions by the Department of Housing and Community Development (“DHCD”), the governing body of any county or city may submit an application to DHCD requesting enterprise zone designation for an area within the locality.\(^3\) The application is to include proposals for “local incentives . . . [to] stimulate real property improvements and new job creation” within the potential enterprise zone.\(^4\) The EZGA provides that one such incentive may include a reduction of local taxes.\(^5\)

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\(^{1}\) See VA. CODE ANN. § 59.1-545 (2014).


\(^{3}\) Section 59.1-542(A) (2014). After reviewing applications, the Director of DHCD makes a designation recommendation to the Governor. Section 59.1-542(E). Enterprise zone designation initially lasts ten years, followed by two potential five-year renewal periods. Id.

\(^{4}\) Section 59.1-543(A) (2014).

\(^{5}\) Id. Additional “local incentives include, but are not limited to: (i) reduction of permit fees; (ii) reduction of user fees; [and] (iii) reduction of business, professional and occupational license tax . . . .” Id. As part of the program, a portion of the tax revenue derived from the local enterprise zone is placed into a Local Enterprise Zone Development Fund. Section 58.1-3245.8 (2013). This Fund may be used in accordance with a number of statutorily enumerated purposes that generally
Once DHCD approves an enterprise zone application, the enterprise zone is created, and the locality may then adopt a program: the *Code of Virginia* provides that “[t]he governing body of any county, city, or town may adopt a . . . program by passing an ordinance designating an enterprise zone located within its boundaries as a local enterprise zone . . . .”6 In other words, as long as there is an enterprise zone “within [the] boundaries” of a locality, the locality may establish a program.

The EZGA does not indicate that the reversion of an independent city into a town would dissolve enterprise zone designations within the former city.7 It is also significant that this enterprise zone was renewed by DHCD in 2014, a year after the former city reverted to town status. Because the town is located within the county, this means that when DHCD granted the 2014 renewal, it was aware that the enterprise zone was located in both the town and the county. In the absence of any facts or laws triggering termination or limitation of the enterprise zone designation, I conclude that the enterprise zone in question has valid existence within both the town of Bedford and the County of Bedford.

The Dillon Rule strictly construes local government authority in Virginia, such that “municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from granted powers, and those that are essential and indispensable.”8 A corollary to the Dillon Rule provides that “the powers of [county] boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.”9 Therefore, the ability of a county to establish a program depends upon delegation of the requisite authority by the General Assembly.10

aim to ameliorate quality of life and incentivize business development within the local enterprise zone. Section 58.1-3245.10 (2013).

6 VA. CODE ANN. § 58.1-3245.8(A) (2013). Section 58.1-3245.8(B) requires “[t]he governing body [to] hold a public hearing on the need for a local enterprise zone development taxation program in the county, city, or town prior to adopting a local enterprise zone development taxation ordinance.”

7 Id.


10 See Bd. of Zoning Appeals, 276 Va. at 552-53.
Section 58.1-3245.8(A) explicitly gives counties, cities, and towns the authority to adopt programs within enterprise zones within their boundaries. It is therefore apparent that the General Assembly “expressly granted” to local governing bodies the power to establish these programs, and there is no need to determine whether such authority is “necessarily or fairly implied from granted powers.” In addition, the Code of Virginia does not restrict the authority to enact a program for a particular enterprise zone to the original applicant for enterprise zone designation. Accordingly, I conclude that the governing body of the county may establish a program within the enterprise zone identified in your request.

CONCLUSION

For the reasons stated above, it is my opinion that § 58.1-3245.8(A) expressly empowers Bedford County to adopt a program for the enterprise zone in the Town of Bedford. The Code of Virginia does not indicate that the town’s previous status as an independent city at the time of the initial enterprise zone designation limits or otherwise affects this authority.

OP. NO. 16-008

TAXATION: STATE RECORDATION TAX

The exemption to the grantor’s tax contained in § 58.1-811(C)(4) of the Code of Virginia does not apply to a Trustee’s Deed where the creditor is a government agency and is named as a grantor for indexing purposes only.

THE HONORABLE REBECCA P. HOGAN
CLERK, FREDERICK COUNTY CIRCUIT COURT

DECEMBER 2, 2016

ISSUE PRESENTED

You ask whether the exemption to the grantor’s tax contained in § 58.1-811(C)(4) of the Code of Virginia applies to a Trustee’s Deed of

\[11\text{ See id.}\]
Foreclosure where the creditor is a United States administrative agency and is listed along with the trustee as a grantor.

**BACKGROUND**

You relate a scenario in which a Trustee’s Deed is presented for recordation at the Clerk’s Office. The deed lists the trustee as grantor, but it also lists the creditor as an additional grantor. The deed states that the creditor is listed as a grantor “for indexing purposes only.” Because the creditor is the United States, acting through an administrative agency, the party recording the deed asserts that inclusion of the federal government creditor as an additional grantor makes the deed exempt from grantor’s tax pursuant to the exemption for government grantors found in § 58.1-811(C)(4).

**APPLICABLE LAW AND DISCUSSION**

The Virginia Recordation Tax Act\(^1\) provides generally that certain recording taxes must be paid when a deed is presented for recordation. In addition to all other applicable recording taxes imposed on a deed conveying real estate to a purchaser, the Act imposes a separate recording tax upon the grantor.\(^2\) Several exemptions, however, apply to imposition of the grantor’s tax. The exemption in question, which is contained in § 58.1-811(C)(4) of the Code, provides that the grantor’s tax “shall not apply to any . . . [d]eed conveying real estate from the United States, the Commonwealth or any county, city, town, district, or other political subdivision thereof . . . .”\(^3\) Pursuant to the statute, where one of these governmental entities conveys real estate in a deed (i.e., is the grantor in a deed), the exemption applies.\(^4\) Thus, the essence of your inquiry is whether the federal agency listed as a grantor in the Trustee’s Deed has

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\(^2\) See VA. CODE ANN. § 58.1-802 (Supp. 2016); see also § 58.1-802.2 (Supp. 2016) (imposing a “regional congestion relief fee” in the form of a grantor’s tax that is assessed only in certain localities). I shall refer to the recording taxes imposed upon a grantor by either §§ 58.1-802 or -802.2 as “grantor’s tax” in this opinion.

\(^3\) VA. CODE ANN. § 58.1-811(C)(4) (Supp. 2016).

\(^4\) BLACK’S LAW DICTIONARY 816 (Bryan A. Garner et al. eds., 10th ed. 2014) (defining the term “grantor” as “[s]omeone who conveys property to another”).
actually “conveyed” real estate such that it is properly identified as a grantor entitled to the exemption.

The mere fact that the federal agency is listed as grantor in the Trustee’s Deed is not dispositive. In the circumstance you describe, it is necessary to look to the mechanics of the transaction to determine whether the federal agency has actually conveyed real estate to the grantee. The purpose of a Trustee’s Deed is to transfer real estate to a purchaser after a foreclosure sale. Prior to any foreclosure proceedings, the trustee holds legal title to the property for the benefit of the creditor as security for the debt, while the debtor retains equitable title, including the use and enjoyment of the land.

In the event of the debtor’s default, the trustee’s possession of legal title enables him to commence foreclosure proceedings at the request of the creditor and sell the property at auction. Although the debtor’s equitable title gives him the right to cure the default and redeem the property prior to sale, “[c]ompletion of the sale extinguishes the debtor’s equity of redemption and unifies legal and equitable title in the trustee, subject to the equitable interests of the purchaser at foreclosure.” Stated differently, once the trustee accepts the highest bid at auction and executes a memorandum of sale, full title to the property becomes vested in the trustee alone, who later conveys it to the purchaser by executing the Trustee’s Deed.

The mechanics of this transfer by Trustee’s Deed show that neither the creditor nor the debtor conveys title to the property; rather, it is the trustee who...

7 See, e.g., Larchmont Homes, Inc., 201 Va. at 182; see also VA. CODE ANN. § 55-59(7) (2012) (providing that, at the request of the creditor, the trustee may accelerate the debt in the event of default and “may take possession of the property and proceed to sell the same at auction”).
9 Subject to the equitable interests of the purchaser at foreclosure.
conveys title as agent for both parties.\(^{10}\) In particular, and as relevant to your inquiry, under Virginia case law, the creditor “sells nothing . . . and is merely to receive the proceeds of the sale.”\(^{11}\) Thus, in the scenario you describe, the federal agency is the creditor and the beneficiary under the trust, but it does not convey the real estate to the purchaser at foreclosure. Therefore, it is not identified correctly as a “grantor” in the Trustee’s Deed, and the exemption from grantor’s tax in § 58.1-811(C)(4) does not apply. Including the federal agency as a grantor “for indexing purposes only” on the face of the deed does not defeat the legal realities of the transaction—nor does it alone remove the obligation of the trustee to pay grantor’s tax.\(^{12}\)

**CONCLUSION**

Accordingly, it is my opinion that the grantor’s tax exemption contained in § 58.1-811(C)(4) does not apply to a Trustee’s Deed on the basis that the creditor is a government agency and is named along with the trustee as a grantor for indexing purposes only.

**OP. NO. 16-053**

**CRIMES AND OFFENSES GENERALLY: CARRYING A WEAPON INTO A COURTHOUSE**

The Fauquier County Sheriff may legally implement a courthouse security plan under which weapons are prohibited throughout the Fauquier County Courthouse, subject to the exception for certain public officers and officials set forth in § 18.2-283.1.

**THE HONORABLE ROBERT P. MOSIER**

**SHERIFF, FAUQUIER COUNTY**

**DECEMBER 9, 2016**

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\(^{10}\) *See, e.g.*, *Feldman*, 201 Va. at 20.

\(^{11}\) *Powell*, 179 Va. at 175 (quoting *Motley v. Hodges*, 120 Va. 498, 499 (1917)).

\(^{12}\) *See VA. CODE ANN.* § 17.1-249 (2015), for provisions regarding indexing of deeds.
You ask whether it is legally permissible to prohibit weapons in all parts of a courthouse, including those areas occupied by constitutional officers and county employees.

The facts you have provided are as follows:

The Fauquier County Courthouse was completed approximately forty years ago. It is a single four-story building with four public entrances, one on each side of the building. It houses two Circuit Court courtrooms, a temporary detention facility for prisoners awaiting court appearances, the Circuit Court record room, the Circuit Court Clerk’s Office, the court’s administrative offices, the judges’ chambers, offices of three constitutional officers, and also several county administrative offices. It has been considered a mixed-use facility since it was completed. One entrance, on Culpeper Street, has been continuously identified as the courthouse entrance.

At that entrance, which provides access to the two courtrooms and is used only when court is in session, there is a security officer and a metal detector. Weapons may not be brought into the courthouse through it. The other three entrances provide direct access to the Clerk’s Office, the constitutional officers, and county administrative offices. At these entrances, there is no security officer and no metal detector. There is presently no prohibition against bringing weapons into the building through the three unsecured entrances, and persons have from time to time been observed in the Clerk’s Office or record room carrying firearms.

A person who enters the building through one of the unsecured entrances may obtain access to secured areas such as the courtrooms, the judges’

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1 The architect’s plans are dated March 1, 1971 and November 18, 1972, with renovation plans dated July 4, 2004.
2 Commonwealth’s Attorney, Treasurer, and Commissioner of the Revenue.
3 Community Development, Permitting, Building and Zoning, Land Development, GIS Department, Mapping, and 911 Addressing.
chambers, and the Commonwealth Attorney’s office through a number of different internal access points, including emergency exits, stairwells, and elevators. While there are restrictions of access at some of these access points, they are not uniform, and several of the restrictions may be bypassed. For that reason, it is not possible to effectively isolate the secured areas from persons who enter the courthouse through the unsecured entrances. Security audits made by outside consultants and law enforcement agencies indicate that the present system of access to the courthouse creates material security risks.

In order to provide adequate security to the courthouse, you have determined that it is necessary to restrict the building to one full-time public entrance and one entrance that is open only when court is in session, and to have metal detectors at both of those entrances. Weapons would not be allowed into the building, except for persons authorized by law to carry weapons in courthouses. You ask whether such a security plan would be legal.

**APPLICABLE LAW AND DISCUSSION**

The General Assembly has determined that it is illegal—a Class 1 misdemeanor—for anyone to have a weapon in a courthouse, subject to an exception for certain public officers and officials. The statute is § 18.2-283.1 of the *Code of Virginia*, and it provides as follows:

> It shall be unlawful for any person to possess in or transport into any courthouse in this Commonwealth any (i) gun or other weapon designed or intended to propel a missile or projectile of any kind, (ii) frame, receiver, muffler, silencer, missile, projectile or ammunition designed for use with a dangerous weapon and (iii) any other dangerous weapon, including explosives, stun weapons as defined in § 18.2-308.1, and those weapons specified in subsection A of § 18.2-308. Any such weapon shall be subject to seizure by a law-enforcement officer. A violation of this section is punishable as a Class 1 misdemeanor.

The provisions of this section shall not apply to any police officer, sheriff, law-enforcement agent or official, conservation police officer, conservator of the peace, magistrate, court officer, judge, or city or
county treasurer while in the conduct of such person’s official duties.[4]

To underscore the importance of this prohibition, the General Assembly has also determined that certain weapons taken into a courthouse are forfeited to the Commonwealth.5 In light of this emphatic statutory prohibition on weapons in courthouses, the precise question presented is whether the various non-judicial offices within a courthouse are somehow exempt from the prohibition.

The manifest purpose of the statute in question is to ensure security in courthouses by barring the possession of weapons there. “[I]t is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.”6 Allowing persons with weapons into unsecured non-judicial areas of a courthouse where—as is the case here—they would have access to secured areas such as courtrooms and judges’ chambers would defeat the purpose of the statute.

Further, an important principle of statutory construction is that words not defined in a statute are to be construed according to their ordinary meaning.7 A 2008 Attorney General Opinion noted that where a statute referred to courthouses but did not define that term, “it is necessary to employ the general definition of that word.”8 The ordinary meaning of the term “courthouse” is “a building housing judicial courts.”9 Here, that means the entire Fauquier County Courthouse.

The fact that some portions of the courthouse are used for non-judicial offices does not change the fact that they are within, and a part of, the

5 “Any firearm . . . or any weapon concealed, possessed, transported or carried in violation of § 18.2-283 . . . shall be forfeited to the Commonwealth . . . .” Section 19.2-386.28 (2015).
7 Sansom v. Bd. of Supvrs., 257 Va. 589, 594-95 (1999) (quoting Dep’t of Taxation v. Orange-Madison Coop. Farm Serv., 220 Va. 655, 658 (1980)) (“An undefined term must be ‘given its ordinary meaning, given the context in which it is used.’”).
courthouse. The General Assembly could have worded the weapons statute to exclude “non-judicial” offices in a courthouse. It did not do so. “Rules of statutory construction prohibit adding language to or deleting language from a statute.”

For the reasons stated, and because of the particular fact that there is access from unsecured non-judicial areas in the courthouse to secured judicial areas, I conclude that the statute barring weapons in courthouses applies to the entire Fauquier County Courthouse, not just those portions of the building occupied by judges and courts.

CONCLUSION

Accordingly, it is my opinion that under the circumstances you have described, it would be legally permissible to implement a courthouse security plan under which weapons are prohibited in all parts of the Fauquier County Courthouse, including those areas occupied by constitutional officers and county employees, subject to the exception for certain public officers and officials set forth in § 18.2-283.1.11

10 Appalachian Power Co. v. State Corp. Comm’n, 284 Va. 695, 706 (2012) (citing BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 331 (2007)). I note that there is case law holding that a circuit court judge may not control which government officials occupy portions of a courthouse not devoted to the judicial function, and it is the locality which has authority to assign that space. Egerton v. Hopewell, 193 Va. 493, 501 (1952); see also Bd. of Supvrs. v. Bacon, 215 Va. 722, 724-25 (1975) (holding that the locality, rather than the circuit court, controlled the use and occupancy of a portion of the courthouse building not designated for judicial function). However, that holding was based on facts unrelated to the present issue of courthouse security, and it was controlled in part by a statute unrelated to courthouse security. Further, it does not change the clear language of the statutory ban upon weapons in courthouses. A court cannot change or amend a statute. Burns v. Gagnon, 283 Va. 657, 675 (2012) (citing Tazewell Cnty. Sch. Bd. v. Brown, 267 Va. 150, 162 (2004) (quoting Coca-Cola Bottling Co. of Roanoke, Inc. v. Cnty. of Botetourt, 259 Va. 559, 565 (2000)) (A court “cannot change or amend a statute, under the guise of construing it.”).

11 I acknowledge that the ultimate authority over courthouse security is the judiciary. Courts have inherent authority to ensure the security of their courtrooms. Payne v. Commonwealth, 233 Va. 460 (1987), holding at 466 that, “The trial judge has overall supervision of courtroom security.” That authority also extends to the entire courthouse, because, “it would be folly to claim the circuit judge has the power to ensure courtroom security, but not courthouse security.” Epps v. Commonwealth, 46 Va. App. 161, 176 (2005).
OP. NO. 16-049

ADMINISTRATION OF GOVERNMENT: EXCEPTION AS TO PUBLIC OFFICER OR EMPLOYEE ENGAGING IN WAR SERVICE OR CALLED TO ACTIVE DUTY WITH THE ARMED FORCES

A local school board has the duty and sole authority to select and appoint a temporary replacement for a member who has notified the board of his upcoming military deployment. After the member returns from deployment, he will return to his position on the school board, where he will serve the remainder of the term to which he was elected.

THE HONORABLE RICHARD H. STUART
MEMBER, SENATE OF VIRGINIA

DECEMBER 9, 2016

ISSUES PRESENTED

A member of a local school board (the “Board Member” and the “School Board,” respectively) who is a reserve military officer is being called into active service for a temporary deployment. You ask whether the Board Member has the right to determine whether an appointment will be made to fill his temporarily vacant position, and whether he has the right of approval over a temporary replacement. Your opinion request states that he “is not a constitutional officer.”

BACKGROUND

The Board Member recently announced at a School Board meeting that he had received mobilization orders to an overseas location. He went on to state his belief that a statute dealing with military deployment of elected officials “allows me to make a decision on whether I would like a temporary replacement who would serve as an acting school board member just during the months I am gone, or I can chose [sic] not to have a temporary replacement. . . . I want to be clear—I have not yet made my decision to request a temporary replacement[,] and I am not authorizing the board to appoint one at this time.”
By statute, county or municipal officers will not forfeit their offices because of being “called to active duty in the armed forces of the United States,” and the officer or body authorized to fill vacancies must appoint someone to perform the responsibilities of the absent officer until he returns from active duty:

No . . . county or municipal officer . . . shall forfeit his title to office or position or vacate the same . . . when called to active duty in the armed forces of the United States. Any such officer . . . who, voluntarily or otherwise, . . . is called to service may notify the officer or body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office or position during the period of such service. The officer or 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.[1]

This statute applies, in relevant part, to any “county or municipal officer.” The term “officer” has been defined as “[i]n public affairs . . . a person holding public office under a national, state, or local government.”[2] A prior opinion of this Office states that a “school board member [is] an officer of local government.”[3] It is thus evident that this statute applies to school board members, such as the one who is the subject of the present inquiry.

The statute is triggered when the officer who has been called into service gives notice to “the officer or body authorized by law to fill vacancies in his office.”[4] Once he has given that notice, he is “thereupon . . . relieved from the duties of his office . . . during the period of such service.” In this particular locality, the appointing authority to fill vacancies on the school board is the

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remaining members of the school board. Here, there can be no question but that the Board Member has provided notice of his upcoming deployment to the School Board. Thus, by operation of law he has now been “relieved from the duties of office” commencing on the date of his deployment, and the replacement statute is in effect.

When the statute applies, the appointing authority is required to appoint a temporary replacement, and it alone is authorized to determine who that person shall be. The statute is devoid of any language authorizing the departing official to determine whether a temporary appointment will be made, nor does it give him the authority to select or to have a power of approval over the appointment, if there is to be one. It is well-established that rules of statutory construction prohibit adding language to or deleting language from a statute.

I also note that the Supreme Court of Virginia has held that, under the statute in question, the official who has been called to active duty does not have the authority to determine whether a temporary replacement will be appointed. Instead, once the official provides notice, a duty devolves solely on the appointing authority to select and appoint a temporary replacement.

The locality is Prince William County, which has the County Executive form of government. The School Board is elected. As per § 22.1-57.3(D), vacancies are filled under the procedures set forth in §§ 24.2-226 and 24.2-228. Under those statutes, when a vacancy occurs in the office of an elected school board member, the remaining members of the board shall within forty-five days appoint a qualified voter of the district in which the vacancy occurred. Sections 24.2-226 and 24.2-228 call for a temporary appointment followed by a special election. In contrast, § 2.2-2802 requires the temporary appointee to serve until the departed official returns from military service, without any special election. Sections 24.2-226 and 24.2-228 are of general application. That is, they deal with filling vacancies that occur for any reason. Section 2.2-2802 is of specific application: it deals specifically with filling vacancies that occur because of military service. It is a well-established canon of statutory construction that if one statute addresses a subject in a general way and another statute speaks to the same subject in a more specific manner, the latter prevails.


See In re Gordon E. Hannett, 270 Va. 223 (2005). In that case, Floyd County Commonwealth’s Attorney Gordon Hannett—an Army reservist—notified his circuit court judge that he was being called into active duty to be deployed in Iraq. He sought to retain his official position, and he intended to hire an assistant prosecutor to run the office. He planned to supervise the assistant from his duty station in Iraq. The judge instead appointed an interim Commonwealth’s Attorney pursuant to the present statute. Hannett then sought writs of prohibition and mandamus against the interim

5 The locality is Prince William County, which has the County Executive form of government. The School Board is elected. As per § 22.1-57.3(D), vacancies are filled under the procedures set forth in §§ 24.2-226 and 24.2-228. Under those statutes, when a vacancy occurs in the office of an elected school board member, the remaining members of the board shall within forty-five days appoint a qualified voter of the district in which the vacancy occurred. Sections 24.2-226 and 24.2-228 call for a temporary appointment followed by a special election. In contrast, § 2.2-2802 requires the temporary appointee to serve until the departed official returns from military service, without any special election. Sections 24.2-226 and 24.2-228 are of general application. That is, they deal with filling vacancies that occur for any reason. Section 2.2-2802 is of specific application: it deals specifically with filling vacancies that occur because of military service. It is a well-established canon of statutory construction that if one statute addresses a subject in a general way and another statute speaks to the same subject in a more specific manner, the latter prevails. Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 245 (1997).


7 See In re Gordon E. Hannett, 270 Va. 223 (2005). In that case, Floyd County Commonwealth’s Attorney Gordon Hannett—an Army reservist—notified his circuit court judge that he was being called into active duty to be deployed in Iraq. He sought to retain his official position, and he intended to hire an assistant prosecutor to run the office. He planned to supervise the assistant from his duty station in Iraq. The judge instead appointed an interim Commonwealth’s Attorney pursuant to the present statute. Hannett then sought writs of prohibition and mandamus against the interim
There is a different statute, § 24.2-228.1, which provides in Subsection G that if a *constitutional officer* is absent from his position because of a military deployment, “the power to relieve a constitutional officer of the duties or powers of his office or position during the period of such absence shall remain the sole prerogative of the constitutional officer unless expressly waived by him in writing.” However, a Board Member is not a constitutional officer, and your acknowledgement of that status is legally correct: a “constitutional officer” is identified in Article VII, § 4 of the Constitution of Virginia as “a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue.” Because a local school board member is not a constitutional officer, this statute does not apply, and thus the Board Member does not have the prerogative of determining whether a replacement shall be appointed for him.

By law, a local officer who departs for military service “shall [not] forfeit his title to office or position or vacate the same.” Once the Board Member completes this deployment, he will resume the duties of his office for the remainder of the term to which he was elected.

**CONCLUSION**

For the reasons stated, it is my opinion that the School Board, having received notice of a Board Member’s upcoming military deployment, has both the duty and the sole authority, pursuant to a statute duly enacted by the General Assembly, and consistent with a decision of the Supreme Court of Virginia interpreting that statute, to select and to appoint a temporary replacement for him until the end of his deployment. The law does not give him the right to decide whether a replacement will be named, since he is not a constitutional appointment. In denying the writs, the Supreme Court of Virginia held that the circuit court was not bound by Hannett’s assertion that he could continue to perform the duties of his office while deployed in Iraq, and the circuit court’s conclusion to the contrary was not unreasonable. I note that a prior opinion of this Office reached a contrary conclusion about this same matter prior to *Hannett* being decided. 2005 Op. Va. Att’y Gen. 9. That opinion was effectively overturned by the Supreme Court of Virginia’s decision in *Hannett*, and therefore it is no longer of any force or effect. I also note that the analysis in the opinion was for a statute applicable only to constitutional officers, and thus even if the opinion were still effective, it would be inapplicable to a school board member, who is not a constitutional officer.

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8 VA. CODE ANN. § 2.2-2802.
officer. After he returns from deployment, he will return to his position on the School Board, where he will serve the remainder of the term to which he was elected.

**OP. NO. 16-041**

**TAXATION: COMMISSIONERS OF THE REVENUE**

Public utilities are not exempt from providing information requested by commissioners of the revenue pursuant to § 58.1-3109(6) pertaining to contractors that may be subject to a local business license ordinance. Public utility personnel are likewise not exempt from a summons issued by a commissioner of the revenue in accordance with § 58.1-3110(A) for the purpose of answering, under oath, questions about contractors that may be subject to a local business license ordinance.

**THE HONORABLE CALVIN C. MASSIE JR.**
**COMMISSIONER OF THE REVENUE, CAMPBELL COUNTY**

**DECEMBER 21, 2016**

**ISSUES PRESENTED**

You ask whether public utilities are exempt from providing information requested pursuant to § 58.1-3109(6) of the *Code of Virginia* by a Commissioner of the Revenue pertaining to contractors that may be subject to a local business license ordinance. You further ask whether public utility personnel are exempt from being summoned by a Commissioner of the Revenue in accordance with § 58.1-3110(A) for the purpose of answering, under oath, questions about contractors that may be subject to a local business license ordinance.

**APPLICABLE LAW AND DISCUSSION**

Commissioners of the Revenue are constitutional officers elected by citizens within the locality that they serve. The *Code of Virginia* provides that

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1 VA. CONST. art. VII, § 4 (“There shall be elected by the qualified voters of each county and city . . . a commissioner of revenue.”); VA. CODE ANN. § 15.2-1636 (2012) (“The voters in every county and city shall elect a commissioner of the revenue, unless otherwise provided by general law or special act.”).
they “shall exercise all the powers conferred and perform all the duties imposed . . . by general law.”

Their primary duty is to assess the fair market value of “all subjects of taxation in [the] county or city.” In addition, they are tasked with the duty to assess local business, professional and occupational license taxes. With some statutory limitations, localities may require contractors to pay local business license fees and taxes.

As a constitutional officer, a Commissioner of the Revenue possesses complete discretion in the manner in which he administers his office and carries out his prescribed duties, unless limited by constitutional provision or statute.

Section 58.1-3109(6) enables Commissioners of the Revenue to require “any person . . . or corporation to furnish information relating to [the] . . . license taxes of any and all taxpayers . . . .” This section further “require[s] such persons to furnish access to books of account or other papers and records for the purpose of . . . procuring the information necessary to make a complete assessment of any taxpayer’s . . . license taxes for the current tax year and the three preceding tax years.” Contractors subject to local business license fees and taxes.

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2 Section 15.2-1636; see also VA. CONST. art. VII, § 4 (providing that the duties of the Commissioner “shall be prescribed by general law or special act”); § 58.1-3103 (2013); McGinnis v. Nelson Cty., 146 Va. 170, 172 (1926) (noting that the duties of commissioners “are regulated and defined by statute”).

3 Section 58.1-3103.

4 See § 58.1-3109 (2013). Local governing bodies “may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town . . . .” Section 58.1-3703(A) (Supp. 2016).

5 Section 58.1-3715 (2013). See § 58.1-3714(D) (2013) for a definition of the term “contractor.” Contractors are generally subject to local business license ordinances of the locality in which their principal office or any branch office is located as well as any other locality in which “the amount of business done by the contractor in such county, city or town exceeds or will exceed the sum of $25,000 for the license year.” Section 58.1-3715(B).

6 1984-1985 Op. Va. Att’y Gen. 284, 284 (noting that a commissioner possesses “general authority and discretion to organize and manage his operations”). “While the powers and duties of a constitutional officer are those prescribed by statute . . . except as limited by law, the constitutional officer is free to discharge his prescribed powers and duties in the manner in which he deems appropriate.” Id.

7 Section 58.1-3109(6).
ordinances must pay local business license taxes. Such contractors would therefore constitute “taxpayers” pursuant to § 58.1-3109(6).

As a public service corporation, the public utility referenced in your request would qualify as a “corporation” required to furnish information relating to the assessment of business license tax liability of a contractor under § 58.1-3109(6). Further, because corporations are treated as persons under the law, a public utility qualifying as a public service corporation likewise constitutes a “person” subject to this section. Public utility personnel may additionally be deemed “persons” that are obligated to provide information requested by Commissioners of the Revenue under the statute. Accordingly, I conclude that public utilities are not exempt from providing information requested by Commissioners of the Revenue pursuant to § 58.1-3109(6) when it relates to contractors that may be subject to a local business license ordinance.

Section 58.1-3110 additionally empowers a Commissioner of the Revenue to “summon the taxpayer or any other person to appear before him at his office, to answer, under oath, questions touching the tax liability of any and all specifically identified taxpayers and to produce documents relating to such tax liability, either or both.” However, he “shall not . . . summon a taxpayer or other person for the tax liability of the taxpayer which is the subject of litigation.” Public utility personnel constitute “persons” under § 58.1-3110(A). So long as the tax liability of the person summoned or the public utility is not the subject of pending litigation, a Commissioner of the Revenue may therefore summon public utility personnel to appear, answer questions under oath, and produce documents for the purpose of assessing the business license taxes of a contractor.

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8 Section 58.1-3700 (2013). “Whenever a license is required by ordinance . . . and whenever the local governing body shall . . . levy a license tax on any business . . . it shall be unlawful to engage in such business . . . without first obtaining the required license.” Id. Further, “[a]ny person who engages in a business without obtaining a required local license, or after being refused a license, shall not be relieved of the tax imposed by the ordinance.” Id.

9 Section 1-230 (2014) (defining “person” as “any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof”).

10 Section 58.1-3110(A) (Supp. 2016).

11 Id.
Your opinion request mentions that the contractor at issue may be subject to a local business license ordinance. One could argue that a contractor does not constitute a “taxpayer” over which a commissioner has authority for the purposes of §§ 58.1-3109(6) and 58.1-3110(A) unless the contractor is actually subject to a local business license ordinance and therefore liable for local business license taxes. However, § 58.1-3109(6) enables Commissioners of the Revenue to obtain “the information necessary to make a complete assessment of any taxpayer’s . . . license taxes.”  Ascertaining whether a contractor is subject to a business license ordinance is necessary in order to make a “complete assessment” of license taxes, and it is therefore within the scope of authority under the statute.

In the absence of any provision exempting public service corporations from the scope of a Commissioner of the Revenue’s authority under §§ 58.1-3109(6) and 58.1-3110(A), I conclude that Commissioners of the Revenue possess both statutory and inherent authority to obtain from public utilities and their employees information needed to determine whether a contractor is subject to a business license ordinance.

CONCLUSION

Accordingly, it is my opinion that public utilities are not exempt from providing information requested by Commissioners of the Revenue pursuant to § 58.1-3109(6) and that public utility personnel are likewise not exempt from appearing at the request of a Commissioner of the Revenue pursuant to a summons issued in accordance with § 58.1-3110(A).

12 Section 58.1-3109(6).

13 A commissioner may only exercise authority under these statutes in order to assess the taxes of taxpayers within his jurisdiction. Section 58.1-3102 (2013) (“The jurisdiction, powers, and duties of commissioners do not extend beyond the bounds of their respective counties or cities.”).
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ADMINISTRATION OF GOVERNMENT

EXCEPTION AS TO PUBLIC OFFICER OR EMPLOYEE ENGAGING IN WAR SERVICE OR CALLED TO ACTIVE DUTY WITH THE ARMED FORCES

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A bill proposing creation of an executive-branch policy board that does not have executive-branch officials, employees, or appointees as a majority of its members, and which grants the legislative members of the Board effective veto power over the Board’s grant decisions, likely violates the separation-of-power principles in the Constitution of Virginia......................................................... 160

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federal law. Additionally, while a strong argument could be made that discrimination on the basis of gender identity or sexual orientation is always sex discrimination within the meaning of Virginia’s anti-discrimination statutes, the Supreme Court of Virginia has not considered and resolved that question. 

The Virginia Human Rights Act prohibits discrimination based on “sex.” Although the General Assembly did not define the term “sex” in the Act, it directed that the Act’s provisions “shall be construed liberally for the accomplishment of its policies.”

**VIRGINIA PUBLIC PROCUREMENT ACT**

In general, § 2.2-4321.2 of the Virginia Public Procurement Act establishes three broad rules that apply to the use of a project labor agreement (“PLA”) on public works contracts. First, a state agency cannot require the use of a PLA on a public works contract. Second, a state agency cannot prohibit the use of a PLA on a public works contract. Finally, within a public works contract, discrimination is prohibited against certain individuals or entities on the basis of whether that individual or entity has signed or agreed to adhere to a PLA. These three broad rules apply both when the state agency is the actual purchasing entity and when it is simply issuing grants, providing financial assistance, or entering into a cooperative agreement.

Section 2.2-4321.2 of the Code of Virginia, a provision of the Virginia Public Procurement Act, does not apply to contracts awarded under Virginia’s Public-Private Transportation Act of 1995.

Section 2.2-4321.2 of the Virginia Public Procurement Act governs the use of project-specific agreements with labor organizations (commonly known as project labor agreements) for a defined class of public works contracts.

**ADMINISTRATIVE LAW**

A state agency has no authority to adopt a policy inconsistent with a statute.

Regulations of state agencies may not conflict with the authorizing statute.
ANIMAL CARE

CONTROL OF DANGEROUS DOGS

In addition to the exceptions in § 3.2-6540(A) of the Code of Virginia, there are also certain defenses in subsection C of that statute to a dangerous dog charge. In setting forth the defenses, the statute provides, “[n]o canine or canine crossbreed shall be found to be a dangerous dog” based on certain factual situations. These defenses may be applied only by the court, not by an animal control officer.

There are a number of statutory exceptions in § 32.-6540(A) to the general definition of “dangerous dog.” One is if the dog has not caused serious injury to a dog or cat “as determined by a licensed veterinarian.” Another is “for other good cause as determined by the court.”

Under § 32.-6540(B) of the Code of Virginia, when an animal control officer has an objective reason to believe that a dog has bitten, attacked, or inflicted injury on a person, he must apply to a magistrate for issuance of a summons for violation of the dangerous dog statute. Only a court, and not an animal control officer, may determine, after consideration of the evidence, whether the exceptions and defenses found in subsections A and C of § 3.2-6540 are applicable.

CIVIL REMEDIES AND PROCEDURE

JURIES

A “term jury” list, or list of potential jurors for a term of court as described in § 8.01-351 of the Code of Virginia, is not subject to public inspection. It may be inspected only by counsel of record in cases that are to be tried by a jury during the term. Copying of the list by counsel may be permitted only by leave of the court upon a showing of good cause. Any litigant who is preceding pro se in a jury case enjoys this same right.

Jury lists are excluded from the scope of FOIA.

Three types of jury lists are used by clerks for trials in Virginia’s circuit courts: master jury lists, term jury lists, and panel jury lists. Each list is prepared at a separate stage in the jury selection process.
PROCESS

If service is attempted by mailing, it is sufficient if the clerk sends a copy of the order by registered or certified mail to the nonresident debtor’s last known address and files a certificate showing that such has been done. This is so regardless of whether the registered or certified mail receipt is not returned to the clerk by the post office, or is returned stating “not accepted” or “not at this address.”..........................................................................................................................139-40

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A bill creating an executive-branch policy board that does not have executive-branch officials, employees, or appointees as a majority of its members, and which grants the legislative members of the Board effective veto power over the Board’s grant decisions, likely violates the separation-of-power principles in the Constitution of Virginia ..........................................................152

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DOMESTIC RELATIONS

MARRIAGE GENERALLY

A retired judge who has voluntarily removed himself from the recall list of the Supreme Court of Virginia, after years of honorable active and recall list service, may celebrate the rites of marriage without necessity of bond or order of authorization.

EDUCATION

SCHOOL BOARDS

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REGULATIONS

The State Health Commissioner has certain authority under statute to enforce the standards for food preparation in the Commonwealth. To carry out this authority, the Commissioner administers licensing requirements for “restaurants” in the Commonwealth.

INDIAN COUNTRY

STATE AUTHORITY AND JURISDICTION

Despite federal recognition of the Pamunkey tribe, Virginia state and local law-enforcement agencies retain the same authority on the Pamunkey reservation as elsewhere in the Commonwealth to serve legal process, arrest warrants and subpoenas, and to investigate misdemeanors and felonies. The same conclusion with respect to criminal jurisdiction applies to the Mattaponi reservation, where there has been no federal recognition.

Generally, primary jurisdiction over land classified as Indian country rests with the federal government and the Indian tribe inhabiting it, and not with the States.

Lands occupied by Native Americans qualify as “Indian country” under federal law only in cases where the land was set aside for Indian use by the federal government, and the land remains subject to “federal superintendence.”
The provision of federal health, education, and welfare benefits to federally recognized tribes does not alone constitute active federal control over the Tribe’s land sufficient to support a finding of federal superintendence....216-17

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**LOCAL AND REGIONAL LIBRARIES**

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STATE AND LOCAL CORRECTIONAL FACILITIES

All correctional facilities, whether local or state, must provide medical care for inmates in accordance with law.

The Virginia Compensation Board is required to reimburse local correctional facilities for the medical costs of all inmates who are “State Responsible” while those inmates are in the temporary custody of a local correctional facility, beginning on the sixty-first day after notice of the commitment order is provided.

PROPERTY AND CONVEYANCES

PROPERTY OWNERS’ ASSOCIATION ACT

A property owners’ association may not deactivate a member’s barcode for nonpayment of a regular assessment if deactivation would endanger health, safety, or property. Further, deactivation for nonpayment of a special assessment under § 55-514 is not permitted when it would deny the owner “direct” access to his or her property through the roads of the development which are common areas.

PUBLIC SAFETY

DEPARTMENT OF CRIMINAL JUSTICE SERVICES

SCHOOL BOARDS

ELIGIBILITY TO STAND FOR ELECTION

In determining the eligibility of individuals who seek to stand for election to local office in the City of Richmond, the City’s Electoral Board is required to determine, as a factual matter, whether a candidate for school board meets the statutory qualifications for office, at the time of the November 8 election. Further, the City’s Electoral Board is not legally required to reexamine the signatures on all petitions submitted by candidates for office due to later changes in status of the voters who signed those petitions. Where the Electoral Board determines a candidate meets the statutory qualifications for office, the candidate’s name may be included on the ballot.

STATUTORY CONSTRUCTION

DILLON RULE

A corollary to the Dillon Rule provides that the powers of county boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.

As constitutional officers, clerks are subject to the Dillon Rule of strict construction, which limits their powers to those that are “expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”

The Dillon Rule strictly construes local government authority in Virginia, such that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from granted powers, and those that are essential and indispensable.

With respect to the power of localities to assess license fees on boats, I note that Virginia adheres to the Dillon Rule, which provides that the powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication. Unlike the power of the State legislature, the power of a locality must be exercised in accordance with an express grant of authority.
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