ANNUAL REPORT
OF THE
ATTORNEY GENERAL
TO THE
GOVERNOR OF VIRGINIA
2017

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND
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LETTER OF TRANSMITTAL

May 1, 2018

The Honorable Ralph S. Northam
Governor of Virginia
Richmond, Virginia

Dear Governor Northam:

In accordance with Virginia Code Section § 2.2-516, I am pleased to present to you the Annual Report of the Attorney General for 2017. It is my honor and privilege to lead the efforts of the very talented and hard-working team of legal professionals and staff members who proudly serve the citizens of the Commonwealth of Virginia in its Department of Law. The following report presents a summary and highlights of the work of this Office in 2017.

With kindest regards, I am

Very truly yours,

Mark R. Herring
Attorney General
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 also assists all Divisions of the Office with constitutional and appellate issues. In August 2017, Solicitor General Stuart A. Raphael concluded three-and-a-half years of service, at which point Trevor S. Cox became Acting Solicitor General.

Perhaps the most significant matter handled by the Solicitor General’s Office (the “Office”) in 2017 was not an appeal but a case in the U.S. District Court for the Eastern District of Virginia: Aziz v. Trump, challenging the constitutionality of President Trump’s January 27, 2017 executive order barring entry to the United States by individuals from certain countries, even those who were lawful permanent residents or entering the United States on valid work or student visas. Represented by the Solicitor General, the Commonwealth intervened in a pending lawsuit to defend the rights of its residents and its own sovereign rights. The court granted the Commonwealth’s motion for a preliminary injunction, thereby becoming the first in the nation to enjoin the original travel ban. The Office was also active in other travel-ban litigation, co-authoring an amicus brief filed in the U.S. Court of Appeals for the Fourth Circuit on behalf of 16 States and the District of Columbia and also joining other briefs in similar litigation around the country and in the U.S. Supreme Court.

A category of cases that saw substantial activity this year involved juvenile sentencing and the meaning of the U.S. Supreme Court cases Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 132 S. Ct. 2455 (2012), and Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Among those that we handled on appeal was LeBlanc v. Mathena, in which a district court had granted LeBlanc habeas relief based on his claim that his life sentence for a non-homicide offense committed when he was a juvenile violates Graham. The Fourth Circuit affirmed, rejecting the Commonwealth’s reliance on Angel v. Commonwealth, 281 Va. 248 (2011), in which the Virginia Supreme Court had held that Virginia’s sentencing scheme complies with Graham because, given the availability of geriatric release, it does not mandate life-without-parole sentences. When the Fourth Circuit denied our petition for rehearing, we filed a petition with the Supreme Court, which summarily reversed the Fourth Circuit’s
In a subsequent case handled by the Office, *Contreras v. Davis*, the Fourth Circuit recognized that Virginia does not impose mandatory life-without-parole sentences and that Virginia’s geriatric-release program gives inmates a meaningful opportunity to receive parole. Two other cases in the Fourth Circuit concerning similar issues—*Malvo v. Mathena* and *Blount v. Clarke*—have been briefed but remained pending at the end of 2017.

In addition to *LeBlanc*, there was other significant activity in the U.S. Supreme Court in 2017. The Court granted certiorari in two cases challenging decisions of the Supreme Court of Virginia: *Collins v. Virginia*, a Fourth Amendment challenge to a warrantless search of a motorcycle parked on a residential driveway; and *Currier v. Virginia*, which concerns whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal. Both *Collins* and *Currier* remained pending before the U.S. Supreme Court at the end of 2017.

The Supreme Court also issued a decision in *Bethune-Hill v. Virginia State Board of Elections*, a suit challenging 12 House of Delegates districts as racial gerrymanders. The Court vacated the three-judge district court’s ruling that race did not predominate in shaping 11 of the districts; it upheld the district court’s ruling, finding that, while race predominated in shaping the twelfth district, it was narrowly tailored. The Court remanded to allow the district court to determine whether, applying the correct legal standard, race did predominate and, if so, whether the use of race was narrowly tailored to satisfy the Voting Rights Act. Our Office represented the Board of Elections in the remand proceedings, including a four-day evidentiary hearing in October, but no ruling was issued in 2017.

The Office briefed or argued more than a dozen other cases in the Fourth Circuit in 2017. Favorable results were obtained in, among other cases, *Virginia Uranium, Inc. v. Warren*, upholding the constitutionality of Virginia’s moratorium on uranium mining; *Vista-Graphics, Inc. v. VDOT*, holding that restrictions on tourism literature available to travelers at VDOT rest-area facilities did not violate the First Amendment; and *Toghill v. Clarke*, rejecting a facial constitutional challenge to a Virginia statute under which Toghill had been convicted of soliciting sodomy from a person he believed was a minor. As in previous years, we also handled numerous matters arising in the correctional
context, including *DePaola v. Virginia Department of Corrections*, in which the court upheld the constitutionality of the Department’s “step-down” program for housing dangerous inmates, and *Makdessi v. Fields*, in which the court rejected Makdessi’s Eighth Amendment claim that prison officials had been deliberately indifferent to the risk of a physical attack by his cellmate. Several other constitutional challenges to Virginia statutes were briefed but remained pending at the end of 2017, including *Manning v. Caldwell*, a challenge to Virginia statutes prohibiting the sale to or possession of alcohol by those subject to interdiction orders, and *Stinnie v. Holcomb*, a suit challenging the suspension of driver’s licenses by Virginia courts, but brought against the DMV Commissioner.

The Office claimed a number of victories in the Supreme Court of Virginia as well, including in *Shin v. Commonwealth*, a case involving Virginia’s implied-consent law regarding alcohol testing of drivers, in which the Court upheld a civil conviction against a number of constitutional claims.

Finally, the Office achieved favorable results in a variety of other matters in 2017, including filing amicus briefs in the Court of Appeals of Virginia regarding the jurisdiction of Virginia courts to make factual findings needed by juvenile immigrants to apply for Special Immigrant Juvenile status from the federal government; and, in a Virginia circuit court, moving to quash subpoenas issued to the Secretary of the Commonwealth seeking materials related to the Governor’s exercise of his constitutional power to restore an individual’s political rights.

**CRIMINAL JUSTICE AND PUBLIC SAFETY DIVISION**

The Criminal Justice and Public Safety Division includes the following sections: Computer Crimes, Correctional Litigation, Criminal Appeals, Major Crimes and Emerging Threats, Health Care Fraud and Elder Abuse/Medicaid Fraud Control Unit, and the Sexually Violent Predators Civil Commitment Section. It also includes the Tobacco Enforcement Unit. The Division handles computer crimes and cyber-security issues, cases brought by inmates, criminal appeals, Medicaid fraud cases, as well as prosecutions relating to child pornography, gangs, money laundering, fraud, and patient abuse. It also represents criminal justice and public safety agencies within the Commonwealth, petitions for the civil commitment of sexually violent predators, and administers the 1998 Tobacco Master Settlement Agreement.
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 is also responsible for representing criminal justice and public safety agencies, and advising the Secretary of Public Safety and Homeland Security, as requested. Additionally, the Section advises the Secure and Resilient Commonwealth Panel, an advisory board of the executive branch of state government that monitors and assesses the implementation of statewide prevention, preparedness, response, and recovery initiatives and, where necessary, reviews, evaluates, and makes recommendations relating to the emergency preparedness of government at all levels in the Commonwealth.

MC&ET also implements public safety initiatives of the Attorney General. Major public safety initiatives pursued by the Section in 2017 included: continuing implementation of the heroin and prescription drug abuse agenda to combat the heroin/opioid epidemic in Virginia, prosecuting homicides and other violent crimes, prosecuting gun crimes, prosecuting human trafficking crimes, engaging in prevention, intervention, and suppression of criminal street gang activity, participating in major financial crime investigations, and targeting and prosecuting violators of Virginia’s Racketeer Influenced and Corrupt Organization Act. The Section also works to build successful collaborative partnerships to better achieve these public safety initiatives.

Criminal Prosecutions

The Section is comprised of eleven attorneys. Ten are prosecutors who are located throughout the Commonwealth and routinely handle criminal prosecutions in both federal and state courts. During 2017, three prosecutors were based in Norfolk. Additionally, the Section has one prosecutor located in our Fairfax office, two prosecutors located in our Richmond office, two prosecutors in Alexandria, one prosecutor in the Shenandoah Valley and one prosecutor located in Southwest Virginia.

In 2017, seven of the prosecutors were cross-designated as Special Assistant United States Attorneys in the Eastern or Western District of Virginia to further enhance the valuable working relationship that exists between the
Section and the United States Attorneys’ offices. Through a grant from the Baltimore-Washington High Intensity Drug Trafficking Area (“HIDTA”) Program, two Assistant Attorney General prosecutors are located at the United States Attorney’s Office in Alexandria. They are responsible for prosecuting significant federal drug trafficking related cases, with an emphasis on heroin trafficking.

Multi-Jurisdiction Grand Juries

In 2017, the Section was instrumental in the formation of the multi-jurisdiction grand jury in Powhatan, which includes the jurisdictions of Powhatan, Goochland, Amelia, and Prince Edward Counties. This new multi-jurisdiction grand jury will enable prosecutors to more thoroughly investigate and prosecute all types of serious crime in those jurisdictions. Additionally, MC&ET prosecutors serve as special counsel to the Shenandoah Valley Multi-Jurisdiction Grand Jury, investigating gang-related and cold-case homicide investigations in that region, in addition to multi-jurisdiction grand juries in Newport News, Portsmouth, Albemarle County, and Northern Virginia.

Heroin/Opioid Agenda & Related Prosecutions

The Attorney General continued to make prosecutions of heroin/opioid cases a priority. In 2017, MC&ET prosecutors worked with local and federal partners to prosecute more than 40 cases against dealers and traffickers involving more than 100 kilograms of heroin with an estimated street value of approximately $20 million.

To that end, MC&ET attorneys and staff have established a major multi-faceted program aimed at using education, prosecution, and legislation to combat the heroin/opioid epidemic in Virginia. Section prosecutors have consistently sought ways to develop consensus to address the epidemic among law enforcement, medical personnel, and other community stakeholders through task forces and working groups. In 2017, an MC&ET prosecutor continued to lead the Hampton Roads Heroin Working Group, with the cooperation of the Office of the United States Attorney for the Eastern District of Virginia. The mission of the group is to aggressively and relentlessly 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. Another MC&ET prosecutor continued to
lead the Northern Virginia Regional Heroin Task Force. The Section also worked to establish collaborative partnerships in Southwest Virginia.

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

**Commonwealth v. Weldemariam** (Fairfax Cty. Cir. Ct.) – Weldemariam, a narcotics redistributor, sold a combination of heroin, carfentanil, and fluoroisobutyryl fentanyl that killed a young woman in Fairfax Station. He was sentenced to eight years’ imprisonment.

**Commonwealth v. Gaskins** (Fairfax Cty. Cir. Ct.) – Gaskins distributed heroin that killed a young man in Centreville. He also distributed heroin in controlled purchases with police. He pled guilty to five counts of distribution of heroin, one count of possession with intent to distribute heroin, and one count of conspiracy to distribute heroin. He was sentenced to seven years’ imprisonment.

**Commonwealth v. Evers** (Fairfax Cty. Cir. Ct.) – Evers, a high school senior and drug distributor, distributed morphine to a 17-year-old during a party in Centreville in exchange for other narcotics. The 17-year-old died hours later, and the morphine was a contributing cause of the victim’s death. Evers was sentenced to seven years’ imprisonment.

**Commonwealth v. San Pietro** (Fairfax Cty. Cir. Ct.) – San Pietro, a heroin redistributor, had obtained a particularly potent dose of heroin from her supplier. She told her dealer that the heroin was so strong that someone would likely die from its use. San Pietro distributed the drug in a parking lot in Merrifield and the victim died shortly thereafter in his car. San Pietro was sentenced to five years’ imprisonment.

**Commonwealth v. Kelly** (Fairfax Cty. Cir. Ct.) – Kelly sold heroin to an individual in Vienna, who died hours later from an overdose. Kelly was sentenced to four years’ imprisonment.

**United States v. Twitty** (E.D. Va.) – Twitty was convicted of conspiracy to distribute heroin, cocaine, and marijuana for his role in an extensive drug operation involving a Mexican drug cartel, which occurred over the course of two years and involved the distribution of wholesale amounts of heroin, marijuana, and cocaine in various cities along the east coast, including Philadelphia, New York City,
Charlotte, and throughout Hampton Roads. When special agents from the federal Drug Enforcement Administration arrested the defendant, they recovered 2.6 kilograms of methamphetamine, over a quarter kilogram of heroin and marijuana, a stolen Glock 21 semi-automatic firearm, several cellular telephones, a money counter, and $18,745 in cash. Twitty used at least two co-conspirators to insulate himself from the risks associated with narcotics trafficking. One co-conspirator, working on behalf of Twitty, made nearly $300,000 in cash deposits into 22 accounts in just six months. These accounts, some of which originated in Mexico, were often emptied within 24 hours of receiving the funds. Twitty was sentenced to 27 years’ imprisonment.

United States v. Harris (E.D. Va.) – Harris was convicted of possession with intent to distribute 100 grams or more of Heroin. Henrico County police executed a search warrant on Harris’s residence and another residence belonging to his mother. Police recovered two large bags containing 153 grams of heroin, two large bags containing 262 grams of cocaine and 62 grams of cocaine base, digital scales, baking soda, cell phones, and more than $70,000. Harris was sentenced to 120 months in federal prison.

United States v. Perdue (E.D. Va.) – On August 14, 2017, over 300 law enforcement agents made arrests and executed search warrants in Virginia, Georgia, and New York. The “takedown” was the result of a multi-year, multi-jurisdictional, and multi-agency Organized Crime Drug Enforcement Task Force investigation designated “Operation Hardest Hit.” Law enforcement began investigating Leroy Perdue and his drug trafficking organization (“Perdue DTO”) following the heroin overdose death of a young resident of Chesapeake. Law enforcement infiltrated the Perdue DTO and made ten undercover controlled purchases of heroin and fentanyl. One member of Perdue DTO, Rhadu Schoolfield, was arrested in Norfolk with more than 800 grams of heroin after he returned from a trip to New York. The Perdue DTO distributed in excess of 100 kilograms of heroin (approximately 250,000 doses) over a ten-year period. Members of the Perdue DTO were responsible for supplying a violent gang based in Portsmouth and continued to sell dangerous narcotics even after learning that their drugs resulted in death. In 2017, twelve of the thirteen federally indicted defendants pleaded guilty in conjunction with the Perdue DTO conspiracy, and four of thirteen have now been sentenced to a combined 65 years in federal prison.

United States v. Gordon (E.D. Va.) – Five members of a Portsmouth-based heroin and fentanyl trafficking organization were convicted and sentenced to a
combined total of 66 years in prison. All were sentenced consistent with their respective roles in the conspiracy. Members of this organization conspired to manufacture and distribute heroin in excess of 1,000 grams. The group’s primary source of supply for heroin and fentanyl came from Baltimore. The narcotics were then transported to Hampton Roads and repackaged using a hydraulic press machine and gel capsules for retail sales. This organization further disseminated their drugs and served as a source of supply for other individuals in the Outer Banks of North Carolina. Police executed a search warrant on Gordon’s residence and recovered opiates, scales, drug paraphernalia, and firearms. During the conspiracy, Gordon, a convicted felon, possessed an AK-47-style rifle as well as a Taurus handgun. When Gordon was arrested, police recovered nearly $50,000 in cash, a firearm, heroin, and fentanyl. Gordon was sentenced to 24 years’ imprisonment.

United States v. Shepard (W.D. Va.) – A Wise County physician investigated for prescribing narcotic pain killers to a patient with whom the physician had a sexual relationship was convicted for distribution of controlled substances without a legitimate medical purpose. The physician prescribed over 2,700 dose units of numerous controlled substances to the patient, the majority of which were Percocet. A review of the physician’s records revealed only two documented patient visits for this individual. He was sentenced to serve six months in federal prison.

Prosecution of Violent and Firearms-Related Crimes

A primary public safety initiative of the Attorney General is prosecuting crimes involving violence and firearms. To that end, MC&ET prosecutors collaboratively work with the Virginia State Police and the federal Bureau of Alcohol, Tobacco, Firearms, & Explosives (“ATF”) to develop innovative strategies to prosecute cases involving the illegal possession and trafficking of firearms throughout the Commonwealth. In addition, MC&ET prosecutors collaborate with Commonwealth’s Attorneys and United States Attorneys to prosecute crimes involving violence and firearms throughout the Commonwealth. In 2017, this collaboration resulted in numerous noteworthy convictions in both state and federal courts for crimes such as murder, malicious wounding, gang participation, use of a firearm during the commission of a felony, possession of a firearm by a felon, and possession of firearms in conjunction with narcotics trafficking.
In 2017, over 150 law enforcement agents and officers executed a major narcotics takedown known as “Operation Riptide,” arresting dozens of individuals for their respective roles in selling drugs and guns in Norfolk. ATF began Operation Riptide in the fall of 2016 and, in collaboration with the Norfolk Police Department, Virginia State Police, and prosecutors from this Office as well as the U.S. Attorney’s Office, identified more than 30 individuals throughout Hampton Roads who were illegally selling firearms, heroin, and/or other narcotics. This operation resulted in the recovery of over 50 firearms (including at least 3 assault rifles, 2 sawed-off shotguns, and 47 handguns, 18 of which had obliterated serial numbers or were stolen), over 170 grams of heroin, 65 grams of powder cocaine, 290 grams of crack cocaine, and a bulletproof vest. MC&ET attorneys worked collaboratively with law enforcement on this major operation and assisted in securing indictments and the convictions of seventeen federal defendants.

Summaries of some of the significant firearm and violent crime cases that MC&ET prosecuted during the year in both state and federal courts are as follows:

**Commonwealth v. Perez** (Augusta Cty. Cir. Ct.) – Perez was convicted of distributing more than 200 grams of methamphetamine and pleaded guilty to distributing more than $24 million in methamphetamine from 2014 to 2016 in Augusta County and the I-81 corridor. A member of a Mexican drug cartel, Perez bragged to a variety of people about how people who owed his organization money were tortured or their family members killed. He told one individual about a person in Mexico that owed his cartel $1,500. That person was kidnapped, tortured and had their feet burned with a blow torch. He also talked about a man in Waynesboro who owed a significant debt to his cartel. That person’s 4-year-old daughter was found dismembered in a dumpster in Mexico. Perez was sentenced to 35 years in prison with 15 years suspended.

**United States v. Rivera-Gutierrez** (E.D. Va.) – This case involved a three-year conspiracy to distribute cocaine and firearms in Hampton Roads. The DEA conducted nine controlled purchases of cocaine. During one of these purchases, Rivera-Gutierrez sold five firearms with high-capacity clips (100 round drums) and a silencer. The firearms included a Russian Izhmash Saiga 12 caliber shotgun, an Israeli Tavor Sar 556 caliber rifle, a DMPS Panther 223 caliber rifle, and a stolen Olympic MRF AR-15. At the sentencing, the two defendants received a combined total of twelve-and-a-half years in federal prison.
Commonwealth v. Everett (Norfolk Cir. Ct.) – Norfolk Police responded to an apartment to check on the welfare of a child. Upon entering the apartment, they smelled marijuana and encountered Everett, who voluntarily surrendered a plastic bag containing a small quantity of marijuana. Police searched the apartment and recovered a 9mm handgun from a hamper in the bedroom closet. Under the mattress, police recovered a 9mm magazine with 10 cartridges in it. Everett, who had been convicted in 2007 of aggravated sexual battery, admitted that when he heard the police at the door he went and hid the gun in the hamper. Everett pleaded guilty to possession of a firearm by a felon. Defendant was sentenced to five years with three suspended.

Commonwealth v. Jones (Norfolk Cir. Ct.) – Jones was charged with possession of a firearm by felon after officers responded to a “shots fired” complaint and stopped a vehicle in which Jones was a front-seat passenger. A 9mm cartridge casing was found on the passenger side floorboard and a Keltec 9mm handgun, loaded with hollow point ammunition, was located under the passenger seat. Jones admitted the gun was his and that he fired it in the air after being threatened. He had been previously convicted as a juvenile of breaking and entering and malicious wounding by mob. Jones was sentenced to five years with four years suspended.

Human Trafficking Task Force

MC&ET continues to play a significant role in the Hampton Roads Human Trafficking Task Force. This task force, consisting of local, state, and federal law enforcement officials, prosecutors, and victim advocates, was formed with a mission to target and prosecute sex traffickers as well as to assist victims of human trafficking. In 2017, the MC&ET assigned prosecutor created collaborative partnerships and began actively investigating and prosecuting sex traffickers in the Norfolk area.

Agency Representation & Emergency Management

MC&ET also serves as agency counsel to a host of public safety agencies, including the Department of Virginia State Police, the Department of Criminal Justice Services (“DCJS”), the Department of Forensic Science, the Office of the Inspector General, the Department of Emergency Management (“VDEM”), the Department of Fire Programs, the State Fire Marshal’s Office, the Virginia Fire Services Board, and the Department of Military Affairs (which includes the
Virginia National Guard and the Virginia Defense Force). The Section also serves as counsel to the Virginia Board of Corrections.

Legal representation of the above-referenced agencies and entities includes, but is not limited to reviewing legislation proposed by the agency, reviewing proposed regulations and amendments to regulations, and representing the agency in federal and state courts. The Section also provides advice on a plethora of subjects, including Freedom of Information Act requests, contracts, and personnel issues. In addition, the Section is responsible for representing DCJS in administrative hearings involving individuals licensed by the agency, such as bail bondsmen, bail enforcement agents, and private security services businesses. MC&ET attorneys represent 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 attempt to subpoena VSP’s criminal investigative files in civil cases. Attorneys from the Section also represent VSP in cases filed by registered sex offenders petitioning the court to be relieved of their registration requirements.

While certain responsibilities of agency representation are shared among the Section, MC&ET has one attorney, located in the Fairfax regional office, who is dedicated solely to agency-representation matters, particularly in the specialized area of emergency management and natural disasters. As such, MC&ET advises VDEM regarding the legality of emergency response actions before, during, and after declared states of emergency. The Section also coordinates with the Governor’s counsel and cabinet secretaries as needed during states of emergency. In 2017, MC&ET assisted with each of the state’s declared emergencies. Following the incidents during the rally in Charlottesville on August 12, MC&ET attorneys advised and represented the Secretary of Homeland Security, VDEM, and VSP personnel regarding various legal matters, some of which remained ongoing at the end of 2017. The MC&ET Section continues to advise VDEM regarding the Access and Functional Needs Advisory Committee to ensure inclusive emergency planning for the whole community, including individuals with disabilities and limited English proficiency.

MC&ET works closely with emergency management personnel at the local, state, and federal levels by participating in regional and national workgroups such as the National Capital Region Attorneys Group (“NCRAG”) and the National Emergency Management Association Legal Counsel
Workgroup. NCRAG addresses legal issues specific to the National Capital Region with a focus on special security events, such as inaugurations and other special events in Washington, D.C. In 2017, MC&ET’s emergency management attorney also participated in Federal Emergency Management Agency Region III-sponsored training and continued to serve on the Virginia Mass Care Task Force, which assists in the development and implementation of a statewide sheltering strategy and supports local and regional disaster sheltering.

Financial Crimes Investigators

The financial crimes team is comprised of two financial investigators and a criminal analyst. The mission of this team is to identify, target, and disrupt financial crimes and the financial aspects of all other crimes 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 during the execution of search warrants, sharing timely intelligence on money laundering and 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 cases. Over the course of the year, the team assisted local and federal law enforcement agencies in the investigation of various crimes with a financial nexus, including homicide, drug and cigarette trafficking, fraud, and embezzlement.

Examples of investigations during the year include the following:

**Michael Dean Kent** – This was a joint investigation with the U.S. Postal Inspection Service, the Frederick County Sheriff’s Office, and the U.S. Attorney’s Office for the Western District of Virginia. This investigation involved Michael Dean Kent, a.k.a. Michael Dean Duncan, and his company Holiday Property Group. Kent solicited people who were interested in selling their timeshares, indicating to them that he had buyers ready to purchase. He required an upfront payment, generally around $1,500 per property to sell the timeshares. Once he had the funds in hand, he usually provided no further communication. Kent entered a guilty plea in federal court for conspiracy to commit wire fraud. He admitted to victimizing more than 500 persons to obtain roughly $550,000. His sentencing remained pending at the end of 2017.
David Vatter – This was a joint investigation with the Augusta County Commonwealth’s Attorney, Augusta County Sheriff’s Office, and VSP. David Vatter was charged with first-degree murder in the 2014 death of his wife Shelby Vatter. The motive for the murder was believed to be financial. The financial crimes team assisted with the investigation and prosecution. Ultimately, David Vatter was found guilty of first-degree murder during a jury trial in November 2017, for which he received a life sentence.

Computer Crimes Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crimes Section within the Office of the Attorney General (the “Office”). The long-term vision for the Section was to spearhead Virginia’s computer-related criminal 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 within Virginia’s Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft.

Prosecutions

During the year, members of the Computer Crimes Section traveled 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 over the past year include, among others, the counties of Albemarle, Fluvanna, Fairfax, Greene, Halifax, Henrico, King George, Loudoun, Madison, New Kent, Powhatan, Prince Edward, and Southampton, and the cities of Harrisonburg, Norfolk, Petersburg, Richmond, Staunton, and Virginia Beach.

The three 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 109 cases during the year, obtaining 25 convictions (with the remainder of cases ongoing) for crimes of possession of child pornography, production of child pornography, distribution of child pornography, receipt of child pornography, and internet solicitation of children. Defendants in these cases were sentenced to a total of 139 years and six months of active imprisonment.
A few of the Section’s significant cases are summarized below:

**Commonwealth v. Kiser** (Augusta Cir. Ct.) – Kiser came to the attention of law enforcement after his live-in girlfriend witnessed him sexually assaulting their daughter. Responding officers learned that Kiser had placed security cameras inside the house, so they obtained a search warrant for computer and video recording equipment within the residence. During a search of these items, investigators uncovered multiple files of child pornography on both Kiser’s personal computer and a series of CDs found in Kiser’s locked computer room. Kiser was charged with 11 counts of possession and 11 counts of reproduction of child pornography (along with a charge of aggravated sexual battery of a victim less than 13, which was dealt with separately). A jury ultimately found the defendant guilty on all charges and recommended a sentence of 66 years, with $11,000 in fines. Following this, Kiser pled guilty to the remaining aggravated sexual battery charge that was scheduled to be tried the following week.

**United States v. Macaluso** (E.D. Va.) – The defendant was a rocket scientist with access to top secret military information at the U.S. Naval Surface Warfare Center Dahlgren Division (“Dahlgren”) in King George County during the course of his criminal conduct. Dahlgren’s IT department detected Macaluso frequenting child pornography websites while at his work station on base. A subsequent computer forensic examination revealed he had accessed several dozen child pornography images on his work computer, which also compromised work-related materials saved on the same computer. Macaluso ultimately pled guilty to a Criminal Information charging one count of possession of child pornography. The court sentenced the defendant to 12 months and 1 day in prison and imposed a $50,000 fine, along with an additional 10 years of supervised release. By statute, Dahlgren maintains exclusive federal jurisdiction over crimes committed on its base, thus state charges were not possible.

**Commonwealth v. Overholt** (Madison Cir. Ct.) – Investigators with the Northern Virginia Internet Crimes Against Children Task Force executed a search warrant on Overholt’s Madison County residence after downloading several dozen child pornography files from him over a peer-to-peer file-sharing network. During the search, investigators uncovered thousands of files of child pornography on Overholt’s computer and external storage devices. Overholt had a prior conviction for possession of child pornography from 2001, as well as
a lengthy criminal record of arson, theft, and drug-related offenses. Overholt failed to appear on the date of his jury trial, but was later apprehended and ultimately found guilty at a bench trial. He was sentenced to 12 years on 10 counts of possession of child pornography, and an additional 12 months on the failure to appear charge.

Computer Forensic Unit

Throughout the year, the Section’s Computer Forensic Unit continued to make extensive progress towards alleviating Virginia law enforcement’s computer forensic backlog. The Unit’s three forensic examiners handled 188 total cases from 37 separate jurisdictions of the Commonwealth. As part of those cases, the Unit’s examiners forensically analyzed 577 pieces of digital evidence, including computer hard drives, cell phones, tablets, and various storage devices.

The deployment of the Unit’s RV-style mobile computer forensic lab, one of only three in Virginia, allows computer forensic examiners to analyze seized evidence on-site at search warrant executions in order to timely determine which items are of evidentiary value and thereby assist with furthering the investigation while on scene. The Unit also maintains a state-of-the-art computer forensics lab located within the Office of the Attorney General.

Task Force Collaboration

The Section also continued to be an active member of the Southern Virginia and Northern Virginia Internet Crimes Against Children Task Forces and the Richmond-based Virginia Cyber Crime Strike Force, dedicating its three computer forensic examiners and providing three prosecutors to pursue 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 the aforementioned computer crimes and to provide Virginia with centralized locations to report such crimes.
Trainings & Service Activities

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 Commonwealth. Training locations included the cities of Hampton, Richmond, and Roanoke, as well as Chesterfield County and Pulaski County. These trainings focused on the legal issues surrounding computer crimes, including methods of obtaining search warrants to gather digital evidence and the use of procedural tools in the investigation of computer crimes and identity theft.

As in past years, the Computer Crimes Section traveled frequently throughout Virginia to speak to students and parents for the Attorney General’s Virginia Rules’ “Safety Net” presentation. “Safety Net” is an interactive presentation that addresses issues of “cyber-bullying” 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. This past year, members delivered the presentation numerous times to schools in the counties of Chesterfield, Henrico, Orange, and Richmond, the town of Tappahannock, and other locations throughout the Commonwealth.

Database Breaches & Other Notifications

In addition to investigating and prosecuting computer crimes, the Section serves as a clearinghouse for information concerning criminal and civil misuses of computers and the internet. The Section’s attorneys review notifications from companies and organizations that experience database breaches to ensure compliance with Virginia’s database breach notification law contained in § 18.2-186.6 of the Code of Virginia. In 2017, the Section received 831 such notices, a 50 percent increase from 2016. The Section also handled over 100 investigatory leads and citizen complaints received through the Section’s email inbox and the FBI’s Internet Crime Complaint Center, which is the primary resource nationwide for computer crime complaints. During the year, attorneys from the Section were selected to speak as experts on data breach law and computer crime law at various national conferences, including conferences in Miami, New York, and Santa Monica.
Legislation

After completing service on the Governor’s Cyber Security Commission that ended in 2016, Section members helped to shepherd Commission-backed legislation through the 2017 General Assembly. These newly-enacted laws, drafted by the Computer Crimes Section, created felony prohibitions against hacking government and utilities computers and clarified when search warrants should apply to searching digital evidence.

Correctional Litigation

The Correctional Litigation Section represents the Department of Corrections, the Parole Board, the Department of Juvenile Justice, the Criminal Sentencing Commission, and the Board of Juvenile Justice. Additionally, the Section represents the Secretary of Public Safety and the Governor on writs and extradition matters, and Commonwealth’s Attorneys on detainer matters. Members of the Correctional Litigation Section also serve as the official designee for the Attorney General to both the Criminal Justice Services Board and the Criminal Sentencing Commission. The Section consisted of five attorneys for most of 2017.

During the year, the Section handled a total of 531 cases in both state and federal courts, of which 378 were received in 2017. Cases handled by the Section included section 1983 civil rights cases involving excessive force and claims pursuant to the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), First Amendment cases, habeas corpus petitions, mandamus petitions, cases pursuant to the American with Disabilities Act, inmate tort claims, and declaratory matters. The Section also handled 445 documented advice matters for client agencies.

Summaries of some significant federal cases handled by the Section in 2017 are as follows:

Gray v. McAuliffe (E.D. Va.) – This case challenged the method of execution designated by the Commonwealth to be used for Gray’s execution and requested injunctive relief. After an evidentiary hearing, Gray’s appeals to the Fourth Circuit and the U.S. Supreme Court were denied, and Gray was executed in 2017.
Stinnie v. Holcomb (W.D. Va.) – This case was filed as a putative class action challenging the suspension of driver’s licenses by Virginia courts for nonpayment of fines and costs by indigent individuals. The court dismissed the case. Plaintiffs appealed to the U.S. Court of Appeals for the Fourth Circuit, and the matter remained pending at the end of 2017. The Solicitor General’s Office is handling the appeal.

Hendrick v. Caldwell (W.D. Va.) – This case was filed as a putative class action against the putative defendant class of all Commonwealth’s Attorneys in Virginia as a challenge to the Virginia statutes prohibiting the sale or possession of alcohol by those subject to interdiction orders. This Office briefed and argued the Rule 12(b)(6) motion to dismiss, which the district court granted. Plaintiffs appealed to the Fourth Circuit and the matter remained pending at the end of 2017. The Solicitor General’s Office is handling the appeal.

Muhammad v. Mathena (W.D. Va.) – This case was brought by an inmate who asserted five separate claims under section 1983 against multiple defendants involving a fight between inmates. After numerous motions for summary judgment and following discovery, all the claims but one were dismissed by the court. After a two day trial, the jury returned a verdict in favor of the two officers, finding that they responded appropriately to the altercation.

Peterson v. Barksdale (W.D. Va.) – In this case, the plaintiff, an inmate, filed a section 1983 civil rights action alleging that the Department of Corrections’ failure to provide him a diet consistent with his Asatru religious beliefs violated his rights. The district court dismissed both of these claims on the basis that the Department’s policies and conduct did not place a substantial burden on the plaintiff’s ability to exercise his religious practices.

Criminal Appeals Section

The Criminal Appeals Section handles an array of post-conviction litigation filed by, or on behalf of, individuals convicted of state crimes 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 responds to petitions for writs of actual innocence and also defends against appellate and collateral challenges to all cases in which a death sentence has been 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 2017. Finally, the Section represents the Capitol Police, state magistrates, and the Commonwealth’s Attorneys’ Services Council.

During the year, the Section defended against 835 petitions for writs of habeas corpus and represented the Commonwealth in 360 appeals in state and federal courts. The Section also received 44 petitions for writs of actual innocence, an ever-increasing area of responsibility and a more than thirty-percent increase from 2016. The Section also handled 20 matters involving magistrates, including two lengthy section 1983 cases that remain pending in federal district court.

In 2017, there were seven capital cases pending in the Section’s Actual Innocence and Capital Unit. Of the seven, two were concluded by commutation (William Burns and Ivan Teleguz) and two by execution (Ricky Gray and William Morva). The remaining three death penalty cases are either pending in federal district court or on appeal to the U.S. Court of Appeals for the Fourth Circuit Court: Porter v. Zook and Lawlor v. Zook will be argued in the Fourth Circuit in 2018 and Juniper v. Zook is on remand from the Fourth Circuit to the federal district court for a hearing on Juniper’s Brady claim alleging that the defendant was prejudiced by the prosecution’s suppression of favorable evidence.

The Court of Appeals of Virginia issued several important decisions in 2017 dealing with technology and scientific evidence. In Atkins v. Commonwealth, the court found that the evidence adequately established the necessary foundation for admission of text messages and Instagram posts obtained from a cellular phone that the defendant had identified as his and for which he had provided the password to the police. In a “cold case” involving a rape conviction, Madonia v. Commonwealth, the Court rejected the defendant’s claim that there had been a break in the chain of custody of DNA evidence, because the police officer responsible for taking the forensic evidence to the laboratory was deceased at the time of trial. In Aponte v. Commonwealth, the Court ruled that a state trooper had not violated the defendant’s Fourth Amendment rights by obtaining a warrantless blood sample, which had been taken by a nurse at a hospital several hours after the defendant had been involved in an alcohol-related accident. Lastly, in Broadous v. Commonwealth, a case of first impression, the Court held that Virginia Code § 18.2-251.03 provides an affirmative defense to an individual who makes an emergency report of an overdose, but not to the person who passively receives emergency medical attention as the result of such overdose.
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 comprises investigators, auditors, analysts, computer specialists, attorneys, nurses, outreach workers, and administrative staff. Over the past 35 years, MFCU has successfully prosecuted providers in cases involving patient abuse and neglect or fraudulent acts committed against the Virginia Medicaid program, and has secured over $1,980,737,890.42 in criminal and civil recoveries. In addition to prosecuting those responsible for health care fraud or abuse, the MFCU recovered $23,255,898.03 last year in court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements.

MFCU has expanded its outreach efforts to seniors, law enforcement, and senior citizen service providers. MFCU is now helping to inform the community on the latest methods to effectively prevent and/or report elder abuse and provide 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 community organizations, government agencies, academic institutions, and law enforcement personnel working with Virginia’s senior population. MFCU publishes an annual report and a quarterly newsletter, and also maintains a Twitter account and an active Facebook page.

MFCU had a very successful year in 2017. By the end of the year, MFCU had obtained 38 convictions and had 116 active criminal investigations pending. In addition, MFCU’s Civil Investigations Squad opened 76 new civil cases.

A few notable matters handled in 2017 include the following:

United States v. Taylor (E.D. Va.) – Taylor was convicted of one count of conspiracy to commit health care fraud and one count of tax evasion in the U.S. District Court for the Eastern District of Virginia in Richmond. Taylor owned and operated Global Interventions, LLC (“Global”), a Medicaid-contracted Therapeutic Day Treatment (“TDT”) services provider. TDT is a Medicaid health care program that provides mental health services to Medicaid-eligible children. TDT services are designed to be targeted and time-limited...
interventions for children who are at risk of failing at school or being expelled from school due to a significant behavioral or mental health issue. Taylor and a co-conspirator knowingly and intentionally prepared and submitted false billings to Medicaid for TDT services that were not provided. As a result of these falsified billings, Global obtained health care benefit payments from Medicaid totaling approximately $595,645.12. In addition, Taylor failed to pay employee withholdings to the IRS. In an attempt to mislead the IRS, Taylor prepared and submitted to the IRS a fraudulent Employer’s Annual Federal Tax Return (Form 944). Taylor disregarded the instructions of his accountant to fund an account from which Global’s employment tax obligations were to be paid to the IRS. Instead, Taylor stopped making deposits into a tax account while telling his accountant he had deposited $48,604.82 worth of payments into that account. Taylor was sentenced to 37 months’ incarceration and three years’ supervised release after release from incarceration. He is required to pay $595,645.12 in restitution to Virginia Medicaid and $398,375.00 to the IRS.

*United States v. Branch* (W.D. Va.) – This tragic case began when three children were found living in filth at a home in Bristol, Virginia. Melissa and Bryan Harr had hired Deborah Branch to provide attendant care and respite care to their Medicaid eligible son under a consumer-directed waiver program. From January 2010 through September 2015, Branch submitted time sheets claiming she was providing services for the Harrs’ disabled son, who suffers from cerebral palsy, when in fact she was not providing any care. In exchange for assisting Branch in getting paid for work she did not do, Branch paid the Harrs approximately $200 every two weeks. As a result of Branch’s falsified timesheets, Virginia Medicaid’s Department of Medical Assistance Services paid out $350,641.02, of which $207,854.43 was paid to Branch. More importantly, the Harrs’ disabled son did not receive the services he legitimately needed pursuant to the waiver program.

Deborah Branch was sentenced on one count of conspiracy to commit health care fraud and one count of wire fraud. She was sentenced to 72 months’ imprisonment, three years of supervised release, and a $200 special assessment. Melissa Harr was sentenced on one count of conspiracy to commit health care fraud. She was sentenced to 48 months to run consecutively to a three-year state sentence she is currently serving. She was also sentenced to three years’ supervised release and a $100 special assessment. Bryan Harr was sentenced on one count of conspiracy to commit healthcare fraud. He was sentenced to 48 months to run consecutively to a three-year state sentence he is currently serving.
In re: Mylan – The Mylan Settlement Team, working with the U.S. Department of Justice and on behalf of the Office of Inspector General of the Department of Health and Human Services, reached an agreement with Mylan, Inc. and Mylan Specialty, L.P. (hereinafter collectively referred to as “Mylan”) to settle claims set forth in two qui tam actions filed in the U.S. Court for the District of Massachusetts: United States ex rel. Sanofi-Aventis US LLC v. Mylan Inc. (No. 16-cv-11572-ADB) and United States ex ref. Ven-A-Care of the Florida Keys, Inc. v. Mylan Inc. (No. 16-cv-9484-JGK). The settlement resolved allegations that from July 29, 2010 to March 31, 2017, Mylan Specialty knowingly submitted false statements to the Centers for Medicare and Medicaid Services (“CMS”) and/or the state governments that incorrectly classified EpiPen as a “noninnovator multiple source” drug, as opposed to a “single source” or “innovator multiple source” drug, as those terms are defined in the Rebate Statute and Rebate Agreement. Mylan Specialty also did not report a Best Price to CMS, as that term is defined in the Rebate Statute and Agreement, for EpiPen which it was required to do for all “single source” and “innovator multiple source” drugs. As a result, Mylan submitted or caused to be submitted false statements to states relating to EpiPen for Medicaid rebate purposes and knowingly underpaid EpiPen rebates to the states’ Medicaid programs. Mylan’s settlement with the United States also resolved allegations that Mylan Specialty overcharged certain entities (known as the “340B Covered Entities”) that participated in the 340B Drug Pricing Program, 42 U.S.C. § 256b.

The total recovery to state and federal Medicaid programs, including Virginia, is $465 million, of which $445.7 million will be paid to the Medicaid Programs, with the remaining amount paid to the 340B entities. Virginia’s federal and state share of the settlement is $10,793,994.94. Virginia’s total share of the settlement is $6,593,925.90. The net state recovery after deducting a relator’s share of $1,087,977.77 is $5,505,948.13. In addition, Mylan will be subject to a Corporate Integrity Agreement with the Office of the Inspector General of the U.S. Department of Health and Human Services.
Sexually Violent Predators Civil Commitment Section

Since the Sexually Violent Predators Act became effective in April 2003, the Commitment Review Committee and the courts have referred a total of 1,611 cases to the Sexually Violent Predators Civil Commitment Section as of the end of 2017. To date, the Section has filed approximately 853 petitions for civil commitment or conditional release and reviewed approximately 753 other cases where it was determined that offenders did not meet the statutory criteria to be declared a sexually violent predator (“SVP”).

In 2017, 106 cases were referred to this Office and the Section filed approximately 53 petitions, made 389 court appearances, and travelled approximately 60,000 miles. Since 2003, 727 persons have been determined to be SVPs, and 596 have been civilly committed to a facility run by the Department of Behavioral Health and Developmental Services. The vast majority of civilly committed SVPs are male. They are placed at the Virginia Center for Behavioral Rehabilitation. Female civilly committed SVPs are placed at Central State Hospital. Since 2003, approximately 318 offenders determined to be SVPs have been placed on conditional release. At the end of 2017, approximately 421 offenders were civilly committed in inpatient treatment and 205 offenders were on conditional release.

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 to ensure compliance with the settlement terms. During 2017, the Commonwealth received more than $117 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 complementary 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.

In 2017, the Unit conducted 1,257 retail inspections and destroyed 788 packs of contraband cigarettes via court order; filed 14 civil cases involving seized contraband; investigated more than 178 potentially false businesses involved in cigarette trafficking; conducted 7 stamping agent facility inspections; performed 17 stamping agent field audits as well as additional desk audits; testified in 39 cigarette trafficking cases; assisted law enforcement agencies with more than 42 investigations that resulted in 972 criminal charges; assisted the Tax Department with 97 background checks; 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 its study of cigarette trafficking in the Commonwealth.

COMMERCE, ENVIRONMENT & TECHNOLOGY DIVISION

The Commerce, Environment, and Technology Division provides comprehensive legal services to secretariats, executive agencies, state boards, and commissions for much of the Commonwealth’s government. Composed of three Sections—Financial Law and Government Support, Environment, and Technology and Procurement Law—the Division provides advice across a wide range of substantive areas as well as 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, commissions, and authorities, 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, Freedom of Information Act matters, Conflict of Interest Act 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 (“SBE”) and the Department of Elections (“ELECT”). The administration of the 2017 general election for statewide elected offices and House of Delegates seats sparked federal litigation, and FLAGS represented SBE and ELECT in all such cases. Additionally, FLAGS represented SBE and ELECT in two federal cases, one concerning a challenge to Virginia’s party primary process, and one challenging the voter petition process for independent presidential candidates. Additionally, redistricting litigation continued in state and federal courts in 2017.

FLAGS also represents the Department of Labor and Industry (“DOLI”). Following the deaths of four employees at a Virginia manufacturing plant over a one-year period, the Office worked closely with DOLI to negotiate a settlement with the employer that would hold the employer accountable for the serious and willful safety violations discovered during DOLI’s investigations. These protracted and, at times, contentious negotiations were conducted over a six-month period and resulted in a substantial monetary penalty and the employer’s agreement to abate hazards at the plant and to implement policies and procedures to demonstrably increase worker safety. DOLI recognized the Office’s instrumental role in bringing about this agreement.

The Section continued its representation of the Virginia Employment Commission (“VEC”). In 2017, the number of VEC unemployment benefit appeals to circuit courts handled by FLAGS increased to 89 petitions for judicial review, compared to 61 petitions in 2016 and 75 petitions in 2015.
Both common law and the Virginia Code assign a special status to the Attorney General with respect to institutions that use charitable funds to accomplish a beneficent purpose. In this role, 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. During the year, FLAGS attorneys, on behalf of the Attorney General, worked with numerous nonprofits to ensure that their use of donated funds closely hewed to the purpose for which they were donated. This work included continued efforts with Sweet Briar College to release restrictions on charitable gifts when appropriate so that the school could continue its educational purpose.

In its representation of agencies and boards reporting to the Secretary of Agriculture and Forestry, FLAGS represents the Virginia Department of Agriculture and Consumer Services and the boards and commissions concerned with agriculture, commodities, and charitable gaming, including the Milk Commission, the Wine Board, and the Charitable Gaming Board. The Section also advises the Virginia Racing Commission ("VRC"). In 2017, FLAGS assisted VRC in several licensing decisions concerning new satellite wagering facilities opened by the Virginia Equine Alliance, a non-profit organization of horsemen’s groups in Virginia created in 2015. The Section also assisted the VRC with various technical amendments to its regulations and worked with the VRC on licensure decisions for live racing events at Shenandoah Downs in Woodstock and the Gold Cup at Great Meadow.

FLAGS serves as agency counsel to the Department of Veterans Services ("DVS"). During the year, FLAGS attorneys continued to work with DVS following its discovery in late 2016 of hundreds of veterans’ disability benefits claims in an abandoned public storage unit rented by a former DVS employee. The Section assisted the agency in developing and implementing an action plan to provide identity theft protection for all individuals whose files were discovered in the storage unit. Additionally, FLAGS assisted with the resolution of the claims made by veterans whose disability benefits were delayed by this incident.

Following the success of the Attorney General’s legal clinics offering basic estate planning services to Virginia veterans and their spouses, Section attorneys drafted, in collaboration with attorneys in other Divisions, a comprehensive Military & Veteran Legal Resource Guide. The Guide provides relevant and timely information to Virginia military servicemembers, veterans, and their
families on the legal protections and benefits available to them in several key areas, including employment, education, and consumer protection. Additionally, Section attorneys began working with the Virginia Department of Corrections to establish basic estate planning clinics for veterans incarcerated in Virginia’s prison system. The first clinic is expected to be held at a Virginia correctional center in 2018.

A number of attorneys in this 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”), this 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 2017. One ongoing grouping of cases concerns the requirement that corporate taxpayers add back royalty expenses subject to Virginia Code § 58.1-402(B)(8) to their federal taxable income. In one of these suits, Kohl’s Department Stores, Inc. v. Virginia Department of Taxation, the circuit court granted summary judgment in favor of TAX. After considering the taxpayer’s appeal, the Supreme Court of Virginia ruled, for the most part, in favor of TAX. The Court affirmed the lower court’s finding that the subject-to-tax exception to the add-back requirement applies only to the extent that the royalty payments were actually taxed by another state. The Court further found that the lower court erred in not addressing an alternative argument regarding the appropriate calculation of taxable income under Virginia’s add-back statute. Under that alternative argument, the Supreme Court held that the safe harbor applies regardless of which entity pays the tax. The Supreme Court remanded the case to the circuit court for consideration of the extent to which Kohl’s paid income tax in other states on the royalties it had paid to its affiliate.

In Corporate Executive Board Company v. Virginia Department of Taxation (Arlington Cir. Ct.), the Section successfully defended a claim 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 for the tax years 2011-2013. The circuit court granted summary
judgment in favor of TAX. The plaintiff filed a petition for appeal to the Supreme Court of Virginia in late 2017.

Finally, FLAGS attorneys also work 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 2017, including James K. Woolford. v. Virginia Department of Taxation. In this matter, the Supreme Court of Virginia reversed the decision of the trial court, which had held that the taxpayer failed to support his application for land preservation tax credits with a qualified appraisal from a qualified appraiser.

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 that will significantly increase the efficacy of TRRC and stability of its funds for future years.

The Section represents the Department of Alcoholic Beverage Control (the “Department”) and the Virginia Alcoholic Beverage Control Authority (the “Authority”) (collectively “ABC”). FLAGS attorneys litigated a number of appeals of administrative agency decisions in circuit courts, the Court of Appeals, and the Supreme Court of Virginia. The Section continues to serve as general counsel to ABC, advising the agency on licensing matters, employment disputes, marketing efforts, regulatory action, and law enforcement operations. 2017 saw an increase in attempts by private corporations to place “gaming” machines at licensee locations. FLAGS attorneys provided advice to ABC to assist it in determining which of these games were legal games of skill and
which constituted illegal gambling in violation of ABC regulations. Finally, in anticipation of the transition of the Department to the Authority in January 2018, FLAGS attorneys provided extensive guidance and advice.

This Section also provides legal advice to certain independent agencies, including the Virginia Retirement System and the Virginia Workers’ Compensation Commission.

**Environmental Section**

The eight attorneys of the Environmental Section represent agencies reporting to the Secretaries of Natural Resources, Agriculture and Forestry, Health, Finance, and Commerce and Trade. Section 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 the 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, responding to subpoenas issued to agency personnel, real estate work, and related matters.

The Environmental Section represents DEQ’s Air, Water, Land Protection and Revitalization, and Enforcement divisions. Throughout the year, the Section successfully defended numerous challenges to agency policy and permitting decisions and pursued enforcement actions against polluters. The Section also represented the Commonwealth in litigation supporting the federal Clean Power Plan and the Mercury Air Toxics Standard, and advised its clients on the enactment of state-level regulations for the reduction of carbon dioxide emissions.

The Section advised DEQ’s Land Protection and Revitalization Division on a number of matters during the year. It obtained approval from the U.S. District Court for the Western District of Virginia of a consent decree with DuPont for the largest natural resource damages claim in Virginia history, and
the eighth largest ever in the United States, which arose from mercury contamination from Dupont’s former facility in Waynesboro, Virginia. The Section also worked with DEQ to resolve a natural resource damages claim against Dominion Energy for a transformer oil spill in Crystal City and with DEQ, North Carolina, and a number of federal agencies on potential natural resource damage claims arising out of the 2014 Duke Energy coal ash spill into the Dan River.

The Section also represented the Land Protection and Revitalization Division in an Administrative Process Act appeal brought by the Hampton Roads Sanitation District (“HRSD”) (Hampton Roads Sanitation District v. DEQ). HRSD argued that the Department erred in deciding that its 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. The Virginia Court of Appeals affirmed DEQ’s case decision.

The Section represented DEQ’s Enforcement Division in several cases. It concluded an action against an individual in Greene County, Virginia for the mismanagement of poultry waste that posed a threat to nearby surface waters; the farmer came into compliance and a civil penalty was paid. We litigated an ongoing case against a group of parties in Hanover County for the unlawful destruction of a wetlands mitigation site. And we filed an action in the Circuit Court for Lancaster County against the owners of a marina and a wastewater treatment facility for failure to provide financial assurance and for the unpermitted discharge of wastewater. The court ordered injunctive relief, which resulted in the owner and operator coming into compliance, and also imposed civil penalties totaling $487,500.

The Section continued to work with DEQ on a variety of matters arising from the EPA’s ongoing, large superfund remediation project at the Atlantic Wood Industries property on the Elizabeth River in Portsmouth, Virginia.

The Section advised the Department of Forestry on a range of matters in 2017, including numerous real estate transactions, Freedom of Information Act requests, employment issues, and various contractual arrangements. It also continued to support the Department’s conservation easement program, with the agency successfully placing over 7,500 acres of property under easement during the year.
The Section represented the Virginia Department of Health (“VDH”) and its Office of Environmental Health Services and Office of Drinking Water in several litigation and non-litigation matters in 2017. The Section brought a civil enforcement action on behalf of the Commissioner of Health against a restaurant and its owner for operating without a permit and for a multitude of violations of the food safety regulations. It resolved the suit through an agreed order that imposes terms on the operation of the restaurant going forward, including monetary penalties for significant violations of the food regulations. The Section also defended the Commissioner of Health in an appeal of a case decision related to the continued operation of a marina without a certificate to operate. Along with an attorney from the Office’s Health Services Section, it advised VDH concerning a locality’s decision to shut off water to a resident who had not paid her water bill, which resulted in the resident’s appealing to VDH for assistance. The Section continued to advise VDH regarding a case arising from a dispute that began in 2014 between two homeowners regarding a shared septic system and the system’s performance. After the civil action between the two homeowners was completed, the Section assisted the agency in determining the best path forward and took part in a meeting with one of the homeowners and VDH concerning how the homeowner could obtain approval for the existing sewage system. Section attorneys also assisted the agency in developing and amending various regulations and provided advice on a host of other matters.

The Section represented the Department of Game and Inland Fisheries (“DGIF”) in various litigation and non-litigation related matters in 2017. After a three-year DGIF undercover investigation, the Animal Law Unit prosecuted ten owners, operators, or lessees of fox pens who were caught illegally buying foxes and coyotes. During the year, two defendants were convicted, and seven defendants pled guilty to misdemeanors or felonies and relinquished their right to participate in fox pen activities and their licenses to trap. Other cases are ongoing. The Section also facilitated a settlement of an enforcement action by DGIF against a wildlife rehabilitator and exhibitor in Fairfax County that included him relinquishing his rehabilitator permit indefinitely. It also assisted the Department with several real estate transactions in 2017, including the acquisition of a large addition to its Havens Wildlife Management Area in Roanoke County and several utility right-of-way transactions.

The Section represented the Virginia Marine Resources Commission (“VMRC”) in a number of administrative appeals. Section attorneys successfully defended VMRC’s decision to issue a riparian oyster lease against a
challenge by the City of Virginia Beach in circuit court; the City’s appeal is pending in the Virginia Court of Appeals. The Section continues to represent the VMRC in that case and two other cases filed by the City of Virginia Beach based on the City’s claim to dredging rights superior to oyster leases and its claim of eligibility to receive oyster lease transfers. It also obtained two circuit court rulings affirming the VMRC’s decisions to deny two general oyster lease applications, because they were not in the public interest.

The Section continued during 2017 to represent the Department of Mines, Minerals and Energy, and other Commonwealth defendants, by defending the moratorium on uranium mining found in Virginia Code § 45.1-283. It assisted the Solicitor General in obtaining from the U.S. Court of Appeals for the Fourth Circuit an affirmance of the district court’s order dismissing the action, finding the state law was not preempted. The plaintiff petitioned the U.S. Supreme Court for review. The plaintiff had also previously filed a companion suit in the Wise County Circuit Court challenging the moratorium on the grounds that it was a taking for private use. After substantial pre-trial discovery and motions practice, late in 2017 the circuit court stayed the case pending the U.S. Supreme Court’s disposition of the federal case.

Throughout the year, the Section continued to represent the Department of Mines, Minerals and Energy in various administrative proceedings, providing requested advice and ensuring that Virginia’s hard-earned environmental protections obtained during Alpha Natural Resources, Inc.’s Chapter 11 reorganization remained in place during the sale of its Twin Star Mine complex in Southwest Virginia.

It was an active year in the Section’s representation of Virginia’s Soil and Water Conservation Districts. The Section continued to provide advice to Districts around the Commonwealth on complying with the State and Local Government Conflict of Interests Act and the Freedom of Information Act. Section attorneys advised the Robert E. Lee Soil and Water Conservation District on issues arising from the faulty effort in 1998 to constitute a water improvement district, including guidance on its proper creation. The Culpeper Soil and Water Conservation District continues to require representation in a matter involving a frequent pro se litigant who has filed three lawsuits in the Madison County Circuit Court relating to the operation and maintenance of a dam that is the subject of an easement held by the District on the property of the litigant’s wife; the District prevailed in each case. The Section also advised a
number of districts on easements, cost-share contracts, and other transactional matters.

The Section assisted the Department of Conservation and Recreation ("DCR") with a number of different issues in 2017. These included assisting the agency in completing a unique leasing arrangement with Albemarle County, thereby allowing the County to operate unused agency property as a county park. It also worked with DCR to begin implementing the DuPont Waynesboro natural resources damages settlement through the purchase of property to add to DCR’s network of natural area preserves. In addition, the Section worked with the agency on a number of property transactions, including easement donations, utility right-of-way transactions, acquisition of properties for addition to natural area preserves and state parks, and property exchanges with localities. Section attorneys also obtained dismissal of the agency from litigation concerning the ownership of a flood control project in northern Virginia. Finally, the Section assisted the agency and the Virginia Land Conservation Foundation in awarding a record number of grants for land preservation activities in the Commonwealth, funded through the DuPont Waynesboro settlement and other mechanisms.

During 2017, the Animal Law Unit ("ALU") handled more than 250 matters, ranging from consultations with local animal control officers to prosecutions through trial and appeal. These matters included criminal, civil, regulatory, training, and other animal-related matters, including assisting multiple localities with animal cruelty, seizure, neglect, and animal fighting prosecutions. The year saw the conclusion of the prosecution of the owners of the cockfighting facility known as the Big Blue Sportsmen’s Club. They were sentenced to probation, forfeited $100,000, and paid for the demolition of the facility.

During the year, the ALU was appointed as special prosecutor for fifty-eight animal cruelty, animal fighting, and wildlife trafficking cases. Of note, a serial horse abuser was tried, convicted, and sentenced to two years of incarceration. The ALU also won the related seizure proceeding at trial and on appeal; twenty abused horses were seized and placed in appropriate facilities. The ALU successfully prosecuted numerous individuals in several jurisdictions for abuse of chickens on breeder farms, the first successful prosecution of such abuses in the United States. As highlighted above regarding the Section’s representation of DGIF, the ALU brought seven wildlife traffickers to justice who had been illegally buying and selling wildlife (foxes and coyotes) to stock...
their fox pens. We investigated and initiated the prosecution of two animal fighting cases involving birds and dogs. We successfully won seizure hearings on over 500 fighting birds and 26 dogfighting dogs. Finally, the ALU engaged in training of law enforcement and prosecutors on animal crimes all over the state, the United States, and in Greece.

**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), the Virginia Foundation for Healthy Youth, 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 2017, 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, and other areas.

The Section provided necessary legal support for the Commonwealth’s central procurement agencies, the Department of General Services and the Virginia Information Technologies Agency (“VITA”), including legal review or drafting of revisions to procurement regulations and policies, and legal assistance regarding procurements, debarments, contracts, and associated disputes, joint procurements with other states, Freedom of Information Act requests and disputes, and employment disputes.

The Section continued providing legal assistance to VITA regarding management of the Commonwealth’s Comprehensive Infrastructure Agreement, disentanglement from the contractor under that Agreement, and transition to replacement providers. Litigation with the outgoing contractor began in 2017,
and the Section is monitoring and assisting outside counsel as needed. The Section is providing necessary legal service to transition the Commonwealth’s information technology infrastructure from the outgoing contractor’s 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. In 2017, this assistance included developing updated contracts, advising about numerous legal issues related to the complex, phased procurements, assisting with the management and implementation of the new email and mainframe contracts, and negotiating on behalf of VITA to secure new contracts for the Commonwealth’s managed security services and the new systems integrator.

The Section continued to assist 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 implement legislative changes, 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 proposed legislation to modernize the Code of Virginia for Next Generation 9-1-1.

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.

The Section assisted the Attorney General’s Opinions Counsel with analysis and drafting of official and informal opinions requested by Commonwealth officers, employees, and legislators, as well as local officials, on topics relating to conflicts-of-interest, public access to records, public procurement, and legislation.

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 matters, technology acquisitions, data security, conflicts, and intellectual property matters. These included providing necessary legal support for: the Virginia Department of Health’s transition to the lead role in a multistate contract for the development and maintenance of a federally funded software application; protests and appeals regarding medical transcription services contract awards by the Department of
General Services, the Department for Aging and Rehabilitative Services, and Central State Hospital; litigation over the voiding of a purchase by Norfolk State University; filing of a non-provisional patent application in the U.S. Patent and Trademark Office on a device invented by a Virginia Department of Transportation employee; guidance for responding to and resolving alleged 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 ("Division") of the Attorney General’s Office advances the rights of consumers, ratepayers, and taxpayers. It also defends the interests of the Commonwealth, its agencies, institutions, and officials in civil matters. The Division handles civil enforcement actions pursuant to Virginia’s consumer protection and antitrust laws, counsels consumers with questions and complaints, and mediates disputes between consumers and businesses. The Division also prosecutes licensed medical professionals who have acted contrary to law, investigates civil rights and fair housing claims, pursues debts owed to Commonwealth agencies, and serves as consumer counsel in regulatory matters before the State Corporation Commission.

The Civil Litigation Division consists of six sections: Consumer Protection, Trial, Insurance and Utilities Regulatory, the Division of Debt Collection, Health Professions, and the Division of Human Rights and Fair Housing.

Consumer Protection Section

The Consumer Protection Section enforces state and federal laws to protect Virginia consumers from deceptive and illegal business practices. The Section includes five units: Counseling, Intake and Referral; Dispute Resolution; Antitrust; Charitable Solicitations and Deceptive Conduct; and Predatory Lending.
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 to provide information about where specific complaints should be filed.

In 2017, CIRU received and processed 3,932 written consumer complaints. In addition, CIRU received and handled 24,135 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 2017, DRU, along with CIRU and the Section’s investigators, resolved or closed 3,213 complaints. Consumer recoveries from closed complaints totaled $944,106.

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 2017, AU received favorable rulings in two suits that were filed in 2016 to block mergers in the health insurance industry. In January 2017, the
United States District Court for the District of Columbia issued an Order enjoining the proposed merger of Aetna, Inc. (Aetna) and Humana, Inc. (Humana). In this case, *United States v. Aetna, Inc. and Humana, Inc.*, the court concluded that the merger was likely to substantially lessen competition in the Medicare Advantage market in all of the 364 counties included in the Complaint and in the public exchanges market in three counties in Florida. The suit to block the merger was filed with the United States Department of Justice (DOJ), seven other states, and the District of Columbia. In February, the United States District Court for the District of Columbia issued an Order enjoining the proposed merger of Anthem, Inc. (Anthem) and Cigna Corp. (Cigna) in a separate suit brought with DOJ, ten other states, and the District of Columbia. In *United States v. Anthem, Inc. and Cigna Corp.* (D.C. Cir.), the court determined that the merger was likely to substantially lessen competition in the market for national health insurance accounts as well as the market for large group commercial insurance in at least one local market alleged in the Complaint, which was Richmond, Virginia. In April 2017, the United States Court of Appeals affirmed the order permanently enjoining the merger and noted that harm in both the national market for commercial insurance and in the large group commercial market in Richmond were each sufficient grounds for blocking the transaction. After filing a Petition for a Writ of Certiorari with the United States Supreme Court, Anthem terminated the merger agreement and withdrew its Petition. In June 2017, the litigating states received $1.36 million in attorneys’ fees and costs from Aetna and Humana, of which Virginia received almost $135,000. At the end of the year, the litigating states were in mediation with Anthem and Cigna over an award of attorneys’ fees and costs.

In October 2017, AU and 43 other states entered into a $220 million settlement with DeutscheBank for claims related to fraudulent and anticompetitive conduct involving the manipulation of the London Interbank Offered Rate (LIBOR) between February 2005 and at least July 2009. 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 United States, among others, were defrauded of millions of dollars when they entered into swaps and other investment instruments with DeutscheBank without knowing that DeutscheBank and other banks on the US-dollar-LIBOR-setting panel were manipulating LIBOR and colluding with other banks to do so. Virginia entities are expected to receive approximately $6 million from the settlement.
Throughout 2017, AU actively litigated two suits that were filed in 2016. First, State of Wisconsin v. Indivior, Inc. (E.D. Pa.) was initiated in September 2016 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 case is ongoing.

Second, State of Connecticut v. Aurobindo Pharma USA, Inc. (D. Conn.) was initiated in December 2016 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 for severe acne, and Glyburide, an oral diabetes medication used to treat Type 2 diabetes. The case is ongoing.

AU also provided advice to the Virginia Department of Health pursuant to the Cooperative Agreement provision in Virginia Code § 15.2-5384.1. In February 2016, Wellmont Health System and Mountain States Health Alliance submitted an application to the Southwest Virginia Health Authority for a letter authorizing a cooperative agreement. Such an authorization permits the parties to proceed with a proposed merger of their operations in Southwest Virginia and northeastern Tennessee without challenge under state or federal antitrust laws. As part of the review of the cooperative agreement, the State Health Commissioner is required to consult with the Attorney General. In fulfillment of this statutory duty, AU retained an economic expert to examine the merger and provided an advice letter to the State Health Commissioner on October 23, 2017.

Also during 2017, the Office’s non-profit review panel, which includes representatives from AU, the Financial Law and Government Support Section, and the Health Services Section, completed review of several transactions under the non-profit conversion statute in Virginia Code § 55-532.

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. CSDCU also serves as counsel to the Office of Charitable and Regulatory Programs within the Virginia Department of Agriculture and Consumer Services. During 2017, CSDCU participated in several significant multistate settlements in addition to bringing various enforcement actions in Virginia.

In January 2017, CSDCU obtained court approval of a Final Judgment by Consent in Commonwealth v. Volkswagen AG (Richmond Circuit Court). The Consent Judgment memorialized a Partial Settlement Agreement with Volkswagen Auto Group of America, Inc. and related entities for consumer protection claims related to their 2.0-liter diesel vehicles. The settlement, entered along with 42 other states and the District of Colombia, includes injunctive relief preventing future unlawful conduct related to emission defeat devices and a payment of $20,206,434.65 to the Commonwealth. The settlement was announced in conjunction with settlements involving the federal government and private class actions and incorporates restitution relief for affected consumers. Consumers were given a choice to have their vehicles fixed or to sell back their vehicles at pre-scandal resell value. Consumers also were provided a $5,100 to $10,000 restitution payment based on the value of the vehicle.

Also in January 2017, CSDCU, 49 other states, and the District of Columbia entered an Agreement with The Western Union Company (Western Union) regarding fraud-induced money transfers. In the settlement, Western Union is enjoined from transmitting a money transfer that the company knows or reasonably should know is induced by fraud, providing substantial assistance or support where the company knows or should know that a money-transfer payment is for goods or services telemarketed to the consumer, failing to stop certain payments including those made to a recipient previously subject to a complaint about fraud-induced money transfers, and failing to monitor and investigate Western Union agents. The Agreement also requires certain disclosures on forms, media, and platforms used by the company, a website for consumer assistance and for filing complaints, and reimbursements to consumers for fraudulently-induced transfers where the company has not complied with required procedures for preventing such transfers. The Agreement requires that the company establish a comprehensive anti-fraud program, including appointing a compliance auditor. Additionally, the
Agreement provided a $5 million payment to the states with $78,337.51 provided to Virginia.

In February 2017, CSDCU obtained court approval of an Assurance of Voluntary Compliance (AVC) entered with Hobby Lobby Stores, Inc. (Hobby Lobby) concerning alleged violations of the VCPA and the Comparison Price Advertising Act. In Commonwealth v. Hobby Lobby Stores, Inc. (Henrico Cty. Cir. Ct.), the Commonwealth alleged that Hobby Lobby violated these statutes by using comparison prices, e.g., stating that its prices are “Always 50% Off of the Marked Price,” and that “Marked Prices Reflect Comparable Prices Offered by Other Sellers for Similar Products,” and failing to define and disclose the trade area to which the comparison prices referred. The AVC required Hobby Lobby to modify its advertisements to clearly define and disclose the trade area to which any comparison prices it uses refer, and required Hobby Lobby to pay the Commonwealth $8,000 for civil penalties and attorneys’ fees.

Also in February 2017, CSDCU resolved a suit previously filed against Shockoe Bottom Automotive & Tires, Inc. for alleged violations of the VCPA and Virginia’s “bait and switch” statute. In the Consent Judgment entered in Commonwealth v. Shockoe Bottom Automotive & Tires, Inc. (Richmond City Cir. Ct.), the company agreed to detailed injunctive terms and to pay a total of $8,585 in restitution, civil penalties, and attorneys’ fees.

In May 2017, CSDCU, 46 other states, and the District of Columbia reached a multistate settlement with Target Corporation (Target). The AVC in Commonwealth v. Target Corporation (Richmond City Cir. Ct.) resolves claims related to the data breach that occurred in late 2013. The AVC requires Target to develop, implement, and maintain a comprehensive information security program and to hire an independent, qualified third-party to conduct a comprehensive security assessment. Target also must maintain appropriate encryption policies for cardholder and personal information, segment its cardholder data environment from the rest of its computer network, and undertake steps to control access to its network, including implementing password rotation policies and two-factor authentication for certain accounts. The settlement also required a monetary payment of $18,500,000 to the states with $352,710.80 provided to Virginia.

Also in May 2017, CSDCU joined 41 other states and the District of Columbia in a multistate settlement with Johnson & Johnson Consumer Inc. and
Johnson & Johnson concerning the conduct of its wholly-owned subsidiary, McNeil-PPC, Inc. (McNeil), in the marketing, promotion, and distribution of certain over-the-counter (OTC) drugs. In Commonwealth v. Johnson & Johnson (Richmond City Cir. Ct.), the companies agreed to pay $33 million to resolve state consumer protection allegations that McNeil was misrepresenting the contents and quality of their OTC drugs and the drugs’ compliance with current Good Manufacturing Practices. Virginia’s share of the payment was $777,020.65.

In June 2017, CSDCU filed suit against Sea-Thru Windows, Inc., a Virginia Beach-based window installation contractor, and its President and sole owner, Jeffery Pesich, for allegedly failing to perform scores of promised window installations and failing to honor valid warranties in violation of the VCPA and the Virginia Home Solicitation Sales Act (VHSSA). In December 2017, CSDCU obtained a permanent injunction and final judgment against the defendants in Commonwealth v. Sea-Thru Windows, Inc. (Virginia Beach Cir. Ct.). The judgment ordered the contractor and its owner to pay $149,924.34 in restitution to 64 consumers, $64,000 in civil penalties, and $47,068 in attorneys’ fees and costs. The defendants also are permanently enjoined from violating the VCPA and from using contracts that violate the VHSSA.

In July 2017, CSDCU entered into a Consent Judgment with Virginia Silversmiths, Inc., a now-defunct silversmith business, and its President, Lindsay Martin, to resolve alleged violations of the VCPA. The Complaint filed in Commonwealth v. Virginia Silversmiths, Inc. (Lynchburg Cir. Ct.) alleged that the company engaged in a pattern and practice of accepting silver goods for repair, charging down payments or partial payments from customers, and thereafter failing to start or complete the contracted-for work, provide refunds, or return the silver goods to customers. The Consent Judgment included injunctive relief, civil penalties totaling $5,000, and attorneys’ fees totaling $10,000. Virginia Silversmiths and Mr. Martin provided the disputed property to CSDCU for return to individual complainants.

In September 2017, CSDCU filed suit against Wall & Associates, Inc., a Virginia-based tax debt settlement company, for alleged violations of the VCPA. In Commonwealth v. Wall & Associates, Inc. (Fauquier Cir. Ct.), CSDCU alleged that the company took thousands of dollars in large up-front and monthly payments from consumers, while misleading them about the effectiveness of its services, the qualifications of its employees, and the time it
would take to resolve consumers’ tax disputes. The matter remains in active litigation.

In October 2017, CSDCU, 49 other states, and the District of Columbia obtained an Agreed Consent Judgment against General Motors Company (GM) to resolve consumer protection claims related to GM’s delayed recall of vehicles containing a defective ignition switch. The Consent Judgment entered in Commonwealth v. General Motors Company (Richmond City Cir. Ct) enjoins GM from representing that a motor vehicle is “safe” unless it has complied with the applicable Federal Motor Vehicle Safety standards. GM also is enjoined from representing that certified pre-owned vehicles that GM advertises are safe, have been repaired for safety issues, or have been subject to rigorous inspection, unless such vehicles are not subject to any open recalls relating to safety or have been repaired pursuant to such a recall. The Consent Judgment also requires GM to instruct its dealers that all applicable recall repairs must be completed before any GM motor vehicle included in a recall is eligible for certification and, if there is a recall on any certified pre-owned vehicle, the required repair must be completed before the vehicle is delivered to a customer. The settlement provided a monetary payment of $120 million to the states with $2,396,147.70 provided to Virginia.

In December 2017, CSDCU and 23 other states entered into a multistate settlement with the charitable organization VietNow National Headquarters, Inc. (VietNow) and fourteen individuals. The Consent Judgment entered in Commonwealth v. VietNow National Headquarters, Inc. (Richmond City Cir. Ct.) resolves claims that the organization violated Virginia’s solicitation of contributions law by using false and misleading telemarketing solicitation scripts, diverting charitable funds donated for a specific purpose, and submitting false and inaccurate financial statements to state regulators. The settlement included injunctive relief prohibiting continued unlawful conduct, permanently removed VietNow’s officers and directors, and appointed a receiver to wind down the charity. Four of the directors and officers are permanently enjoined from serving as charitable fiduciaries or acting as professional fundraisers. Remaining funds are to be paid to two national veterans’ charities, Fisher House Foundation and Operation Homefront.

Also in December 2017, CSDCU joined 49 other states and the District of Columbia in a multistate settlement with Boehringer Ingelheim Pharmaceuticals, Inc. (BIP) regarding its off-label marketing and misleading representations made
in the promotion of four prescription drugs: Micardis®, Aggrenox®, Atrovent®, and Combivent®. In Commonwealth v. Boehringer Ingelheim Pharmaceuticals, Inc. (Richmond City Cir. Ct.), BIP agreed to pay $13.5 million to resolve state consumer protection claims that it had misrepresented the uses, benefits, or qualities of its prescription drugs. Virginia’s share of the settlement was $277,264.92.

In addition, the Office filed two suits against the United States Department of Education to protect the interests of Virginia students as consumers of education services and borrowers. In July, the Office joined a coalition of 19 other jurisdictions in a challenge to the Department of Education’s rescission of its Borrower Defense Rule in Massachusetts v. United States Department of Education (D.D.C.). The Borrower Defense Rule allows certain borrowers to be eligible for loan forgiveness of federal student loans used to attend a school if that school misled them or engaged in other misconduct in violation of certain laws. In October, the Office joined a coalition of 17 other jurisdictions in Maryland v. United States Department of Education (D.D.C.) to challenge the Department of Education’s refusal to enforce the Gainful Employment Rule. The Gainful Employment Rule is a federal regulation that protects students from predatory for-profit schools by requiring that certain programs meet minimum thresholds with respect to debt-to-income ratios of their graduates. The Rule is designed to assess whether schools’ programs provide education and training to their students that lead to earnings that will allow the students to repay their loans.

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 June 2017, PLU obtained court approval of a Stipulated Final Judgment and Order against CashCall, Inc. and its president and CEO, J. Paul Reddam, for alleged violations of the VCPA. In Commonwealth of Virginia v. CashCall, Inc. (E.D. Va.), the Commonwealth alleged that CashCall utilized a deceptive “rent-a-tribe” lending program to make closed-end Internet loans at annual interest rates greater than 12 percent, the maximum rate permitted under Virginia’s usury laws absent an exception. CashCall’s Western Sky loan program violated
the VCPA by misrepresenting to Virginia consumers that the lender had various connections to a Native American tribe that did not exist. CashCall then attempted to claim that the false Native American tribal affiliation exempted its loans from various consumer protection laws, including Virginia’s usury laws. The settlement, which was finalized in conjunction with a private class action lawsuit, included injunctive relief, $9.435 million in restitution, approximately $5.9 million in debt forgiveness, a payment to the Commonwealth of $65,000 as a civil penalty, and a payment to the Commonwealth of $35,000 for its attorneys’ fees and costs. The Settlement Administrator mailed restitution checks to eligible consumers in September 2017.

In July 2017, PLU obtained court approval of an AVC entered with Alternative Finance Company, LLC (AFC), an open-end credit lender, for alleged violations of Virginia’s consumer finance statutes and the VCPA. In Commonwealth v. Alternative Finance Company, LLC (Richmond City Cir. Ct.), the Commonwealth alleged that AFC violated the open-end credit statute by failing to provide a minimum 25-day grace period before imposing a finance charge in the form of a cash advance fee. The failure to comply with the statute made AFC subject to the consumer finance statutes, which it violated by charging interest in excess of 12 percent annually. The Commonwealth further alleged that AFC misrepresented to consumers that it would not perform credit checks to determine their eligibility for loans, and that it had filed suits and obtained judgments against hundreds of consumers in Virginia Beach General District Court without a legal basis to use that venue. The settlement included injunctive relief, required AFC to file notices of satisfaction of the judgments entered against consumers (resulting in over $450,000 in forgiven debt), provided approximately $14,000 in refunds and over $17,000 in interest forgiveness to consumers, and required payment of $30,000 in attorneys’ fees and costs to the Commonwealth.

In September 2017, PLU filed suit against Allied Title Lending, LLC d/b/a Allied Cash Advance (Allied) for allegedly making illegal loans at 273.75 percent annual interest and violating Virginia consumer finance statutes and the VCPA. In Commonwealth v. Allied Title Lending, LLC (Richmond City Cir. Ct.), the Complaint specifically alleges that, during the period from July 28, 2013 through at least July 24, 2017, Allied violated the Virginia law governing open-end credit plans by charging a $100 origination fee during the statutorily mandated finance-charge-free grace period, and by engaging in a pattern of
repeat transactions with some borrowers that is more similar to a closed-end, payday loan than an open-end credit transaction.

In October 2017, PLU obtained court approval of an AVC entered with Investment Evolution Corporation d/b/a Mr. Amazing Loans (Mr. Amazing), a Las Vegas, Nevada-based Internet lender, for alleged violations of the VCPA. In Commonwealth v. Investment Evolution Corporation d/b/a Mr. Amazing Loans (Richmond City Cir. Ct.), the Commonwealth alleged that Mr. Amazing made closed-end installment loans over the Internet to Virginians and that, on its website, Mr. Amazing misrepresented that it was a licensed consumer lender regulated by the State Corporation Commission’s Bureau of Financial Institutions. Based on its purported licensure, Mr. Amazing misrepresented its legal ability to charge more annual interest than Virginia’s general usury cap of 12 percent absent an exception. Mr. Amazing was not licensed and did not qualify for any exception to the general usury cap. The Commonwealth also alleged that Mr. Amazing misrepresented in its loan agreements that it could legally assess a late charge of more than 5 percent of the installment payment due, which it could not do under Virginia law. The settlement included injunctive relief, $265,000 in restitution and forbearances of illegal interest, a payment to the Commonwealth of $5,000 as a civil penalty, and a payment to the Commonwealth of $45,000 for its attorneys’ fees and costs.

In December 2017, PLU obtained court approval of an AVC entered with Opportunity Financial, LLC (Opportunity), a Chicago-based open-end credit lender that made loans over the Internet, for alleged violations of Virginia’s consumer finance statutes and the VCPA. In Commonwealth v. Opportunity Financial, LLC (Richmond City Cir. Ct.), the Commonwealth alleged that Opportunity violated the open-end credit statute by failing to provide a minimum 25-day grace period before imposing a finance charge in the form of a $50 origination fee, and that it violated the VCPA by representing on its website that it was licensed to make loans in Virginia. The settlement included injunctive relief and required Opportunity to refund more than $305,000 in origination fees and interest to affected consumers, provide interest forgiveness to consumers of approximately $3.1 million, pay the Commonwealth $15,000 for civil penalties, and pay the Commonwealth $15,000 for reimbursement of its attorneys’ fees and costs.
Throughout 2017, PLU entered into settlements with the following eleven pawnbrokers to resolve claims that they charged fees and interest beyond those permitted by the Virginia pawnbroker statutes: (a) Woodbridge Coins and Jewelry Exchange, Inc. d/b/a Woodbridge Gold & Pawn, (b) Pawnking, LLC, (c) All Star Gold & Pawn, LLC, (d) Spotsylvania Gold & Pawn, Inc., (e) Dixie Pawn, Inc., (f) B & B Pawnbrokers, Inc., (g) 610 Pawn, Inc., (h) A to Z Pawn, Inc., (i) Pawn USA, Inc., (j) Fredericksburg Pawn, Inc., and (k) Pawn Emporium, Inc. In the aggregate, these matters required the defendants to provide restitution offers to affected borrowers totaling $438,681.83, reimburse the Commonwealth for its attorneys’ fees and costs totaling $64,698.33, and fund cy pres awards to the Virginia Poverty Law Center totaling $3,051.07. Also, in October 2017, PLU filed suit against a pawnbroker for alleged violations of the Virginia pawnbroker statutes and the VCPA. In Commonwealth v. Unique Jewelry and Loan, Inc. (Loudoun Cir. Ct.), PLU alleged that the pawnbroker violated the pawnbroker statutes and the VCPA by charging illegal and excessive fees in connection with its pawnbroker loan transactions. The matter remains in active litigation.

Also during 2017, more than $2.5 million in restitution was distributed to Virginia consumers as the result of a matter settled by PLU in the prior year. In United States v. HSBC North America Holdings (D.D.C.), PLU joined 48 other states, the District of Columbia, DOJ, the Consumer Financial Protection Bureau, and the United States 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. The settlement required HSBC, among other relief, to offer refunds to those Virginians whose loans were serviced by HSBC and who lost their homes to foreclosure during the period from January 1, 2008, through December 31, 2012. In February 2017, the Settlement Administrator issued settlement payment checks of approximately $1,200 to more than 2,100 affected Virginia borrowers.

**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. The Section handles tort claims, civil rights issues, contract issues, denial of due process claims, employment law matters, election law issues, Birth Injury Fund claims, Freedom of Information Act 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 Trial Unit

The General Civil Trial Unit (or “Trial Unit”) represents the Commonwealth and its agencies, departments, and employees in defensive civil litigation. In addition, the 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. It advises state courts, judges, and clerks as well. During the year, the Trial Unit represented the Virginia State Bar in seven new matters, including an attorney disciplinary appeal before the Supreme Court of Virginia and two unauthorized practice of law prosecutions. In addition to the matters continued from prior years, in 2017 the Trial Unit received 171 new matters, including 13 new matters for the Birth Injury Fund Board, and handled more than 616 matters in all.

Federal court cases

The Trial Unit’s significant matters included several federal civil rights lawsuits. Roxanne Adams, Administrator of the Estate of Jamycheal M. Mitchell v. Naphcare, Inc. (E.D. Va.) involved a mentally-disabled person who died while incarcerated in a regional jail. The decedent’s estate filed a lawsuit against more than 40 defendants, including two court clerks, for civil rights violations. The Unit represents only the two court clerks, and the case is ongoing.

Latson v. Commonwealth of Virginia (W.D. Va.) involved an autistic inmate who was conditionally-pardoned by the Governor and transferred to a hospital in Florida for mental health care treatment. Latson alleges constitutional violations during his incarceration in Virginia, and a jury trial is scheduled for 2018.

Some cases handled by the Unit during the year involved challenges to the constitutionality of the Commonwealth’s law enforcement response. Johnson v. Virginia Department of Alcoholic Beverage Control (W.D. Va.) alleged multiple
claims against the Virginia Department of Alcoholic Beverage Control (ABC) and some of its agents in connection with Johnson’s arrest in front of a bar near the University of Virginia. The Court dismissed several of the claims and agents ruling, among others things, that Johnson’s arrest was supported by probable cause. A jury trial is scheduled for 2018 for the remainder.

*Turner v. Flaherty* (W.D. Va.) challenged the law enforcement response during a racially charged “Unite the Right” protest rally in Charlottesville. A plaintiff alleged that the Commonwealth’s State Police Superintendent and the City of Charlottesville’s Police Chief commanded their law enforcement officers to “stand down” during the rally. The Unit represents the Superintendent and a motion to dismiss the case against him is pending.

In *Patterson v. Lawhorn*, the Unit obtained a favorable decision from the Fourth Circuit, which affirmed the U.S. District Court for the Eastern District of Virginia’s summary judgment dismissal of a malicious prosecution claim brought against a Department of Taxation special agent. In affirming the dismissal, the court found that probable cause supported the special agent’s prosecution of the plaintiff for tax evasion.

The Trial Unit handled several federal civil rights lawsuits arising in the post-secondary education context. Specifically, the Unit handled several lawsuits alleging violations of Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in any federally funded education program or activity. In *Doe v. Old Dominion University* (E.D. Va.), the Unit has engaged in extensive pretrial practice, a motion for summary judgment is pending, and should the matter go to trial, a jury trial scheduled for 2018. The Unit obtained dismissals in *Armstrong v. James Madison University* (W.D. Va.) and in *Feminists Majority Foundation v. University of Mary Washington* (E.D. Va.). Finally, the Unit successfully resolved a First Amendment claim against Virginia Western Community College in *Deegan v. Melanie Moore* (W.D. Va.), in which a student claimed that officials violated her First Amendment rights.

In addition to the federal civil rights litigation above, the Trial Unit represented the confidentiality interests of the Commonwealth’s Judicial Inquiry and Review Commission in the matter of *United States v. Pomrenke* (W.D. Va.).
State court lawsuits

In *Deeds v. Commonwealth* (Bath Cty. Cir. Ct.), a negligence lawsuit was filed against several defendants, including the Commonwealth, challenging the Commonwealth’s alleged failure to adopt various government recommendations relating to mental health treatment. The Commonwealth was voluntarily dismissed from the lawsuit.

The Trial Unit successfully resolved the case of *Marshall v. Martin* (Norfolk Cir. Ct.). This lawsuit claimed that Old Dominion University coaches negligently allowed or caused the plaintiff, then a student on the wrestling team, to sustain concussive brain injuries.

Virginia State Bar and Virginia Board of Bar Examiners

The Trial Unit handled several matters on behalf of the Virginia State Bar and Virginia Board of Bar Examiners, including an appeal by an attorney whose license was suspended for violations of the Rules of Professional Conduct and two unauthorized practice of law cases. The Trial Unit also handled administrative litigation commenced by applicants who failed to gain admission to the Virginia State Bar.

Birth-Related Neurological Injury Compensation Program

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

Eight eligibility petitions were pending at the end of 2016. During the year, the Unit resolved thirteen fees and costs petitions, four van claims, a special equipment claim, three housing matters, and three family care or attendant care matters. The Unit also resolved pre-petition benefit claims related to eight eligibility cases. Additionally, it provided advice to the Program and its Board on a variety of matters.
In 2017, the Unit litigated eleven eligibility cases to conclusion and potentially saved the Program approximately $6,000,000 by obtaining dismissals of three eligibility cases. Negotiations regarding attorney fee petitions saved the Program an additional $14,729.50, and negotiations regarding pre-petition compensation requests saved the Program $163,301.30. At the end of 2017, seven eligibility cases were pending.

Commonwealth Health Research Board

In representing the Commonwealth Health Research Board (CHRB), the Trial Unit provided legal advice to the CHRB and its Administrator. During the year, the Unit reviewed and revised the documents governing the CHRB’s policies, procedures, and administration. It also drafted grant agreement amendments and addenda and reviewed and revised various contracts and memoranda of understanding.

Employment Law Unit

In 2017, the Employment Law Unit provided employment law advice to, or represented in litigation, numerous state entities. The Unit also represented several state employee/officer defendants in employment-related litigation. The Unit provided training to management, human resources, and other personnel from various state agencies. For example, Fair Labor Standards Act training for Salary Regulations was provided to human resources and payroll employees at several public institutions of higher education throughout the Commonwealth. Sexual harassment training and workplace bullying training was provided for the Department of Fire Programs and for the Department of Alcoholic Beverage Control.

In addition to the matters continued from prior years, in 2017 the Employment Law Unit received 27 new lawsuits and grievance appeals. The Unit also reviewed and approved recommendations for 55 cases from the Division of Human Rights and Fair Housing.

Workers’ Compensation Unit

The Workers’ Compensation Unit (or “Unit”) defends workers’ compensation cases filed by employees of state agencies. Since hearings are held throughout the state, cases are assigned to attorneys in Richmond and
Abingdon. The Unit handles claims brought by injured workers, as well as employers’ 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 Virginia Court of Appeals and the Supreme Court of Virginia). In 2017, the Unit handled 428 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 what it has paid to or on behalf of the employee in workers’ compensation benefits. In 2017, the Unit assisted Workers’ Compensation Services and its third-party administrator with subrogation recoveries exceeding $1,388,000.

**Insurance and Utilities Regulatory Section**

The Division’s Insurance and Utilities Regulatory Section serves as the Division of Consumer Counsel of the Office of the Attorney General in matters involving public utilities and insurance companies. In this capacity, the Section represents the interests of Virginia’s citizens 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 Dominion Virginia Energy’s application filed with the SCC for a determination of the return on common equity (“ROE”) applicable to the company’s rate adjustment clauses (“RACs”). Legislation passed by the 2015 General Assembly provided for this stand-alone ROE proceeding for Dominion in 2017 in lieu of the company’s comprehensive biennial review base rate proceedings. The 2015 legislation froze the company’s base rates and suspended SCC review of its earnings. The new authorized ROE would therefore not affect base rates, but rather the various rate riders established through statutorily-authorized RACs. Every 10 basis points (0.10%) of allowed return equates to approximately $3.35 million annually in rates charged to Dominion customers through RACs. The company sought an ROE of 10.50%. Consumer Counsel sponsored testimony of an expert in
finance and economics, who opined that the company’s market cost of equity was 8.75%. The SCC found that the company’s market cost of equity was in a range of 8.50% to 9.50%, and awarded an ROE of 9.20% based on the concept of gradualism in reducing allowed returns. The case included a legal issue pertaining to the proper composition of “peer group utilities.” The SCC agreed with Consumer Counsel’s position as to the statutory requirements used to establish the peer group. Consumer Counsel had also participated in individual Dominion RAC cases earlier in the year where the associated authorized returns were reduced from 9.60% to 9.40%.

Consumer Counsel successfully litigated two RAC cases involving electric distribution projects where the evidence failed to support the reasonableness of utility proposals. First, Dominion sought approval to increase rates for the second phase of its proposed $2 billion (excluding financing costs) “strategic undergrounding program.” Capital investments were $110 million, or $450,000 per mile, for this next phase of converting existing overhead distribution lines to underground. The SCC had previously approved, with Consumer Counsel’s support, the first phase of the undergrounding project as a pilot program to determine whether a full-scale program could be a cost effective means of improving overall reliability for all customers. The Office sponsored an expert witness whose testimony overcame a statutory presumption in favor of the phase two underground conversions as proposed. The SCC noted that additional data based on actual undergrounding experience would be crucial in assessing the impacts of underground conversions, and found it just and reasonable to structure phase two in a more limited manner. To this end, the Commission approved cost recovery for phase two conversions reflecting a total capital investment of $40 million.

The second case concerned an accelerated vegetation management program proposed by Appalachian Power Company (“APCo”) to transition the distribution circuits in its Virginia service territory to a four-year, on-going vegetation management cycle. APCo estimated the total incremental cost to implement the program to be $284 million (excluding financing costs), which would have been funded through monthly bill increases for customers. The SCC agreed with Consumer Counsel that APCo failed to meets its evidentiary burden to prove that the program—which would more than double Appalachian’s current vegetation management cost—was justified by the high level of additional costs to be charged to ratepayers. The Commission further agreed that such broad system-wide program was unnecessary to address the
company’s worst performing distribution circuits and that a more targeted program could address such problems in a manner that would be less burdensome for customers.

As in prior years, Consumer Counsel participated in numerous other Dominion and APCo RAC proceedings. These included five Dominion generation facility RACs that were pending at the time when the federal Public Law No. 115-97 was signed into law. We advocated for the prompt recognition of the lower corporate income tax rate in the approved electric rates, which will reduce costs to ratepayers by $51.9 million annually. We generally supported Dominion and APCo RAC applications for approval of demand-side management and energy efficiency programs.

In a Dominion matter concerning meter reading and billing errors that affected a large number of commercial customers, Consumer Counsel acted to ensure the issue would be resolved in an open and transparent process before the SCC. Due to a failure by meter readers to manually re-set monthly peak demand meters, the company erroneously billed approximately 30,000 of its small and mid-size commercial customers. The company estimated that customers were over-billed by approximately $15 million going back at least three years from the time the problem was discovered and corrected in July 2016. After consultation with our Office and SCC Staff, Dominion initiated a proceeding before the Commission for approval of a proposed rebilling and refund plan. The SCC entered a procedural order requiring Dominion to provide notice to all affected and potentially affected commercial customers. Our Office filed comments in the proceeding highlighting the importance of an open and transparent process to remedy utility billing errors, and noting that Dominion’s proposed rebilling and refund plan was reasonable and in conformance with the company’s approved terms and conditions. The Commission found the proposed rebilling and refund plan to be reasonable. Consistent with our recommendation, the Commission also required the company to provide a status report including, among other things, a listing of customers that submitted billing records pre-dating the minimum three-year utility retention period mandated by the SCC tariff.

APCo filed in 2017 the first case under a statutory provision that could allow electric utilities to foreclose competitive suppliers from offering 100 percent renewable energy if the incumbent utility offered its own such renewable tariff. APCo’s petition sought to establish a voluntary rate rider
whereby customers could purchase electric energy provided entirely from renewable energy resources at a rate substantially higher than standard tariff rates. Approval of the renewable tariff would have had the legal effect of disallowing APCo’s customers from purchasing renewable energy, at potentially lower cost, from any licensed competitive supplier. The Code did not set forth the legal standard for approval, and Consumer Counsel supported the SCC’s exercise of its discretion in considering the merits of the proposal, including the cost to potential customers. Exercising this discretion, the Commission cited the positions of customer, environmental, and solar-industry groups, in finding that APCo had not established that the proposed rate for its renewable tariff was just and reasonable for purposes of an incumbent utility supplying 100 percent renewable electric energy.

The Commonwealth’s largest electric cooperative, Rappahannock Electric Cooperative, requested a $22 million increase in its annual revenues, including a doubling of the fixed monthly access charge for residential customers from $10.00 to $20.00. As proposed, the monthly bill for a Residential customer using 1,000 kWh would increase from $115.28 to $123.93. Working with Frederick County and SCC Staff, Consumer Counsel negotiated a settlement that reduced the annual revenue increase to $18 million and limited the increase in the monthly access charge to $14.00. This reduced the increase in the monthly bill of a typical residential customer from almost $9.00 to less than $7.00.

At the federal level, the Office continued to participate in a docket at the Federal Energy Regulatory Commission (“FERC”), whereby APCo, through its parent company American Electric Power Company (“AEP”), submitted proposed revisions to its transmission formula rates and annual update protocols. AEP had 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. We submitted comments to the FERC protesting certain changes to AEP’s formula rate update protocols which could improperly shift the burden of proof (from the utility to ratepayers) for demonstrating rates to be just and reasonable. The FERC set the proceeding for settlement judge procedures and our Office participated in multiple settlement conferences over the course of the year. A settlement agreement was filed with the FERC in late 2017 which, in part, addressed some of our stated concerns. Also at FERC, Consumer Counsel intervened in a case challenging APCo’s FERC-approved ROE for transmission rates.
Consumer Counsel was active in three natural gas utility rate cases in 2017. We intervened in Washington Gas Light Company’s case where the company sought an annual rate increase of $45.6 million, including $22.3 million to be rolled in from an existing rate rider. The Office filed expert testimony highlighting issues with the company’s class cost of service study, which affected the proposed allocation of costs among the various rate classes. We argued for a smaller allocation of costs to the residential customer class, as well as no increase to the $11.25 fixed monthly customer charge. We agreed to a stipulation with the parties where the company would receive a rate increase of $34 million with no increase in the monthly customer charge, and which addressed the rate design issues raised in our expert testimony.

The Office also intervened in Columbia Gas of Virginia, Inc.’s application for a $37 million annual rate increase. While we did not file expert testimony in this proceeding, we had an interest in several issues that impacted residential customers, including a proposed $2 increase in the $15 monthly customer charge, and a revenue allocation proposal from intervening industrial customers that would shift more of the rate increase to the smaller customer classes. Settlement negotiations resulted in reducing the rate increase to $28.5 million, maintaining the existing customer charge, and adopting a revenue allocation as proposed by the company and not as advocated by the industrial customers.

The third case was Virginia Natural Gas, Inc.’s application for a rate increase of $30.7 million, including $13.4 million to be rolled in from an approved rate rider. The company also proposed increasing the fixed monthly residential customer charge from $11.00 to $20.00. We filed expert testimony taking issue with the manner in which the company’s cost of service study assigns pipe “mains” to various customer classes. Our testimony also opposed the company’s request to increase the residential monthly customer charge because it would shift more of the cost recovery away from volumetric rates and to fixed rates. As with the other natural gas cases, we reached a successful settlement. The parties agreed to a lower, $20.7 million, increase in the annual revenue requirement, under which all customer classes would receive a uniform share of the increase. Under the stipulation, a typical residential customer will see a $4.50, or 9.14%, increase in the monthly bill, compared to the requested $7.98, or 16.2%, increase, and there was no increase to the monthly customer charge.
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 (“NCCI”) 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, etc. 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. Although there were no disputed actuarial issues in 2017, for the first time in decades there were disputed issues on the cost of capital and expected investment income rates of return. These variables affect the “profit and contingency factor,” which in turn impacts assigned risk rates. Through cross examination at hearing and post-hearing briefing, our Consumer Counsel supported the Bureau of Insurance on these issues, and the Commission rejected NCCI’s proposed changes to the method for determining the profit and contingency factor. This resulted in materially lower increases in the assigned risk rates for three rate classifications, compared to NCCI’s proposals, and an actual reduction in the assigned risk rate for a fourth rate classification compared to NCCI’s proposed rate increase.

**Division of Debt Collection**

The mission of the Division of Debt Collection (Division) is to provide all appropriate and cost effective legal services related to the collection of funds owed to the Commonwealth. In pursuit of its broad mission, the Division handles a variety of claims and performs many tasks. For example, the Division litigates claims throughout the Commonwealth to recover damages to state infrastructure for the Department of Transportation. In addition, the Division recovers civil penalties imposed by state agencies such as the Department of Environmental Quality for violations of administrative regulations. The Division also enforces medical liens on personal injury and wrongful death claims to recover the cost of related medical services that are provided by state hospitals or paid for by state programs. In 2013, the Division assumed oversight and coordination responsibilities for non-Medicaid related recoveries under the Virginia Fraud Against Taxpayers Act (FATA).

The Division has eight attorneys and sixteen staff members dedicated to protecting the taxpayers of Virginia by ensuring fiscal accountability for the
Commonwealth’s receivables. In addition to litigating claims, Division attorneys provide advice on creditors’ rights, bankruptcy, and legislative issues to client agencies and to other sections within the Office of the Attorney General. Moreover, one attorney in the Division serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

During the year, the FATA team of the Division intervened in the case of United States of America., ex rel. David Ridley v. Midasco, LLC (E.D. Va., Case No. 1:15cv257) (Midasco). The case involved a subcontractor on the Commonwealth’s I-495 HOV/HOT Lanes Project. The Project was funded using a combination of funds from the Virginia Department of Transportation and the United States Department of Transportation. The Relators alleged that the subcontractor failed to pay the prevailing wages pursuant to the Davis-Bacon Act to workers on the Project and failed to compensate workers on the Project properly for overtime hours despite certifying compliance with federal labor standards on weekly payrolls. The Commonwealth resolved the allegations in Midasco with all defendants for a total of $450,000. That recovery was shared evenly between the United States and the Commonwealth, after negotiating the statutory minimum 15 percent share ($67,500) with the Relators.

The Division also obtained a landmark decision in Commonwealth of Virginia ex rel. Virginia State Bar v. Young (In re Young) (Bankr. W.D. Va., No. 577 B.R. 277 (2017)). The Court ruled that a debt owed by a disbarred attorney to the Client Protection Fund of the Virginia State Bar is not a dischargeable debt under Chapter 7 of the Bankruptcy Code. This was a case of first impression in Virginia and in the Fourth Circuit Court of Appeals. This precedent should prevent disbarred attorneys who have injured their clients from using the Chapter 7 bankruptcy process to discharge debts owed to the Fund in order to obtain reinstatement of their licenses, and, thus, circumvent an important license reinstatement requirement in Virginia.

James Madison University (JMU) referred a contract dispute with its former head football coach to the Division. The coach left JMU before the end of his employment contract and was required to pay $300,000 to JMU for his early departure. After over a year of negotiations between JMU, the former coach, and his new employer, the debt to JMU remained unpaid. The Division, however, was able to resolve the dispute within months of referral for almost the full principal balance owed, while avoiding costly litigation.
The Division is self-funded by contingency fees earned from its recoveries on behalf of state agencies. The Division manages and deposits recoveries resulting from its debt collection services in the Debt Collection Recovery Fund. The Division also manages and deposits recoveries related to FATA matters in the Fraud Recovery Fund.

During the 12 months from July 1, 2016 through June 30, 2017, gross recoveries for 45 agencies totaled more than $17.2 million in debt collection recoveries. During fiscal year 2017, the Division earned fees of almost $3.5 million from that area of its practice. Fiscal year 2017 fees were nearly $1.3 million in excess of Division expenditures. Out of these excess fees, along with cash on hand, $1,200,000 was returned to the Division’s client agencies, resulting in a 34 percent reduction of the base contingency fee rate paid by these agencies. The balance of the fees was turned over to the General Fund at fiscal year-end.

Health Professions Unit

The Health Professions Unit (“HPU”) conducts administrative prosecution of cases involving healthcare professionals before the health regulatory boards within the Virginia Department of Health Professions. The Unit provides advice and representation of a prosecutorial nature to the Boards within the Department, including the Boards of Medicine, Nursing, Pharmacy, Dentistry, Veterinary Medicine, Funeral Directors and Embalmers, Audiology and Speech-Language Pathology, Counseling, Long-Term Care Administrators, Social Work, Psychology, Physical Therapy, and Optometry. Many of the cases that HPU prosecutes involve standard of care violations, patient abuse, incompetence, substance misuse, or inappropriate sexual contact. Following full evidentiary formal hearings before the Boards, disciplinary sanctions, including suspension and revocation of licenses, are often imposed.

As in past years, HPU continued to vigorously prosecute physicians who facilitate the current opioid addiction crisis by prescribing controlled substances in a non-therapeutic or unsafe manner. This includes the prescription of opioids in escalating doses and quantities without establishing a bona fide medical condition justifying the prescriptions, without obtaining prior treatment records, without monitoring the effects of the medications on patients, and without monitoring and managing the patients’ appropriate use of the medications.
In one significant case, the Board of Medicine suspended indefinitely Dr. Charles R. Payling-Wright’s medical license where HPU established that he had indiscriminately prescribed opioids or amphetamines to multiple patients, some of whom were later indicted or convicted on felony charges of illegal distribution of controlled substances.

HPU also prosecutes pharmacists who contribute to the opioid addiction crisis. In a case against Corinthians A. Hughley, HPU presented evidence showing that during the course of his employment as a pharmacist in 2016, he was recorded on video diverting drugs from pharmacies for an unauthorized and unknown use. The diverted drugs included oxycodone, buprenorphine, suboxone, and methadone. A panel of the Board of Pharmacy voted unanimously to indefinitely suspend Mr. Hughey’s license for a minimum of two years.

Some of HPU’s cases involve fraudulent billing by healthcare professionals. In a case involving optometrist Dr. Diana Thao Tran, HPU presented evidence showing that when patients came to Dr. Tran for a routine vision exam or contacts or eyeglass prescriptions, she required that they sign a boilerplate contract and provide her with both vision insurance and medical insurance information. She performed unwarranted medical testing on several patients and then billed the patients’ medical insurance for the testing. Based on the evidence, the Board of Optometry found that the Dr. Tran had violated the law by obtaining payment by fraud or misrepresentation. The Board reprimanded Dr. Tran and placed her on indefinite probation for no less than three years of active practice, among other sanctions.

HPU also prosecutes patient boundary violations across the spectrum of healthcare professions. Numerous cases of this nature were prosecuted during the year, including three cases against mental healthcare professionals whose licenses were revoked. License revocation is the most severe sanction that can be imposed against a healthcare professional.

HPU prosecutes assisted living facility administrators who fail to operate their facilities in a safe and clean manner in accordance with law. In a case against Mable Jones, multiple inspections showed that the assisted living facility under her oversight was infested with vermin, had more than one nonfunctioning bathroom, and was otherwise significantly unhygienic. Numerous building and fire safety code violations were also present at the facility. The Board of Long-
Term Care Administrators sanctioned Ms. Jones by suspending her license for 90 days, followed by a two-year probationary period.

**Division of Human Rights and Fair Housing**

The Division of Human Rights and Fair Housing (“DHR”) performs two primary functions with regard to civil rights laws.

First, DHR receives and investigates complaints alleging discrimination in employment and places of public accommodation in violation of the Virginia Human Rights Act or corresponding federal laws. It provides mediation services throughout the complaint process to all the parties so they may attempt to resolve the dispute themselves. At the conclusion of an investigation, DHR is charged with determining whether there is reasonable cause to believe discrimination occurred. DHR participates in a work-share agreement with the federal Equal Employment Opportunity Commission (“EEOC”) to investigate and make determinations regarding alleged violations of Title VII of the Civil Rights Act of 1964 and related civil rights laws. During the calendar year, DHR investigated 51 cases for violations of Title VII under the EEOC work-share agreement. It also investigated 15 complaints alleging violations of the Virginia Human Rights Act. Overall, DHR received 168 complaints of discrimination and processed 66 investigations during the year. Ten of these investigations were resolved through mediation, resulting in $52,798 in recoveries for charging parties.

In its second function, DHR serves as counsel to the Commonwealth’s 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, DHR prosecutes the alleged violations of the Virginia Fair Housing Law through civil actions filed in the appropriate local circuit court. In 2017, DHR litigated four civil actions alleging discrimination by housing providers. Three involved alleged discrimination against families with children, one of which also included allegations of race discrimination, and the remaining case alleged discrimination against a person with a disability. Additionally, DHR provided six consultation opinions in fair housing investigations to the Real Estate and Fair Housing Boards and provided assistance and legal advice in several other fair housing
investigations. These cases involved the protected classes of race, disability, religion, familial status, and sex.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

Attorneys in the Health, Education, and Social Services Division (“HESS”) represent agencies and institutions of the Commonwealth in the Secretariats of Health and Human Resources and Education. Health and Human Resources agencies oversee the provision of social services, health and disability services, and vocational rehabilitation to vulnerable populations. They enforce child support obligations. They protect public health by monitoring and advising on contagious diseases, and they regulate medical professionals to help uphold a proper standard of care. Education agencies and institutions help ensure a quality statewide system of K-12 education, provide higher education, and help fulfill significant artistic, historic, and cultural missions.

Child Support Section

The Child Support Section represents 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 to the DSS Deputy Commissioner who leads DCSE.

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 provides advice to DCSE directors on program administration and operations, finance, information technology, and other matters. The remaining 39 Section attorneys are located in the field—that is, they are placed throughout the seventeen district offices maintained by DCSE.

Caseload Statistics

In 2017, as in previous years, the Section successfully managed an extremely large caseload, with field attorneys appearing at 97,231 child support
hearings. Twenty-one outside attorneys assisted the field attorneys with their hearings caseload, filling in gaps due to vacancies, overlapping dockets, conflicting schedules, and attorney leave. Outside counsel handled about five percent of the court hearings.

During the year, the Section established new child support orders totaling almost $1.4 million and enforced existing orders by obtaining lump-sum payments of almost $9 million, as well as coercive sentences for nonpayment totaling almost 500,000 days in jail.

Compliance and Technology Initiatives

The Section continued to work closely with DCSE on several initiatives designed to increase parental compliance with child support orders. These included expediting the modification of child support orders to amounts that parents can realistically afford, providing mediation alternatives, utilizing different procedures and dispositions to collect child support arrears in civil contempt cases, and coordinating with judges, clerks, and city officials to place child support payment kiosks at courthouses. In addition, the Section continued to work 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.

During the year, the Section assisted in a project to develop software that will allow DCSE to e-file child support pleadings directly with juvenile district courts statewide. This project is ongoing, and is a joint effort between DCSE and the Supreme Court of Virginia.

Section attorneys also assisted DCSE in implementing the Procedural Justice-Informed Alternatives to Contempt program that was recently funded by the federal Office of Child Support Enforcement. This program, which uses treatment and control groups in the Hampton and Richmond caseloads, seeks to increase compliance with child support orders by fostering parents’ trust in child support agencies and processes.

On January 1, 2017, the United States’ ratification of the Hague Child Support Convention became effective. Pursuant to this global treaty, all Convention countries will use uniform processes and forms for sending and
receiving child support cases—resulting in improved child support for thousands of families. A designated Section attorney reviews all incoming and outgoing Hague Convention cases statewide.

Program Guidance

The Section assisted DCSE’s Program Guidance Team in ensuring that changes in policy were in accordance with all applicable state and federal law. Of particular note, it advised on changes in policy made to conform to the final federal rule, *Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs.* Work on these changes, which will update and modernize the child support program, is expected to continue over the next several years. The Section also provided legal guidance on DCSE’s communications with represented parties and case closure criteria.

Legislation

During the 2017 General Assembly session, Section attorneys reviewed legislation and provided advice on bills that sought to amend child support or other domestic relations laws. Section attorneys also assisted the DCSE Deputy Commissioner in his service on the Virginia Child Support Guidelines Review Panel as it conducted its quadrennial review of the Commonwealth’s guidelines for child support obligation amounts. The Panel’s report was presented to the Governor and the General Assembly in December, recommending certain statutory changes to the Guidelines to ensure that their application results in appropriate child support award amounts.

Regulation

Section attorneys assisted in revising Virginia’s Passport Denial Program regulation, which provides for DCSE’s participation in the federal Passport Denial Program for the denial of a noncustodial parent’s passport for child support arrears above a certain threshold. The amended regulation adds a new option for noncustodial parents to have their passports reinstated when

1 81 Fed. Reg. 93492.
2 These child support guidelines are found in §§ 20-108.1 and 20-108.2 of the *Code of Virginia.*
3 22 VA. ADMIN. CODE § 40-880-405.
international travel is a requirement for work, provided they enter into a payment agreement with DCSE that includes a lump sum payment and an income withholding order.

Bankruptcy Unit

Although child support is not dischargeable in bankruptcy, the filing of a bankruptcy petition by a noncustodial parent places a stay on DCSE collection efforts for back child support from the assets of a bankruptcy estate. The obligation to pay current child support, however, remains in place during the pendency of the case. The Section’s Bankruptcy Unit handles all child support issues that arise in bankruptcy cases. During the year, the Unit processed approximately 1,200 new cases filed under Chapters 7 and 13 of the U.S. Bankruptcy Code, and the bankruptcy attorney appeared at fifteen to twenty hearings each month. As of December 2017, the Bankruptcy Unit was handling 949 active bankruptcies affecting 1,119 DCSE cases, including 201 cases filed under Chapter 7 and 748 cases filed under Chapter 13.

Professional Development, Service, and Training Activities

In addition to their other duties, Section attorneys participated extensively in professional development activities throughout the year. The Section Chief assisted in planning and securing speakers for the annual Policy Forum of the National Child Support Enforcement Association in Washington, D.C. Members of the Section attended this forum, in addition to the annual Eastern Regional Interstate Child Support Association conference in St. Louis, and the American Bar Association’s continuing legal education program on Military Legal Assistance Issues in Richmond. They gave presentations at the annual joint military Integrated Legal Services for Victims Conference in San Diego, and the annual child support enforcement training conference held by the Domestic Relations Association of Pennsylvania in Philadelphia.

Section attorneys, together with other invited speakers, provided 14 hours of continuing legal education credit for family law attorneys at the Annual the “Annual Statewide OAG CLE and DCSE Managerial Training” conference held in Charlottesville. Throughout the year, they also provided training on child support issues to family law attorneys and mediators across the Commonwealth, including at the Virginia State Bar’s Annual Meeting. The Section’s bankruptcy attorney gave presentations on child support issues at the Western District of
Virginia’s Annual Bankruptcy Conference, and also at the national conference of the States’ Association of Bankruptcy Attorneys in Savannah, Georgia.

One Section attorney published an article in the *Virginia Family Law Quarterly*, and another served on a Virginia State Bar disciplinary committee.

**Education Section**

The Education Section provides advice and guidance to the Virginia Department of Education, as well as to Virginia’s public colleges and universities, state museums, and the Library of Virginia. Some of the Section’s attorneys who represent public colleges and universities work at the institutions they serve, rather than at the main Richmond Office.

During the year, the Section advised the Board of Education and the superintendent of public instruction in the development and promulgation of regulations and guidance documents setting forth state educational policy for elementary and secondary schools. The Section reviewed proposed regulatory changes required to implement the federal *Every Student Succeeds Act*, to minimize use of restraint and seclusion as a component of school discipline, and to update standards for teacher licensure. Section attorneys also collaborated with the Department of Criminal Justice Services to prepare a search and seizure guide for training school resource officers.

The Section worked extensively with the Department of Education to refine policies and procedures related to the collection, storage, use, and access of student data. In addition, Section attorneys represented the Department of Education before the Supreme Court of Virginia in *Virginia Education Association v. Davison*, in which the court determined that certain test scores known as student growth percentiles are exempt under the Freedom of Information Act, because they are, as a matter of law, teacher performance indicators that are confidential under Virginia Code § 22.1-295.1(C).

Section attorneys remained active in advising Virginia’s public colleges and universities on institutional responses to sexual violence on campus, as the priorities for federal enforcement actions shifted under a new presidential administration.
Section guidance also was required as public colleges and universities were subjected to heightened federal scrutiny for complying with anti-discrimination laws in housing policies, access to technology, and contracting practices.

Following the unrest in Charlottesville in August, the Section’s attorneys worked closely with public colleges and universities to conduct an exhaustive review of policies and procedures governing use of campus facilities for expressive activities, particularly by unaffiliated third parties. The top priority was the development of content and viewpoint neutral guidelines that would withstand First Amendment scrutiny, while providing administrators and law enforcement officers with tools to address potentially violent demonstrations. Section attorneys collaborated with one another and with colleagues across the nation to share resources and solutions for protecting campus communities while preserving higher education’s role in fostering productive civic discourse.

**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 Wilson Workforce and Rehabilitation Center.

**Department of Behavioral Health and Developmental Services**

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 the state’s system of services for individuals with developmental disabilities. Three status conferences were held before the court, including one in open court. The Section’s 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 the Central Virginia Training Center, including successfully defending the Commonwealth against requests for injunctive relief filed in state and federal court seeking to force the continued operation of the unit.

In addition, the Section’s 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.

Department of Health Professions

The Section continued its efforts assisting the Department of Health Professions and its 14 health regulatory boards in numerous disciplinary proceedings under the Administrative Process Act. Several 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 several of the Boards in crafting regulations governing the prescription of opioids. Further, the attorneys provided advice to the Department of Health Professions on aspects of the disciplinary hearing process, including expert witness testimony and consideration of continuance requests, and on compliance with the Americans with Disabilities Act in the licensure application process.

Department of Health

The attorneys in the Health Services Section advised the Department of Health on legal issues relating to its response to the opioid crisis, including the dispensing of Naloxone and compliance with pharmacy laws. 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 and in implementing a framework for supervision of the approved cooperative agreement. As in past years, the Section continued to provide advice to the Department of Health on a variety of issues including communicable disease outbreaks, vital records, health records privacy, emergency medical services, employee grievances, and emergency
preparedness. The attorneys also advised the State Health Commissioner on issues related to the certificate of public need program (“COPN”) and defended several COPN decisions issued by the Commissioner in state circuit and appellate courts.

Department for Aging and Rehabilitative Services

Additionally, the Section successfully represented the Department for Aging and Rehabilitative Services in a federal court action appealed to the Fourth Circuit Court of Appeals by a vocational services client who alleged violations of the Americans with Disabilities Act. The attorneys also successfully defended the Department of Aging and Rehabilitative Services in a procurement action filed in federal court.

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 (DMAS), the Department of Social Services (DSS), the Office of Children’s Services (OCS), and the Department of Rehabilitative Services (DARS) on several noteworthy matters this past year and assisted these clients in protecting the health and safety of children and other vulnerable citizens of the Commonwealth. The Section was also responsible for the recovery of millions of public dollars that had been inappropriately disbursed.

Department of Medical Assistance Services (DMAS)

This year, the DMAS procurement team posted a number of Requests for Proposals (RFP) and awarded contracts to provide quality care health care services to Medicaid recipients and to ensure the Department’s efficient delivery of Medicaid reimbursement claims. Although the Non-Emergency Medical Transportation RFP was revised and reposted after several protests, this Section successfully defended a subsequent protest of the decision to award the contract to LogistiCare Solution, LLC. This contract enables DMAS to engage the services of a single statewide NEMT broker to provide access to transportation to and from Medicaid and the Family Access to Medical Insurance Security program for eligible members. Such services are particularly important to those members who need, for example, day support, supported employment,
chemotherapy, and dialysis. It is anticipated that over four million trips per year will be provided.

The Section also reviewed the Commonwealth Coordinated Care (CCC) Plus RFP. The Notice of Intent to Award the Contract was issued on February 9, 2017 to six health plans. CCC Plus is a Medicaid managed care program that provides medical, behavioral, substance use disorder, and long term services and supports under one program. CCC Plus began enrollment in the Tidewater region on August 1, 2017.

The Section was also instrumental in the Medallion 4 procurement process, which is still ongoing. This managed care program will provide care to approximately 740,000 individuals (including pregnant women, adults, and children) across Virginia through six managed care organizations. DMAS plans to launch the Medallion 4.0 Program by region beginning in Tidewater on August 1, 2018.

There was also significant movement in DMAS’ quest to replace the Medicaid Management Information System. In 2016, DMAS designed and the Section reviewed five RFPs that will comprise the new Medicaid Enterprise System. Each procurement had different considerations and required distinct analysis to reach agreement with the vendors. Late 2016 and throughout 2017, the Section participated in negotiations with vendors and advised the Department about the ramifications of amendments to the contracts and worked with the OAG’s procurement attorneys. The Department has awarded and signed the contracts for the Pharmacy Benefit Management Solution, the Electronic Data Warehouse Solution, and the Operation Services Solution.

The Section handled 39 cases in various circuit courts across the Commonwealth. Most of those involved Medicaid provider reimbursement appeals and DMAS’ audit practices. In Community Alternatives Virginia v. Dept. of Med. Assistance Services, Case No. CL16-347 (Winchester Cir. Ct.), the court upheld a $1.4 million overpayment finding against a Medicaid provider, who failed to maintain documentation in support of its claims. The provider unsuccessfully argued that the Department did not have the authority to recover the payment and that it did not have substantial evidence to support its findings. The Court rejected the provider’s arguments, upheld the Department’s Final Agency Decision, and denied the Petition for Appeal.
The Section also recovered a $750,000 overpayment from a contractor who failed to appear at a DMAS administrative hearing causing a default order to be entered against the Department. Attorneys worked with the Department to review its contract with the Contractor, and they helped draft a Notice of Damages. The Contractor paid the entire amount. The Section also worked closely with the Medicaid Appeals Workgroup, composed of a number of health care providers and attorneys throughout the Commonwealth and helped to solve several problem issues facing providers in Medicaid reimbursement appeals.

The Section reviews and certifies a number of regulatory packages each year. The Fast Track Peer Support Services Regulations was a large regulatory package intended to implement a directive in the state budget. DMAS was directed to seek federal authority to provide coverage of peer support services to Medicaid individuals in the fee-for-service and managed care delivery systems, including children and adults with mental health conditions or substance use disorders. Despite the length of time involved in the review, the legal advice was well-received and reflective of a positive experience working with the client towards an improved, more defensible end product that achieved the client’s objectives.

Department of Social Services (DSS)

In its representation of DSS, the Section handled 65 circuit court cases in 2017, including defending the local departments of social services’ findings of abuse and neglect of children, decisions involving various benefits programs, decisions by DSS revoking or denying certain licenses including substandard child day care and assisted living facilities and lawsuits seeking adoption records. The Section handled two child protective services cases in the Virginia Court of Appeals, one from Prince William County and one from the City of Norfolk.

The Section also assisted in a matter of first impression stemming from a May 2017 Report of the Grand Jury from the Circuit Court of Rockbridge County. At the VDSS State board meeting held on October 18, 2017, the State Board heard comments from a Rockbridge area citizen who requested that the Board conduct an investigation of the Rockbridge Area Department of Social Services Administrative Board of Directors (RADSS BoD) in response to issues raised in the May 2017 Report. The State Board also heard from the former Commissioner of VDSS as well as the current Director of Rockbridge DSS and
the current Regional staff person for that area. At the conclusion of all comments, the State Board voted in favor of conducting an investigation of the RADSS BoD. As this was the first such investigation, and though the Virginia Code allows for the State Board to conduct an investigation, there were no applicable investigation procedures. As counsel to the State Board, the Section drafted and presented a proposed investigation procedure. Additionally, the Section continues to assist in this investigation through the issuance of document subpoenas.

The Section reviewed 25 regulatory packages dealing with DSS’ various programs, including the review of regulations that: Amend Standards for Licensed Family Day Homes to Address Federal Health and Safety Requirements; Amend Background Checks to Conform with Code; Update General Provisions for Confidential Information; Establish Regulation for Public Assistance Application; and Virginia Child Care Scholarship Program, among others.

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 also assisted DSS in handling a number of disputes with providers.

Office of Children’s Services (OCS)

The OCS, along with its supervisory body, the State Executive Council (SEC), administers the provisions of the Children’s Services Act (CSA), a law that establishes a single state pool of funds to purchase services for at-risk children and 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 our focus centering on DARS’ oversight of adult protective services and the Auxiliary Grant program. The Section provided legal advice and counsel to this agency, including the review of these regulatory packages: Auxiliary Grants Program; Relocating existing regulations on Foreign Government Restitution Payments to Holocaust Survivors; Amend Adult
Services Approved Provider Regulations to comport with legislation passed during the 2017 General Assembly Session; and Amend APS Regulations to comport with legislation passed during the 2017 General Assembly Session.

**TRANSPORTATION, REAL ESTATE, AND CONSTRUCTION LITIGATION DIVISION**

The Transportation, Real Estate, and Construction Litigation Division 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 Office.

**Transportation Section**

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report to the Secretary of Transportation. These bodies include the Virginia Department of Transportation, the Commonwealth Transportation Board, the Department of Motor Vehicles, 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; Freedom of Information Act requests; review of agency procurement contract provisions in response to Joint Legislative Audit and Review Commission recommendations; conflict of interests inquiries; and administrative hearings involving a wide variety of issues and transportation agencies or entities.

Throughout the year, the Section advised the Virginia Department of Transportation ("VDOT") regarding multiple key transportation projects. Section attorneys provided extensive legal advice and drafted preliminary Public Private Transportation Act ("PPTA") transactional and procurement documents. The Section has been instrumental in facilitating the transformation of Interstate 66, both inside and outside the beltway. Outside the beltway, the Section provided legal guidance and drafting on this nearly $3 billion PPTA project (recently named the United States 2017 P3 Project of the Year) that will see 22.5 miles of new express lanes alongside three regular lanes from I-495 to University Boulevard in Gainesville, new and improved bus and transit routes, new and expanded park and ride lots, and interchange improvements. This PPTA project has already seen a $578 million concession fee paid to the Commonwealth for the benefit of toll payers. Inside the beltway, the Section has provided legal counsel to VDOT in its effort to make I-66 available to everyone by removing the current ban on single-occupancy vehicles during restricted periods and by charging them a traffic demand reduction-and-distance-based high occupancy lane toll. This program was instituted to relieve congestion before, during, and after HOV periods by allowing single-occupancy vehicles additional access to I-66 Inside the Beltway and lengthening restricted periods. Additionally, the Section represents VDOT on all ongoing highway projects, including, but not limited to, the I-395 HOT Lanes, I-95 HOT Lanes Southern Extension, I-95 HOT Lanes Fredericksburg Extension, I-64 Widening, I-64 Express Lanes, the High Rise Bridge Design Build Contract (at $409.6 million, the largest design build contract for VDOT to date), the Route 29 Solutions Project, and the Hampton Roads Tunnel Expansion.
In addition to its general counsel and transactional roles, the Section has also continued to represent VDOT in assorted litigation matters. In Vista-Graphics, Inc. v. Virginia Department of Transportation, the Section helped defend against a First Amendment challenge to VDOT’s control of informational materials and advertisements displayed in state-owned welcome centers and rest areas under the Sponsorship, Advertising and Vending Enhancement program, the Partnership Marketing and Advertising Program, and 24 VA. ADMIN. CODE 30-50-10(L). Plaintiffs publish visitor’s guides for distribution in the welcome centers and rest areas and solicit and publish advertisements in those guides. In 2016, the Office was able to obtain dismissal of this matter in the U.S. District Court for the Eastern District of Virginia, and in 2017, the Solicitor General’s Office was successful in having that dismissal affirmed by the U.S. Court of Appeals for the Fourth Circuit. The United States Supreme Court denied certiorari on October 2, 2017. In another appellate matter, Kalergis v. Commissioner of Highways, the Section obtained a favorable ruling in the Supreme Court of Virginia with regard to its interpretation of language in Virginia Code § 33.2-1005(A) and (B).

The Section represented VDOT in several other matters. In an appeal to the Supreme Court of Virginia, the Section represented VDOT in Commissioner of Highways v. Karverly, Inc., addressing the standards for admissibility of expert testimony in condemnation proceedings. The matter is pending decision by the Supreme Court of Virginia. Also, in Tanya & Bruce v. County of Fairfax and Virginia Department of Transportation, the Section represented VDOT in defending the constitutionality of the Commonwealth’s outdoor sign statutes codified under §§ 33.2-1200 to -1234 of the Code of Virginia. The matter is pending in the U.S. District Court for the Eastern District of Virginia, Alexandria Division.

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 of Virginia. As counsel to the VPA, the Section has worked closely with the Port in its $320 million Virginia International Gateway expansion to double terminal throughput capacity, its $350 million renovation of Norfolk International Terminal South, its new 26 Lane North Gate Complex at Norfolk International Terminal, and the ongoing I-564 Intermodal Connector project (in conjunction with VDOT).
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”), providing daily counsel on transactional agreements related to federal rail grants, the Metro State Safety Compact, the Atlantic Gateway Project, right of entry agreements, and high speed rail efforts. In particular, the Section compiled and analyzed over 40 historical agreements and addenda for I-95 corridor rail projects involving the Commonwealth, CSX, Virginia Railway Express (“VRE”), and others spanning two decades as part of a comprehensive new master agreement setting terms and a path forward for all rail corridor projects. Additionally, the Section provided counsel on the $115 million Arkendale Project, including the drafting of three separate amendments, additional Intercity Passenger Rail Operating and Capital agreements, and common interest agreements. All told, the Section assisted DRPT in transactions involving approximately 680 grant agreements cumulatively totaling greater than $500 million in funds.

**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 participates in litigation involving real property interests. One of the Section’s attorneys works out of Northern Virginia and is shared with the Construction Litigation 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; assisting with Attorney General opinions pertaining to property law issues; serving as the Office’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.

In 2017, 218 new matters were opened and an additional 77 matters from prior years remain active and ongoing. During 2017, the Section assisted in transactions, such as acquisitions and sales, involving tens of thousands of acres and in excess of $280 million in assets. These transactions included 9 conservation easements; 16 utility, access, water, and other routine easements; 2 inter-agency transfers; 44 Virginia Department of Alcoholic Beverage Control lease transactions; 6 sales; and 29 payment and performance bond approvals. 17 purchase transactions, 4 sale transactions, and 13 Virginia Public Building Authority transfers are still in progress.

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

**Colleges and Universities**

The Section worked with the Education Section on the conveyance of two dormitories to the Longwood University Real Estate Foundation for renovations. The Section also assisted with the grant of several utility easements on the Longwood campus and with leases at the Early Childhood Development Center, the Midtown Shopping Center, and amendments to several leases at the Moton Museum.

The Section continues to assist Norfolk State University (“NSU”) with the exchange of several parcels on campus due to the construction of the Norfolk Light Rail. This transaction requires a number of conveyances from the City of Norfolk and NSU in exchange for NSU’s conveyances to Hampton Roads Transit for the project.

The Section is assisting in the structuring and negotiation of a master lease with the Radford University Real Estate Foundation involving approximately 40
multi-family and single-family buildings for student housing, which the Foundation plans to acquire by March 2018. Radford University ultimately plans to add the properties to its inventory by exercising a purchase option. The Section also assisted the University with the completion of ten leases and continues to work on an additional six.

The Section continues to assist the Virginia Military Institute with resolving several title concerns with respect to the Corps Physical Training Facility (“CPTF”), including the condemnation of several properties. Two parcels of land to serve the CPTF have also recently been acquired.

Department of Alcohol Beverage Control (“ABC”)

The Section handled leases for 15 new stores and relocations, 11 leases for existing stores on an updated lease template upon renewal, and 18 extensions of existing leases, for a total of 44 lease transactions. The Section also updates the lease and other frequently used templates annually. The Section also assisted with leasing matters as ABC moved to an authority.

Department of Corrections (“DOC”)

The Section assisted DOC with the conveyance of several DOC properties where title had been transferred to the Virginia Public Building Authority (VPBA) as security for bonds issued by the VPBA, the proceeds of which were used for improvement to DOC properties. Specifically, the Section completed the conveyance of the White Post Correctional Center in Clarke County and the Mecklenburg Correctional Center in Mecklenburg County. Additionally, the Section worked with DOC, DGS, and Mecklenburg County to divide the Mecklenburg Correctional Center into separate parcels and to convey a 174-acre portion of the facility to Mecklenburg County as required by the 2013 Acts of Assembly.

Department of Game and Inland Fisheries (“DGIF”)

The Section assisted with the acquisition of 2,899.63 acres in Spotsylvania County for $9 million. DGIF’s purchase was made, in part, with grant funding received from the Virginia Land Conservation Foundation (“VLCF”) and the Wildlife Restoration Program administered by the U.S. Fish and Wildlife Service. This property makes up the new Oakley Forest Wildlife Management
Area and provides a habitat consisting of a mosaic of upland mixed hardwood and pine forests as well as a few small areas of open fields, pastures, and old field habitats. This closing occurred on September 1, 2017.

The Section assisted in the purchase of 156.79 acres in the Counties of Appomattox and Prince Edward for $332,000. DGIF’s purchase was made, in part, with grant funding received from the VLCF and the Wildlife Restoration Program administered by the U.S. Fish and Wildlife Service. This property was added to the Featherfin Wildlife Management Area, which is home to a variety of forestal and wetland habitats. This closing occurred on March 6, 2017.

The Section assisted in the purchase of approximately 107.87 acres in Appomattox County for over $183,000. DGIF’s purchase was made, in part, with grant funding received from the VLCF and the Wildlife Restoration Program administered by the U.S. Fish and Wildlife Service. This property was added to the Featherfin Wildlife Management Area.

Department of General Services (“DGS”)

DGS is authorized under Virginia Code § 2.2-1156 to sell surplus property of the Commonwealth. The Section worked with DGS and the agency declaring the property to be surplus with respect to the following sales in 2017.

The Northern Virginia Training Center property was declared surplus by the Virginia Department of Behavioral Health and Developmental Services as a result of a federal order pursuant to the Americans with Disabilities Act and was sold in 2017 for $30 million. Additional consideration of up to $20 million may be due the Commonwealth, depending upon the zoning density the purchaser obtains. The $20 million contingency payment is secured by a lien on the property.

The Section advised the Virginia Department of Emergency Management (“VDEM”) and DGS on a variety of issues pertaining to the Cheatham Annex in York County, including determining the actions necessary to comply with an Environmental Protection Agency Corrective Action Plan, the surplus sale of approximately 26 acres, and the termination of a lease to the York County Industrial Development Authority that had been in controversy for a number of years.
The Section assisted DGS and the Virginia Employment Commission in the sale of approximately two acres of land in Harrisonburg for a sale price of $1,625,000.

The Section continues to assist the various monument commissions with plans for construction. The Section assisted the Virginia Women’s Monument Commission with completing an agreement for the construction of the Virginia Women’s Monument on Capitol Square. The groundbreaking took place in December 2017. Work concerning the installation of tribute figures is ongoing. The Section assisted DGS with the transition of the operational management of the War Memorial Carillon from the City of Richmond to the Commonwealth. The Section continues to be active with issues surrounding the Indian Monument and the Martin Luther King, Jr. Monument Commissions.

The Section is assisting the Secretary of the Commonwealth and DGS with a process to accommodate the Mattaponi tribe’s acquisition of properties in trust for the tribe. This process implements legislation passed in 2017 and will expedite the current review process while protecting the interests of the Commonwealth. Along with this work, RELU is assisting with correcting several earlier conveyances to the tribe.

Department of Historic Resources (“DHR”)

The Section serves as primary counsel for DHR, attending its quarterly board meetings and responding to DHR’s day-to-day issues. RELU also provides assistance with respect to DHR’s easement program, including advice on best drafting practices. Of particular significance last year was the Section’s review and approval of 9 historic preservation easements totaling 196.7622 acres in Culpeper and Hanover, Henrico, and Prince William Counties, which were recorded in 2017.

Department of Military Affairs (“DMA”)

DMA leased a portion of Camp Pendleton to the City of Virginia Beach to be used to facilitate transatlantic cable, reserving rights to consent to any subleases. The Section assisted DMA in the execution of two sub-leases in 2017. The Section also assisted in the conclusion of a multi-year transaction involving a 25-year easement and a 25-year lease on Camp Pendleton for the benefit of the U.S. Navy.
Department of Motor Vehicles (“DMV”)

The Section assisted in the acquisition of the building and associated real and personal property at 206 South Brunswick Avenue from the Industrial Development Authority of the Town of South Hill. The property was the subject of a lease with a purchase option exercisable at the end of the initial lease term. The closing occurred on April 5, 2017.

Division of Veterans Services (“DVS”)

The Section assisted in a transaction involving the donation of property in Fauquier County for the construction of a DVS Veterans’ Care Clinic. The property was a former army base and was donated by a developer and a local economic development authority, with the assistance of Fauquier County. The transaction involved the acquisition of the property and easements, along with the release of the property from the conditions of a property owners’ association. The Section worked directly with DGS, DVS, the developer, and the economic development authority on this transaction. The Section also assisted in a transaction involving the donation of a property by the City of Virginia Beach for the construction of a DVS Veterans’ Care Clinic. The Section worked with DGS, DVS, and the City of Virginia Beach on this acquisition.

Fort Monroe Authority (“FMA”)

Fort Monroe contains approximately 565 acres of land with over 400 buildings and other facilities, many of which have historical significance as well as environmental issues. The land is owned partially by the U.S. Army and partially by the Commonwealth. Both raw land and improved properties are leased to public, private commercial, and residential users. The Section advises the Board of Trustees and staff on general contract matters, development and local tax related issues, the Freedom of Information Act, leases, and governance matters.

Last year, the Section assisted FMA with an Economic Development Conveyance transfer of non-reversionary property from the U.S. Army, which closed at the beginning of 2017 with several parcels being held back for environmental reasons. The remaining parcels are expected to transfer in 2018. The Section also assisted with a loan for lease improvements from Olde Point National Bank. This loan is to be used to fund improvements for a lease with VMRC. It closed on September 20, 2017.
Virginia Outdoors Foundation (“VOF”)

The Section continues to serve as general counsel to VOF, advising its board of trustees and staff on easement acquisition and stewardship, the administration of VOF-owned lands, and general board and agency operational matters. This advice involves real property, contract, tax, Freedom of Information Act, procurement, statutory authority, and procedural board issues.

Significantly, in 2017, the Section provided advice on the legal and policy implications regarding the Atlantic Coast Pipeline (“ACP”) and Mountain Valley Pipeline (“MVP”) projects. The Section advised VOF throughout its negotiations with ACP and MVP over the property provided by the developers to replace the easement property as required by Virginia Code § 10.1-1704 (conversion/diversion property). These projects represented the largest conversion/diversion of open space property in the Commonwealth to date.

Virginia State Police (“VSP”)

The Section worked with DGS’s Division of Real Estate Services and VSP on communications tower leases. The Section also represented VSP with respect to various income and expense leases for cell towers throughout the Commonwealth.

Virginia Workers’ Compensation Commission (“VWC”)

The Section assisted VWC and DGS with a lease and option to purchase with respect to VWC’s relocation of its headquarters in downtown Richmond. The property where the headquarters is located does not have parking, so the transaction also involved the negotiation of a parking lease to serve the new VWC headquarters.

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 client agencies, makes claims, and 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 following overview highlights some of the Section’s most significant matters from the past year.

In 2017, the Section represented the Commonwealth on approximately $100 million in claims and litigation. Claims and litigation against the Commonwealth seeking over $50 million were resolved for a collective total payment by the Commonwealth of approximately $5.7 million. The Section recovered payments to the Commonwealth, its agencies, departments, and colleges and universities totaling approximately $1.7 million.

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 provided significant legal advice on the I-66 Outside the Beltway Project, which will improve 25 miles of I-66 with express lanes, rapid bus service, and a park-and-ride network from the Capital Beltway to Haymarket. The construction portion of this project is valued at $2.3 billion. The Section advised VDOT on various provisions of the comprehensive agreement, and we will continue to provide legal assistance for any claims which may arise.

Another VDOT project to which the Section devoted significant attention was the Reversible High Occupancy Vehicle/Transit ramp on I-395 at Seminary Road, as well as pedestrian enhancements under a $76 million design-build contract. The Section worked with VDOT staff to evaluate and provide advice on various disputes that arose on this project. These efforts eliminated many delays. Upon completion of the work, the Section worked with VDOT staff and the Federal Highway Administration to resolve all disputes for a small fraction of the initial request.

The Section provided ongoing legal support to VDOT on its $267 million Route 29/Linton Hall Road Interchange project. The Section provided legal
assistance to facilitate the resolution of multiple issues. As a result, the project was completed without a claim being filed.

The Section provided extensive legal support to VDOT on the $37 million Route 7 Widening Project. The Section worked with VDOT to resolve delay and acceleration claims. After analysis of the contractor’s position and negotiations with the contractor, the matter was resolved for less than half of the initial request.

Additionally, through 2016 and concluding in 2017, the Section defended VDOT in a $22.4 million suit filed against it stemming from the Chincoteague Bridge project on Virginia’s Eastern Shore, the largest road and bridge project on the Eastern Shore in decades. Following a seven-week trial, the Accomack Court ruled in favor of VDOT on numerous key issues. After notices of appeal were filed, the case was settled on favorable terms.

The Section has also devoted considerable legal attention to construction issues faced by Virginia’s colleges and universities. The Section has provided legal strategies for resolution of disputes and negotiations with parties to maintain construction deadlines and avoid shutdowns. The Section also pursued claims against the contractors and design professionals for delays and cost overruns on educational projects, including design errors, operating inefficiencies and damage to property committed during construction. Several of these claims were resolved in 2017, resulting in significant recoveries for the colleges and universities the Section represented.

In addition to VDOT and Virginia’s colleges and universities, the Section provided legal assistance to numerous other agencies and commissions. It provided legal assistance to Commissions constructing two monuments on the Capitol grounds in Richmond. The Section also successfully represented the Department of Military Affairs in a dispute involving the construction of barracks at Fort Pickett. In addition, the Section provided legal assistance to the Jamestown-Yorktown Foundation in construction-related disputes.

The Section has dedicated significant legal effort to measures aimed at minimizing disputes on future construction projects. In an effort that began as a response to the JLARC report on state procurement and contracting, the Section has analyzed major contract forms used by VDOT and the Department of General Services. The Section continues working with those agencies on
amendments to those forms which benefit both contractors and the Commonwealth. The Section has also provided legal advice on a number of other contract matters, including construction incentive clauses, indefinite quantity contracts, and local assistance projects.

Legal assistance provided by the Section also extends to construction-related disputes, including prequalification and debarment. In 2017, the Section successfully represented VDOT in an appeal of a prequalification determination. It has provided legal advice on debarment issues related to construction, and advice on construction surety bonds, including takeover agreements.

**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 state officers and employees regarding compliance with the State and Local Government Conflict of Interests Act. The Opinions Section processes and manages all such requests.

The Attorney General issued twenty-seven official opinions in 2017. In addition, the Office issued two conflict of interest opinions, and four informal opinions. Individuals requesting official opinions included members of the Senate and the House of Delegates, Sheriffs, Clerks of Court, County and City Attorneys, and state officials from agencies and commissions, including the Department of Historic Resources, the Department of Transportation, and the Virginia Marine Resources Commission. Official opinions were issued to requesters located in, or representing, numerous localities of the Commonwealth, including the counties of Albemarle, Arlington, Augusta, Charlottesville, Chesterfield, Covington, Essex, Fairfax, Frederick, Hanover, Rockingham, Southampton, Tazewell, and Washington, and the cities of Alexandria, Franklin, Newport News, Norfolk, Petersburg, Richmond, Roanoke, and Virginia Beach.

The Opinions Section also is responsible for publishing the *Annual Report of the Attorney General* pursuant to § 2.2-516 of the *Code of Virginia*. Of
particular note in 2017, the Opinions Section completed a project to place digital copies of all existing *Annual Reports* from 1895 to 2016 on a designated page of the Office’s website. This represents a significant step forward in enhancing public access to official opinions of the Attorney General, as well as a unique tool for historical researchers.

**PROGRAMS & COMMUNITY OUTREACH SECTION**

The Programs and Community Outreach Section works to maximize citizens’ access to the resources and services of the Office of the Attorney General. This centralized team, located in the Executive Division, coordinates and promotes the Office’s programs, some of which are described in detail below. It also provides support and technical assistance to local Triad chapters across the state. Section staff oversees and implements these programs and initiatives with the assistance of community outreach coordinators who are placed in each region of the Commonwealth to provide information to their local communities. Outreach coordinators partner with school and civic groups, organizations for seniors, law enforcement agencies, human services providers, and other stakeholders in crime prevention and public safety, and they represent the Office on a variety of task forces and work groups within their assigned regions.

**Overview and Special Activities**

In 2017 the Programs and Community Outreach Section secured over $1.2 million in federal and state grants to fund programs and initiatives. Members of the Section delivered nearly 250 presentations to nearly 16,500 participants and exhibited at over 120 community events and trainings, providing resources and information to over 40,000 people. Once again in 2017 Section staff assisted with clinic set-up, patient transport, and other support duties at the annual Remote Area Medical Clinic in Wise County, where more than 2,000 individuals received free dental, vision, and healthcare services over the course of three days. Section staff, in conjunction with local law enforcement partners, also participated in National Night Out events in nearly a dozen localities across the state. National Night Out is an annual event in which neighborhoods host events such as block parties and cookouts to strengthen relationships between law enforcement and local communities.
Triad

Since 1995, the Office has promoted the Triad Program to increase community awareness of scams and frauds that target seniors and to strengthen communication between law enforcement and seniors. The Section’s outreach coordinators work closely with the Triad chapters within their regions, coordinating with the Medicaid Fraud Control Unit ("MFCU"), the Consumer Protection Section, local law enforcement, and aging services agencies to educate seniors on crime prevention issues. In 2017, the Office signed a charter for the new Chickahominy Triad, serving New Kent and Charles City Counties, increasing the total number of Virginia Triad chapters to 139. In March, Triad members from across Virginia once again gathered for the annual Statewide Triad Conference held in Richmond. With an emphasis on public safety issues affecting older adults, this two-day conference attracted over 150 participants, including seniors, law enforcement officers, and allied professionals. Late in 2017, the Office once again offered a mini-grant opportunity to Virginia Triad chapters, and announced that funding would be awarded in early 2018.

Victim Notification/Domestic Violence Services

With funding it secured in 2016, the Victim Notification Program expanded services in 2017 with the hiring of an advocate to provide victim assistance in cases that are being prosecuted by the Major Crimes and Emerging Threats Section and the MFCU. Additional duties of the program include notifying victims of any appeal or habeas corpus proceedings associated with their case, assisting surviving family members of victims in capital cases, and administering the Commonwealth’s Identity Theft Passport Program. Enhancements were made to the Identity Theft Passport program, including a redesign of the Identity Theft Passport card and a revamp of the application process. During the year, the Victim Notification Program provided assistance to 521 victims of crime4 and issued 97 Identity Theft Passports. The Program also hosted the inaugural Unsung Hero Awards to honor excellence in victim services. The recipients, including law enforcement officers, victim advocates, and a prosecutor, were honored by the Attorney General at a ceremony in Richmond during National Crime Victims’ Rights Week in April. Additionally, the Section’s Domestic Violence Services enrolled 30 new families into

4 A single victim may be counted more than once depending on the number of cases the individual is involved in.
Virginia’s Address Confidentiality Program, a confidential mail-forwarding service managed by the Office for victims of domestic violence and stalking. Legislation expanding the Address Confidentiality Program to include victims of sexual violence, and in particular victims of human trafficking, went into effect July 1, 2017.

Lethality Assessment Protocol

In its ongoing effort to prevent domestic violence homicides, the Section continued to provide training and technical assistance on the Lethality Assessment Program (“LAP”). The LAP is an evidence-based screening tool that first responders use to identify victims who are at high risk of serious injury or death by their abusers and refer them to local domestic violence services. Since 2015, thirty local geographic jurisdictions in Virginia have implemented the LAP through collaborations with domestic violence crisis centers. In 2017, thirteen local law enforcement agencies began utilizing LAP screenings when responding to domestic calls, such that coverage now includes the counties of Augusta, Dinwiddie, Fluvanna, Prince George, Prince William, and York; and the cities of Bristol, Colonial Heights, Hopewell, Lynchburg, Martinsville, Staunton, and Waynesboro.

Looking ahead to 2018, the Office and statewide LAP partners at the Department of Criminal Justice Services and the Virginia Sexual and Domestic Violence Action Alliance will continue to offer training and assistance to local law enforcement agencies as they implement the program and evaluate its effectiveness.

Hampton Roads Human Trafficking Task Force

The Hampton Roads Human Trafficking Task Force was launched during the year as a partnership between the Office, the U.S. Department of Homeland Security, state and local law enforcement agencies, Commonwealth’s attorneys, and the Samaritan House in Virginia Beach. Supported by a $1.45 million federal grant, the multidisciplinary task force combats human trafficking in Hampton Roads by identifying and restoring victims, building awareness of the realities of human trafficking, and investigating and prosecuting trafficking crimes. Since the creation of the task force, there have been 98 new investigations opened, 43 arrests, 64 trafficking victims identified, and 16 completed state or federal cases. The task force plans to launch a regional
public awareness campaign in 2018. It has also engaged in a partnership with Thomas Nelson Community College to provide education and vocational training to victims of human trafficking.

**Sexual Assault Kit Testing Initiative**

The Section continued to lead the Office’s initiative to completely eliminate Virginia’s backlog of untested rape kits, known as Physical Evidence Recovery Kits (or “PERKs”). The first phase of the project, which was launched to test approximately 2,000 kits collected prior to June 30, 2014, is ongoing. As of the end of 2017, seven jurisdictions had sent 1,068 kits to be tested, and 321 DNA profiles had been entered into the national DNA database known as CODIS (or Combined DNA Index System), generating 70 CODIS hits. To support these efforts, the Section hired a designated victim advocate to assist localities in establishing victim notification protocols. The first phase of the project is funded by a $1.4 million grant from the Manhattan District Attorney’s $38 million initiative to test over 50,000 backlogged rape kits in more than 20 states.

The second phase of the project, which is funded by a $2 million grant from the federal Sexual Assault Kit Initiative, is focused on testing kits that were collected between June 30, 2014 and July 1, 2016. Following a months-long effort to contact each law enforcement agency in the Commonwealth, the Office identified 1,247 kits collected during this time period that remained untested. There was a perfect participation rate from law enforcement agencies during the completion of this inventory. Testing of the kits will begin in 2018.

During the fall, the Section hosted the Cold Case Sexual Assault Training Conference that provided training to law enforcement officers, victim advocates, and prosecutors on best practices in reinvestigating sexual assault cases. The conference, which featured nationally recognized experts in sexual assault case investigations, included guidance on handling sexual assault backlog cases in a victim-focused manner.

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5 On July 1, 2016, legislation went into effect in Virginia requiring that rape kits (with few exceptions) be forwarded to the Department of Forensic Science for testing within 60 days of collection. VA. CODE ANN. § 19.2-11.8 (Supp. 2017).

6 This figure is subject to revision and final approval by the Sexual Assault Kit Initiative program.
Re-Entry Program

The goal of the Re-Entry Program is to assist sheriffs and local and regional jails in providing resources to inmates to prepare them for successful release and re-integration into their communities. During the year, the Office hosted a series of five regional re-entry forums attended by 370 re-entry stakeholders. The Section also implemented a re-entry project in the City of Norfolk designed to reduce recidivism among gang-involved and other violent offenders. The project included providing programming to inmates at the Norfolk City Jail that focused on identifying the underlying risk factors of criminal behavior, as well as building skills in communication, decision making, and anger management.

Virginia Rules

The Section oversees Virginia Rules, an educational program for teens featuring 28 independent modules covering a wide variety of legal issues. Drugs, bullying, and internet safety are among the topics included in the curriculum. New additions in 2017 included a module on shoplifting, as well as an interactive e-learning module to complement the lesson plan “Give It, Get It: Trust and Respect between Teens and Law Enforcement,” which is designed to educate youth on their rights and responsibilities during law enforcement interactions.

During the year, 285 new instructors were enrolled in the Virginia Rules program, increasing the total number of instructors statewide to 2,011. Instructors shared Virginia Rules’ lessons with over 60,000 students across the Commonwealth. In addition, the Section sponsored Virginia Rules Camps in 20 localities, helping provide over 1,000 middle and high school students with a week-long summer day camp experience. The students experienced traditional camp fun, learned about Virginia law, and built positive relationships with school resource officers and other law enforcement officers who served as camp counselors.

Project Safe Neighborhoods

The Section reached out to at-risk youth in the City of Norfolk through its Project Safe Neighborhoods initiative. The goal of this initiative is to reduce violent crime by educating youth about consequences of gang involvement and
the illegal use of guns. Throughout the year, nearly 5,000 elementary, middle, and high school-aged youth in Norfolk were reached through presentations in schools, housing communities, detention centers, and other community venues. The Section also partnered with the Norfolk Anti-Violence Alliance to host a community-wide anti-bullying, gang awareness, and gun-violence prevention forum.

As part of the Project Safe Neighborhoods initiative, the Section also launched “Respect Richmond,” an innovative campaign designed to reduce gun violence and homicides in the City of Richmond. Among other things, the campaign uses digital messaging to target anti-retaliation ads to individuals in neighborhoods with the highest risk of gun violence. The ads are displayed on social media, gaming networks, and other internet venues where disputes can often escalate into violence. In addition, the ads can be adjusted and deployed in real time to target areas where violence has recently occurred and where retaliation may be more likely. The campaign also has its own dedicated website.

Heroin and Opioid Abuse

In support of the Attorney General’s efforts to combat the current heroin and opioid abuse epidemic, the Section oversaw continued distribution of the Office-produced documentary, “Heroin: The Hardest Hit.” Section staff helped plan and promote sixteen “Hardest Hit” screenings throughout the Commonwealth. In addition, the Section promoted a roll call video for law enforcement officers titled “When Seconds Count: How Law Enforcement Can Save a Life during an Overdose.”

Section staff served on numerous local and regional substance abuse coalitions and task forces and participated in over 40 town halls, community forums, and other events across the state to raise awareness of the dangers of heroin and opioid addiction. In April and October, the Section assisted with community Drug Take-Back events in conjunction with law enforcement and substance abuse coalition partners. Drug Take-Back events provide an opportunity for citizens to safely dispose of old or unused prescription drugs, which in turn prevents the drugs from reaching the wrong hands and being misused.
Partnerships and Collaborations

Throughout the year, the Section collaborated with a variety of partners to promote safe communities, including local and state government agencies, non-profit organizations, businesses, schools, universities, and faith-based organizations. Ongoing partners included the Commonwealth’s Attorneys’ Services Council, Department of Criminal Justice Services, the Department of Forensic Science, local law enforcement agencies, the Office of the Executive Secretary of the Supreme Court of Virginia, the Virginia Association of Chiefs of Police, the Virginia Coalition for the Prevention of Elder Abuse, the Virginia Department of Corrections, the Virginia Gang Investigators Association, the Virginia Sexual and Domestic Violence Action Alliance, the Virginia Sheriffs’ Association, the Virginia State Police, and the Virginia Victim Assistance Network. Ongoing partnerships with these and numerous other organizations are crucial to the Section’s continued promotion of secure and thriving communities in Virginia.

LEGISLATIVE ACCOMPLISHMENTS

During the year, the Office of the Attorney General worked to promote several significant legislative initiatives in the General Assembly. The Office supported bills proposing expanded services to victims of sexual violence, an enhanced victim notification process following PERK analysis, increased accessibility to life-saving opioid overdose reversal drugs, prosecution of drug dealers under the felony homicide statute for deaths resulting from use of the illegal drugs they distribute, and expansion of the list of protected classes under Virginia’s hate crime statute. A brief summary of these legislative initiatives follows.

House Bill 2217 was introduced by House Minority Leader David Toscano and pertains to the Address Confidentiality Program, a mail-forwarding program that shields the physical address of victims of domestic violence and stalking by routing their mail to a substitute address managed by this Office. Among other advancements, the bill expands the Program to serve victims of sexual violence, including human trafficking, and increases the certification period for Program participants from one to three years. House Bill 2217 passed in both chambers, with the unanimous consent of those present and voting.
As part of its work on behalf of victims of sexual assault, the Office partnered with Senator Barbara Favola to sponsor Senate Bill 1501, which enhances the victim notification process when a PERK (Physical Evidence Recovery Kit) is tested, even if the kit was collected prior to the enactment of omnibus PERK reform legislation in 2016. Senate Bill 1501 passed in both houses, with the unanimous consent of those present and voting.

The Office also championed two companion bills—House Bill 1449 and Senate Bill 848, sponsored by Delegate Jennifer Boysko and Senator Jennifer Wexton, respectively—to promote the effective distribution of naloxone. Naloxone is a medication that, with timely and effective usage, will reverse the effects of potentially fatal opioid overdoses. Since 2015, the Attorney General has worked to make this life-saving medication more accessible to the general public by reducing certain pharmaceutical distribution restrictions. The companion bills authorize community organizations to dispense naloxone free of charge to members of the general public who have successfully completed a short approved training course in how to administer the medication to a person experiencing an opioid overdose. Senate Bill 848 passed in both houses, with the unanimous consent of those present and voting.

In addition to the expansion of naloxone accessibility, the Office continued work to address the high volume of illicit opioid sales in the Commonwealth and resulting overdose deaths. For the third year in a row, the Office worked alongside Delegate L. Scott Lingamfelter in an attempt to amend the felony homicide statute to enable prosecution of drug dealers for deaths resulting from use of the illegal drugs that they distribute. Unfortunately, this bill (House Bill 1616) did not pass, and prosecutors continue to struggle to find ways to use the felony homicide statute to hold drug dealers accountable.

Lastly, the Office partnered with Delegate Richard Sullivan, Jr., and Senator Barbara Favola to sponsor two bills (House Bill 1702; Senate Bill 1524) that together proposed expanding the list of protected classes under Virginia’s hate crime statute to include sexual orientation, disability, gender, and gender identification. Delegate Lamont Bagby and Senator Favola also promoted legislation (House Bill 2399; Senate Bill 1502) seeking to add certain types of hate crimes to the list of crimes that a multi-jurisdiction grand jury may
investigate. However, these bills were not reported from the committees.
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1 This list includes all persons employed by the Office of the Attorney General during calendar year 2017, 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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Lauren C. Campbell ............................................... Assistant Attorney General
Stephen F. Capaldo .............................................. AAG/Assoc. University Counsel
Ann M. Chidester .................................................. Assistant Attorney General
Melissa Lynn Chong ............................................. Assistant Attorney General
Liam Alexander Curry .......................................... Assistant Attorney General
Braden J. Curtis ................................................... Assistant Attorney General
Nancy H. Davidson ............................................... Assistant Attorney General
Martin L. Davis .................................................... Assistant Attorney General
Katherine M. DeCoster .......................................... Assistant Attorney General
Candice M. Deisher ............................................... Assistant Attorney General/Lead Attorney
Keisha Marnae Dillard-Brady .................................. Assistant Attorney General
Anna Athena Dimitri ............................................ Assistant Attorney General
Vaso Tahim Doubles .............................................. Assistant Attorney General
Robert Norwood Drewry ....................................... Assistant Attorney General
Michelle A. Duda .................................................. Assistant Attorney General
Brittany Agnes Dunn-Pirio ..................................... Assistant Attorney General
James F. Entas .................................................... Assistant Attorney General/Gang Prosecutor
Kathryn F. Fenske .................................................. Assistant Attorney General
James A. Fiorelli .................................................. AAG/Assoc. University Counsel
Eric K.G. Fiske ................................................... Assistant Attorney General
William B. Fiske .................................................. Assistant Attorney General
Elizabeth Kiernan Fitzgerald .................................. Assistant Attorney General
James Michael Flaherty ........................................ Assistant Attorney General
Claire C. Foley .................................................... Assistant Attorney General
Allison Anne Kotula....................................................Assistant Attorney General
Grant E. Kronenberg ..................................................Assistant Attorney General
Kimberly Anne Kurkjian .............................................Assistant Attorney General
Michelle A. L’Hommedieu ..........................................Assistant Attorney General
Amanda L. Lavin .........................................................Assistant Attorney General
Joshua E. Laws ............................................................Assistant Attorney General
Ruth B. Layne .............................................................Assistant Attorney General
Jessica Smith Mackenzie .............................................Assistant Attorney General
Ellen Ruth Malenke ....................................................Assistant Attorney General
Tawnya Ann Manzlak ..................................................Assistant Attorney General
Brock Ronson Maust ...................................................Assistant Attorney General
Laura R. McCarthy .....................................................Assistant Attorney General
Sarah Jane McCoy .....................................................AAG/Virginia Port Authority Counsel
Patrick A. McDade .....................................................Assistant Attorney General
Erin R. McNeill ..........................................................Assistant Attorney General
Sarah E. Melchior .....................................................AAG/Assoc. University Counsel
Mary Grace Miller ....................................................Assistant Attorney General
Charis A. Mitchell .....................................................Assistant Attorney General
Elaine S. Moore ..........................................................Assistant Attorney General
Elizabeth L. Montagna ................................................Assistant Attorney General
Laura Elizabeth Maughan ...........................................Assistant Attorney General
Lena S. Munasifi ..........................................................Assistant Attorney General
Cody Thomas Murphey ................................................Assistant Attorney General
Sean J. Murphy ..........................................................Assistant Attorney General
Janine M. Myatt ..........................................................Assistant Attorney General/Prosecutor
Adele M. Neiburg ......................................................Assistant Attorney General
James W. Noel III .....................................................AAG/Virginia Port Authority Counsel
Andrew C. O’Brion .....................................................Assistant Attorney General
Margaret Anne O’Shea ................................................Assistant Attorney General
Joseph C. Obenshain ..................................................Assistant Attorney General
Mark Joseph Oberndorf ..............................................Assistant Attorney General
Alexander K. Page .....................................................Assistant Attorney General
Christian A. Parrish ..................................................Assistant Attorney General
Elizabeth B. Peay .....................................................Assistant Attorney General
David A. Peters ..........................................................Assistant Attorney General
Kiva Bland Pierce .....................................................Assistant Attorney General
J. Duncan Pitchford ...................................................Assistant Attorney General
Corey L. Poindexter ....................................................Assistant Attorney General
Heather Nicole Pritts ..................................................Assistant Attorney General
Mark S. Fero ................................................................. Public Safety Financial Manager
Grace B. Figueroa ................................................. Criminal Investigator/Computer Forensic Examiner
Teresa J. Finch .............................................................. Intake Specialist Senior Expert
Cynthia Marie Finley ......................................................... Financial Manager
Arian N. Fisher ............................................................ Administrative Assistant
Cheryl D. Fleming ......................................................... Administrative Legal Secretary Senior
Caren Yeager Flick .............................................................. Investigator
Heather M. Ford ......................................................... Administrative Legal Secretary Senior
April Shannon Freeman ........................................ Virginia Rules Coordinator
Lisa Garren Furr ............................................................... Sexual Assault Kit Initiative Project Manager
Sharon K. Goggin ............................................................... Paralegal
Michelle Renee Gopez ...................................................... Records Manager
John M. Gordon ............................................................... Investigative Supervisor
John Anthony Grazioso III ................................................ Investigator
Karl E. Grotos ............................................................... Business Manager
Tracy Lee Hall ............................................................... Web Specialist
Lyn J. Hammack ......................................................... Administrative Legal Secretary Senior
Kathleen Kildea Harrison ............................................................ Legal Secretary
Paul Gabriel Hastings Jr .............................................................. Investigator
Thomas E. Haynesworth ................................................ Facilities Assistant
Jennifer Peterson Heatherington ............................................................... Investigator
Regina M. Hedman ............................................................... Senior Investigator
Deborah J. Henderson ............................................................... Legal Secretary Senior
Howard J. Hicks III ............................................................... Investigative Supervisor
Shaquita I. Hicks ............................................................... Office Support Specialist
Michael T. Hnatowski ............................................................... eDiscovery Project Manager
Margaret C. Horn .............................................................. Chief of Civil Investigations and Elder Abuse
Shante S. Howell ............................................................... Claims Representative
Keith Lamont Ingram ............................................................... Facilities Supervisor
Steven D. Irons ............................................................... Investigative Supervisor
Ruben S. Jefferson Jr ............................................................... IT Support Specialist
Megan Kelly Jenks ............................................................... Investigator
Abigail Lester Johnson ............................................................... Administrative Assistant
Kevin M. Johnson ............................................................... Senior Investigator
Melissa Courtney Johnson ............................................................... Financial Services Specialist
Shawne Moore Johnson ............................................................... Legal Secretary Senior
Jon M. Johnston ............................................................... Investigative Supervisor
Tammy P. Kagey ............................................................... Paralegal Senior Expert
Hyo J. Kang ............................................................... Senior Database Administrator/Developer
John Michael Kelly ................................................................. Investigator
Jennifer Sweat Kibe .......................................................................................... Paralegal
Debra M. Kilpatrick .......................................................... Administrative Coordinator
Ryan T. Kolb ........................................................................................................ Financial Investigator
Antonio Darnell Kornegay .............................................................. Procurement Officer
Jennifer Lynn Krajewski ........................................................ Paralegal Senior
Mary Anne Lange .......................................................................................... Paralegal Senior Expert
Donna Lynn Lanno ........................................................................................ Deputy Director of Finance
Rachel Anne Lawless ....................................................................................... Director of Scheduling
Laura Ann LeBlanc ........................................................................................ Paralegal
Hema Lee ................................................................................................. Grants Manager
Patricia M. Lewis .............................................................................................. Unit Program Coordinator
Michele Irene Leith ....................................................................................... Community Outreach Coordinator
Tonya Lynn Lindsey .................................................................................... Legal Secretary Senior
William T. Ludwig ........................................................................................ Data Analyst
David Siamak Malakouti ............................................................................... Community Outreach Coordinator
Annelynn Tapscott Martin ........................................................................ Senior Victim Advocate
Sara I. Martin .................................................................................................. Human Resources Analyst
Tomisha R. Martin ........................................................................................ Claims Specialist Senior
Joshua A. Marwitz ........................................................................................ Investigator
Stephanie B. Maye ....................................................................................... Legal Secretary Senior
LaToya L. Mayo .......................................................................................... Administrative Assistant
Angela M. McCoy ........................................................................................ Administrative Coordinator
Judy O. McGuire ........................................................................................ Claims Representative
George T. McLaughlin ................................................................................ Investigator/Forensic Examiner
Melissa A. McMeneny ........................................................................ Statewide Facilitator
Jeremy Louis McNeill ................................................................................ Investigator
Jacqlyn W. Melson ........................................................................................ Investigator
David J. Miller ................................................................................................. Investigator
Lynice D. Mitchell ................................................................................ Office Services Specialist Senior
Karen G. Molzhon ........................................................................................ Paralegal
Eda M. Montgomery ....................................................................................... Senior Investigator
Nicole Danielle Monroe ........................................................................ Director of Information Systems
Terrie Darnell Montour ................................................................................ Legal Secretary
Tim R. Morley ................................................................................................. Investigator
Howard M. Mulholland ........................................................................ FCIC Financial Investigator
Mary C. Nevettal ........................................................................................ Office Support Specialist
Meaghan E. O’Brien ..................................................................................... Outside Counsel Program Coordinator
Trudy A. Oliver-Cuoghi ................................................................................. Paralegal
Laura Jean Olman ................................................. Investigator/Forensic Examiner
Christopher M. Olson .......................................................................... Investigator
Timothy J. Ortwein ............ Financial Investigator/Computer Forensic Examiner
Janice R. Pace .............................................................................. Administrative Coordinator
Hailey Jeanine Paladino ...................................... Human Resources Assistant
Sharon P. Pannell ................................................... Legal Secretary Senior Expert
Doris M. Parham .............................................................................. Intake Specialist
John W. Peirce .............................................................................. Investigative Supervisor
Seth Duncan Peltier .............................................................................. Investigator
Coty D. Pelletier .............................................................................. Investigative Supervisor
Duncan Allen Pence .............................................................................. Investigator
Broadus D. Pettiford.................................................. Director of Information Technology
Kyanna Milena Perkins ........................................................................... Program Director, Victim Notification
Nicole Therese Phelps .............................................................................. Victim Advocate
Lynette R. Plummer ..............................................................................
Executive Assistant to Attorney General and Chief Deputy Attorney General
Genea C. Poole-Johnson................................................................. Paralegal
Sandra L. Powell .............................................................................. Legal Secretary Senior
Syed A. Rahman .............................................................................. Auditor
Christine Wendy Reed........................................................................ Administrative Coordinator
Sharon Renee Rice .............................................................................. Legal Secretary Senior
Ashley Elizabeth Rivera ........................................................................ eDiscovery Technician
David A. Risden .............................................................................. Investigator
Dean Nicholas Rolle Jr................................................................. Re-Entry Case Manager
Jake David Rubenstein ........................................ Confidential Assistant and Executive Aide
Frank Matthew Sasser III ........................................................................ Investigator
Constance S. Saupé .............................................................................. Paralegal
Tyler J. Saupé .............................................................................. IT Support Specialist
Theresa Renee Scales ........................................................................... Community Outreach Coordinator
Michelle S. Scott .............................................................................. Legal Secretary
William Alton Shackleford Jr................................................................. Community Outreach Coordinator
Mary Kennedy Sharpe .............................................................................. Victim Advocate
David Lamar Shaw .............................................................................. IT Support Specialist
Gretchen Lynn Shelton ........................................................................... Investigator
Elizabeth G. Sherron ........................................................................... Senior Financial Investigator
Jennifer Ann Marie Simminger ........................................................................ Investigator
DeVon E. Simmons .............................................................................. Re-Entry Project Manager
Whitney Yarchin Siok ........................................................................... Investigator
Jason M. Sloan .............................................................................. Unit Manager, Computer Forensics
Alexander Ross Smith ........................................................................................................................................ Paralegal
Christeen Marie Roth Smith .................................................................................................................... Victim Advocate
Faye H. Smith ............................................................................................................................................... Human Resources Manager
Hasan Smith ............................................................................................................................................... Systems Administrator
Marian B. Smith ........................................................................................................................................ Financial Manager
Ruth Ann Smith .......................................................................................................................................... Paralegal Senior Expert
Tierra Monet Smith ....................................................................................................................................... Office Assistant
Gerald B. Snead II ........................................................................................................................................ EEO Manager
Carol Snodgrass ........................................................................................................................................ Data Analyst Supervisor
Cory William Stufflebeem .......................................................................................................................... Dispute Resolution Specialist
Rhonda H. Suggs ........................................................................................................................................ Investigator
Kaci Cummings Sutherlin ............................................................................................................................ Paralegal
Natalie A. Tamburri Silverman ................................................................................................................. Paralegal Senior
Gregory G. Taylor ..................................................................................................................................... Claims Representative
Kimberly Edward Taylor ............................................................................................................................ Paralegal Senior
Susan W. Terry ........................................................................................................................................... Paralegal Senior Expert
Daniel W. Thaw ......................................................................................................................................... Investigator
Patricia S. Thomas .................................................................................................................................... Nurse Investigator
Erin K. Thompson ...................................................................................................................................... Investigator
Deborah B. Thrift ........................................................................................................................................ Deputy Director of Office Operations
Kimberly D. Tinsley-Straus .......................................................................................................................... Claims Specialist
Sandra K. Tobias ......................................................................................................................................... Paralegal Senior
Mary E. Trapp ........................................................................................................................................... Intake Specialist
Ruta Rahul Trivedi ...................................................................................................................................... Legal Secretary
Ashley C. Trowbridge ................................................................................................................................ Investigator
Lynda Turrieta-McLeod .............................................................................................................................. Administrative Legal Secretary Senior
Latarsha Y. Tyler .......................................................................................................................................... Paralegal
Patricia L. Tyler .......................................................................................................................................... Paralegal Senior Expert/Manager
David M. Varcoe ...................................................................................................................................... Investigator
Ebony E. Velazquez .................................................................................................................................. Human Trafficking Task Force Coordinator
Laura C. Verser .......................................................................................................................................... Paralegal Senior
Mary Frances Davis Waddell ...................................................................................................................... Legal Secretary Senior
Megan Lee Wallmeyer Rose ...................................................................................................................... Paralegal Senior
Jonathan Glenn Ward ............................................................................................................................... Confidential Assistant and Executive Aide
Kaffa Asoanna Alecia Warren .................................................................................................................... Legal Secretary
Amy Elizabeth Weatherly ............................................................................................................................ Paralegal Senior
Christie A. Wells ....................................................................................................................................... Director of Finance
Nanora W. Westbrook ................................................................................................................................. Claims Representative
Gerard Joseph White ................................................................................................................................. Director of Office Operations
Carlisle M. Williams ................................................................. Auditor
Timothy L. Wilson ........................................ Administration/Operations Manager
Tiffany D. Williams .......................................................... Intake Specialist
Carla Nagel Winters ............................................................... Paralegal
Tonya Ellis Woodson .................................................. Director of Human Resources
Brian E. Wray ........................................................................... Investigator
Josephine Wright-Crawley ........................................... Claims Representative
Michael J. Wyatt ......................................................................... Senior Investigator
Abigail T. Yawn ................................................................. Legal Secretary Senior Expert
James A. Zamparello ......................................................... Senior Investigator
Aaron Montreal Ziglar ..................................................... Dispute Resolution Specialist
<table>
<thead>
<tr>
<th>Attorneys General of Virginia</th>
<th>Years</th>
</tr>
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<tbody>
<tr>
<td>Edmund Randolph</td>
<td>1776–1786</td>
</tr>
<tr>
<td>James Innes</td>
<td>1786–1796</td>
</tr>
<tr>
<td>John J. Marshall(^1)</td>
<td>1794–1795</td>
</tr>
<tr>
<td>Robert Brooke</td>
<td>1796–1799</td>
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<tr>
<td>Philip Norborne Nicholas</td>
<td>1799–1819</td>
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<tr>
<td>John Robertson</td>
<td>1819–1834</td>
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<tr>
<td>Sidney S. Baxter</td>
<td>1834–1852</td>
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<tr>
<td>Willis P. Bocock</td>
<td>1852–1857</td>
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<tr>
<td>John Randolph Tucker</td>
<td>1857–1865</td>
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<tr>
<td>Thomas Russell Bowden</td>
<td>1865–1869</td>
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<tr>
<td>Charles Whittlesey (military appointee)</td>
<td>1869–1870</td>
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<td>James C. Taylor</td>
<td>1870–1874</td>
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<tr>
<td>Raleigh T. Daniel</td>
<td>1874–1877</td>
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<td>James G. Field</td>
<td>1877–1882</td>
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<tr>
<td>Frank S. Blair</td>
<td>1882–1886</td>
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<td>Rufus A. Ayers</td>
<td>1886–1890</td>
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<td>R. Taylor Scott</td>
<td>1890–1897</td>
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<td>R. Carter Scott</td>
<td>1897–1898</td>
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<td>A.J. Montague</td>
<td>1898–1902</td>
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<tr>
<td>William A. Anderson</td>
<td>1902–1910</td>
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<tr>
<td>Samuel W. Williams</td>
<td>1910–1914</td>
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<tr>
<td>John Garland Pollard</td>
<td>1914–1918</td>
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<tr>
<td>J.D. Hank Jr.(^2)</td>
<td>1918–1918</td>
</tr>
<tr>
<td>John R. Saunders</td>
<td>1918–1934</td>
</tr>
<tr>
<td>Abram P. Staples(^3)</td>
<td>1934–1947</td>
</tr>
<tr>
<td>Harvey B. Apperson(^4)</td>
<td>1947–1948</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.
J. Lindsay Almond Jr.\textsuperscript{5} ................................................................. 1948–1957
Kenneth C. Patty\textsuperscript{6} ........................................................................ 1957–1958
Frederick T. Gray\textsuperscript{7} ....................................................................... 1961–1962
Andrew P. Miller .......................................................................................... 1970–1977
Anthony F. Troy\textsuperscript{8} ........................................................................ 1977–1978
Gerald L. Baliles .......................................................................................... 1982–1985
William G. Broaddus\textsuperscript{9} .................................................................. 1985–1986
Mary Sue Terry ............................................................................................ 1986–1993
Stephen D. Rosenthal\textsuperscript{10} ............................................................... 1993–1994
Richard Cullen\textsuperscript{11} .......................................................................... 1997–1998
Mark L. Earley .............................................................................................. 1998–2001
Randolph A. Beales\textsuperscript{12} .................................................................. 2001–2002
Jerry W. Kilgore ............................................................................................ 2002–2005

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{10} The Honorable Stephen D. Rosenthal was elected Attorney General by the General Assembly on January 29, 1993, to fill the unexpired term of the Honorable Mary Sue Terry upon her resignation on January 28, 1993, and served until noon, January 15, 1994.

\textsuperscript{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.

\textsuperscript{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.
Robert F. McDonnell............................................................................ 2006–2009
William C. Mims14 ............................................................................... 2009–2010
Kenneth T. Cuccinelli II.................................................................2010–2014
Mark R. Herring...................................................................................  2014–

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

Bethune-Hill v. Virginia State Board of Elections, No. 15-680. In an appeal by voters challenging twelve House of Delegates districts as racial gerrymanders, the Court vacated the decision of a three-judge panel of the U.S. District Court for the Eastern District of Virginia ruling that race did not predominate in shaping 11 of the 12 districts; upheld the finding that, while race predominated in shaping District 75, it was narrowly tailored; and remanded to allow the district court to determine whether, applying the correct legal standard, race did predominate and, if so, whether the use of race was narrowly tailored to satisfy the Voting Rights Act.

Virginia v. LeBlanc, No. 16-1177. In a per curiam opinion, the Court summarily reversed the Fourth Circuit’s affirmance of habeas relief where petitioner-inmate argued that his sentence violated Graham v. Florida, 560 U.S. 48 (2010).

REFUSED

Clark v. Virginia Department of State Police, No. 16-1043. Certiorari denied in case involving a state trooper’s discrimination and retaliation claims based on the Uniformed Services Employment and Reemployment Rights Act, claims that the Supreme Court of Virginia had held were barred by sovereign immunity.

Haendel v. Virginia, No. 17-30. Certiorari denied in case challenging the defendant’s successful demurrer and plea of sovereign immunity.

Jones v. Virginia, No. 16-1337. Certiorari denied where petitioner sought review of the decision of the Supreme Court of Virginia to uphold the denial of his motion to vacate his sentence.

Lindsey v. Virginia, No. 17-132. Certiorari denied in case seeking review of a decision of the Supreme Court of Virginia that a Virginia model jury instruction did not impermissibly shift the burden of proof to the defendant in violation of due process.
Morva v. Zook, No. 16-589. Certiorari denied; declined to review the Fourth Circuit’s decision to affirm dismissal of Morva’s habeas corpus petition by the district court.

Pinckney v. Clarke, No. 17-581. Certiorari denied; declined to review the Fourth Circuit’s decision to vacate, in part, the judgment of the district court, because the defendant failed to exhaust state-court remedies with regard to his claim that the Virginia statute under which the trial court imposed a life sentence for each of his four capital murder convictions was unconstitutional under Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

Vistagraphics, Inc. v. VDOT, No. 17-124. Certiorari denied; declined to review the Fourth Circuit’s decision to affirm the ruling of the U.S. District Court for the Eastern District of Virginia that state content restrictions on tourism literature at VDOT rest-area facilities did not violate the First Amendment, because the tourism literature is government speech rather than private speech.

Zebbs v. Virginia, No. 16-8642. Certiorari denied in two related cases where petitioner had entered an Alford plea to sex-offense charges and was required, as a condition of the partial suspension of prison time, to successfully complete sex-offender treatment; the Supreme Court of Virginia had held that petitioner’s Fifth Amendment privilege against self-incrimination was not violated by a treatment program’s requirement that petitioner admit to his offenses.

PENDING

Coleman v. Virginia, No. 17-546. Response requested in case, arising out of the Fourth Circuit, questioning whether Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), requires an appeals court reviewing a child-pornography conviction to conduct an independent review of the photograph that is the basis of the prosecution, or whether it may simply review a jury determination for clear error.

Collins v. Virginia, No. 16-1027. Certiorari granted to review a decision of the Supreme Court of Virginia that the automobile exception to the warrant requirement permitted a police officer to walk up a private driveway, pull back the tarp covering a motorcycle, and verify the vehicle identification number on the motorcycle.
Currier v. Virginia, No. 16-1348. Certiorari granted in case where the Supreme Court of Virginia and the Virginia Court of Appeals had held that the issue-preclusion component of the Double Jeopardy Clause does not prevent multiple charges from being severed and tried separately with the defendant’s consent and for his benefit.

Delaware v. Pennsylvania, No. 145, Original (consolidated with Arkansas v. Delaware, No. 146, Original). Original action brought by a group 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.

Johnson v. Commonwealth, No. 17-326. Pending petition for certiorari to review the Supreme Court of Virginia’s ruling that the defendant’s sentence of life in prison did not violate Miller v. Alabama, 132 S. Ct. 2455 (2012), and its decision to deny the defendant’s request for the appointment of a neuropsychologist.

Reed v. Virginia, No. 17-5402. Brief requested in response to a petition for certiorari challenging the decision of the Supreme Court of Virginia to deny an appeal of a Virginia Court of Appeals ruling that the warrantless search and seizure of historical cell-site data records revealing the location of petitioner during the commission of a crime did not violate the Fourth Amendment.

Snodgrass v. Messer, No. 17-635. Brief requested in response to a petition for certiorari to review the Fourth Circuit’s decision that a prison inmate’s verbal statements to a corrections officer that he intended to file a grievance against the officer are not constitutionally protected conduct for purposes of stating a First Amendment retaliation claim, and that referring to an inmate as a “snitch” is not sufficient to constitute an adverse action for purposes of stating such a claim.

Stukes v. Virginia Employment Commission, No. 17-5989. Pending appeal by a pro se petitioner challenging the VEC’s denial of his claim for unemployment benefits. The VEC denied his claim, because Stukes did not communicate with his employer concerning his absences and return to work date, which is considered misconduct.

Virginia Uranium, Inc. v. Warren, No. 16-1275. Pending petition for certiorari to review the Fourth Circuit’s decision to uphold Virginia’s statutory
moratorium on uranium mining; the Court’s invitation to the U.S. Solicitor General’s Office to file a brief expressing the views of the United States remains pending.

SUPREME COURT OF VIRGINIA

DECIDED

Ahmed v. Commonwealth, No. 161180. Reversing the decision of the Greensville County Circuit Court to dismiss Ahmed’s case for failure to timely file notice of claim under the Virginia Tort Claims Act.

Cahoon v. Commonwealth, No. 160667. Affirming the decision of the Court of Appeals that the evidence was sufficient to convict the defendant and his brother of possession with the intent to distribute and conspiring to distribute prescription opioids.

Campbell v. Commonwealth, No. 161676. Reversing the decision of the Court of Appeals to overturn the defendant’s conviction for the production of methamphetamine, because the trial court properly applied the exigent circumstances exception to the warrant requirement after the warrant was found invalid under Virginia Code § 19.2-54.

Carter v. Commonwealth, No. 160993. Affirming the decision of the Court of Appeals to uphold the defendant’s conviction for first degree murder, finding the trial court did not err in excluding the victim’s prior violent acts and that any error in excluding evidence of threats made by the victim was harmless.

Cilwa v. Commonwealth, No. 161278. Reversing the judgment of the Court of Appeals, agreeing with the Commonwealth’s concession that the Court of Appeals erred in dismissing the defendant’s appeal as moot.

Cole v. Commonwealth, No. 161113. Affirming the decision of the Court of Appeals to uphold the constitutionality of a strip search and that the evidence was sufficient to prove that the defendant had intended to distribute the cocaine found in the search.

Collins v. Commonwealth, No. 161559. Reversing the decision of the Court of Appeals and finding that the evidence was insufficient to convict Collins, where
the presence of Collins’s fingerprints on a recently stolen and abandoned television did not exclude the possibility that Collins touched the television as an innocent passerby.

_Conservative v. Leonard_, No. 160952. Reversing the decision of the Court of Appeals that the Commonwealth was collaterally estopped from using a valid DUI conviction as a predicate offense for sentencing enhancement, because a general district court, in an unrelated case, had previously ruled that the Commonwealth could not use the same DUI conviction as a predicate offense for sentencing enhancement.

_Conservative v. Moseley_, No. 161013. Reversing the decision of the Court of Appeals that the circuit court erred in convicting the defendant of two counts of burglary and two counts of grand larceny.

_Conservative v. White_, No. 160879. Reversing the decision of the Court of Appeals and affirming a conviction for possession with intent to distribute heroin.

_Conservative v. Wiggins_, No. 160828. Reversing the decision of the Court of Appeals and affirming the decision of the circuit court convicting Wiggins of felony child neglect.

_Daily Press v. Office of the Executive Secretary of the Supreme Court of Virginia_, No. 160889. Affirming the decision of the circuit court to deny a petition for mandamus that sought to compel the Office of the Executive Secretary of the Supreme Court of Virginia to comply with a Freedom of Information Act request for certain public records housed on its premises, because circuit court clerks were the expressly designated custodians of the records and, therefore, proper subjects of the request.

_Dietz v. Conservative_, No. 160857. Affirming the decision of the Court of Appeals that the use of a cell phone for purposes of procuring or promoting an 11-year-old for activity violated Virginia Code § 18.2-370 (taking indecent liberties with children) and upholding Dietz’s conviction under Virginia Code § 18.2-374.3(B).

_Epps v. Conservative_, No. 161002. Affirming the decision of the Court of Appeals that the circuit court did not err in denying the defendant’s motion to
dismiss the indictment in his case, because it had not been entered in the court’s order book until after his trial.

Forbes v. Clarke, No. 170883. Denying a petition for a writ of habeas corpus, because the petitioner’s claim regarding the manner or method of computing petitioner’s release date was without merit.

Graves v. Commonwealth, No. 160688. Reversing the circuit court’s denial of a motion to vacate a sentence in excess of the maximum sentence for a firearms offense.

Grethen v. Robinson, No. 161417. Reversing the decision of the Chesapeake Circuit Court to deny an inmate’s motion to proceed in forma pauperis.

Hackett v. Commonwealth, No. 160619. Affirming the decision of the circuit court that the defendant’s request to have his felony conviction reduced to a misdemeanor was untimely.

Hilton v. Commonwealth, No. 160458. Affirming decision of the Court of Appeals that taking the victim’s keys was sufficient to sustain the defendant’s convictions for carjacking and use of a firearm in the commission of that felony.

Howsare v. Commonwealth, No. 160414. Affirming the decision of the Court of Appeals that the trial court did not err in instructing the jury on the issue of intent in a homicide case.

Jasper v. Director of the Department of Corrections, No. 160992. Denying a petition for a writ of habeas corpus on the grounds the record reflected that petitioner’s sentence had been accurately calculated including credit for time served and finding the remainder of the petitioner’s claims barred, having been previously ruled upon by the court.

Jones v. Commonwealth, No. 131385. On remand from the United States Supreme Court; affirming the decision of the circuit court to deny a motion to vacate life sentence without parole for a homicide committed by juvenile.

Kalergis v. Commissioner of Highways, No. 161347. Affirming the decision of the circuit court to hold that “original purchase price,” as used in Virginia Code § 33.2-1005(A), is not ambiguous and must be construed by its plain meaning;
thus, reconveyance under this statute requires payment of the original purchase price rather than an appraisal valuation amount.

Kim v. Commonwealth, No. 160665. Reversing the decision of the circuit court to convict the defendant for unreasonable refusal, because the location where Kim operated the vehicle was not a highway for purposes of implied consent law, as provided in Virginia Code § 18.2-268.2.

Kohl’s Department Stores, Inc. v. Virginia Department of Taxation, Nokaleri. 160681. Agreeing with the Richmond Circuit Court’s interpretation of Virginia Code § 58.1-402 that the “subject-to-tax” exception to the “add back” statute applies on a post-apportionment basis, such that only the portion of Kohl’s royalties that were actually taxed by another state fell within the exception, but reversing the judgment of the circuit court and holding that to the extent the royalties were actually taxed, they fell within the exception regardless of which entity paid the tax—Kohl’s or its intangible holding company. Remanded to the circuit court for consideration of the extent to which Kohl’s paid income tax in other states on the royalties it had paid to its affiliate.

Meyers v. Commonwealth, No. 150962. Affirming the decision of the Court of Appeals to deny an appeal after the filing of an Anders brief by the defendant’s appellate counsel.

Old Dominion Committee for Fair Utility Rates v. State Corporation Commission, No. 161519; Karen E. Torrent, Esq. v. State Corporation Commission, No. 161521; VML/VACo APCo Steering Committee v. State Corporation Commission, No. 161520 (consolidated appeal). Affirming the decision of the State Corporation Commission to deny the utility rate committees’ petition challenging the constitutionality of a temporary moratorium on biennial rate reviews of certain electric companies, because the committees could not overcome the strong presumption that Virginia Code § 56-585.1:1 does not violate Article IX, § 2 of the Constitution of Virginia.

Opaletta v. Commonwealth, No. 161051. Reversing the decision of the Court of Appeals and remanding with directions ordering the circuit court to conduct a new sentencing hearing, because the bailiff spoke to the jury foreperson about a matter related to the jury’s deliberations.
Palmer v. Atlantic Coast Pipeline, LLC, No. 160630. Affirming the decision of the Augusta County Circuit Court to reject Palmer’s constitutional challenge against 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 Court agreed with the position advanced by Virginia as amicus curiae.

Perry v. Commonwealth, No. 160530. Affirming the decision of the Court of Appeals that the defendant’s statutory right to a speedy trial was not violated.

Peterson v. Commonwealth, No. 161103. Ruling that there was no reversible error in this twenty-horse civil seizure hearing in Charles City County, which stemmed from abuse of the horses.

Pijor v. Commonwealth, No. 161346. Affirming the decision of the Court of Appeals that the doctrine of collateral estoppel did not bar the defendant’s prosecution and that the evidence was sufficient to support the perjury conviction.

Rickman v. Commonwealth, No. 161489. Affirming the trial court’s decision not to grant the respondent’s motion to dismiss and applying the right result/different reason doctrine to hold that the statute in question is in fact procedural and directory.

Shin v. Commonwealth, No. 170128. Affirming the decision of the Fairfax County Circuit Court, upholding Virginia Code § 18.2-268.3 against challenge on various constitutional grounds.

Sly v. Commonwealth, No. 160424. Affirming the decision of the Court of Appeals that the evidence was sufficient to sustain the defendant’s conviction for involuntary manslaughter.

Virginia Education Association v. Davison, Nos. 161017, 161025, and 161031. Reversing the decision of the circuit court to order the production of documents regarding student growth percentiles in response to a Virginia Freedom of Information Act request, holding that the information was confidential under Virginia Code § 22.1-295.1(C), because the requested data constituted teacher performance indicators and contained identifiable teacher information, including teacher names and license numbers.
Williams v. Commonwealth, No. 160257. Affirming the decision of the circuit court imposing, in a single proceeding, a prison sentence to be followed immediately by commitment to Central State Hospital.

Williams v. Commonwealth, No. 170101. Reversing the decision of the Court of Appeals and vacating Williams’ conviction of possessing cocaine with intent to distribute.

Woolford v. Virginia Department of Taxation, No. 161095. Reversing the decision of the circuit court, which had found that the taxpayer failed to support his application for land preservation tax credits with a qualified appraisal from a qualified appraiser.

REFUSED

Anderson v. Clarke, No. 170790. Refusing a petition for a writ of habeas corpus, which sought relief from a revocation order of the circuit court; the petitioner’s claim lacked merit, because the revocation order did not exceed petitioner’s remaining suspended time.

Anderson v. Prince William Courts, No. 170464. Refusing a petition for appeal challenging the dismissal of a petition for a writ of mandamus and prohibition, in which the appellant had sought to compel a general district court to permit a late non-suit.

Bellamy v. Commonwealth, Record No. 171036. The Court refused an appeal of a Virginia Tort Claims Act case that was dismissed by the circuit court.

Cash v. Clarke, No. 170025. Refusing a petition for a writ of habeas corpus on grounds that certain of petitioner’s claims were time-barred and the remaining claims were moot, because petitioner had served his full sentence, including suspended time, and was no longer incarcerated.

Hagmann v. Virginia Board of Medicine, No. 170519. Refusing a petition for appeal in a case where it was found that the Board’s denial of a continuance request did not violate the licensee’s due process rights.

In re: Crawford. Refusing a petition for a writ of mandamus seeking to compel the Virginia State Bar to perform the discretionary act of investigating the
conduct of the petitioner’s former attorney in the course of an unrelated proceeding.

_In re Gordon_, No. 170275. Refusing as moot a petition for a writ of mandamus which had sought to compel a circuit court judge to grant the petitioner _in forma pauperis_ status.

_In re: Perry_. Refusing a petition for a writ of mandamus which had sought relief against a judge and a clerk of court relating to the petitioner’s prior criminal conviction.

_In re: Rutledge_, No. 170109. Dismissing as moot a petition for a writ of mandamus, in which the petitioner had claimed that the circuit court refused to rule on a matter before it.

_Minhas v. Ferguson_, No. 161781. Refusing a petition appeal in a case where it was found that the Commissioner of the Department of Behavioral Health and Developmental Services was not liable for malicious prosecution of a former patient.

_Mills v. Barksdale_, No. 170741. Refusing a petition for a writ of mandamus on the basis that the petitioner had not shown a duty imposed by law on the warden to do the act which the petitioner sought to compel.

_Mims v. Clarke_, No. 170547. Refusing a petition for a writ of habeas corpus challenging the time computation towards the defendant’s current sentence with time from a previous incarceration.

_Zackrison v. Virginia Board of Medicine_, No. 170490. Refusing a petition for appeal in a case where it was found that the Board’s procedural error in not qualifying the licensee as an expert witness did not result in harm to the licensee.

**PENDING**

_Azar v. Craig Burns, Tax Commissioner_, No. 171225. Pending appeal from the decision of the Arlington Circuit Court to uphold the Tax Commissioner’s application of the three-year period of limitations for refunds to an overpayment credit claimed on a late-filed return.

_Brown v. Bennett_, No. 171146. Original jurisdiction; seeking a writ of habeas corpus on the basis of alleged violations of the Ex Post Facto Clause and the
Due Process Clause pertaining to petitioner’s potential release on discretionary parole.


*Bryant v. Commonwealth*, No. 170712. Pending appeal from a decision of the Court of Appeals to affirm a conviction for unlawfully discharging a firearm within an occupied building.

*Bunn v. Clarke*, No. 171325. Original jurisdiction; seeking a writ of habeas corpus challenging the effectiveness of trial counsel and the calculation of petitioner’s criminal sentence.

*Collins v. Brown*, No. 171197. Original jurisdiction; seeking a writ of mandamus in which petitioner claims that his sentences were incorrectly computed.

*Commissioner of Highways v. Karverly, Inc.*, No. 170282. Pending appeal of the trial court’s decision that Virginia law required appraisal of the entire property, including improvements, in order for an expert to testify as to an evidentiary determination that the remaining property was not damaged.

*Commonwealth v. Commonwealth ex rel. Hunter Labs., LLC*, No. 170995. Pending appeal of the Fairfax County Circuit Court’s allocation of settlement proceeds under the Virginia Fraud Against Taxpayers Act.

*Commonwealth v. Gregg*, No. 170586. Pending appeal from the decision of the Court Appeals that the Double Jeopardy Clause barred a conviction and sentence for both the common law offense of involuntary manslaughter and the statutory offense of unlawfully shooting into an occupied vehicle where a death results involuntary manslaughter.

*Commonwealth v. Perkins*, No. 170323. Pending appeal from the decision of the Court of Appeals that the circuit court erred by finding that the evidence, which showed that the defendant struck the victim in the back of the head with a gun while the co-defendant hit him from behind with his fist, rendering him unconscious, established intent for malicious wounding.
Commonwealth v. White, No. 171543. Pending appeal from the decision of the Court of Appeals that the evidence was insufficient to support a conviction for felony child abuse and neglect, when the defendant’s knowing omission of care for her child resulted in his drowning to death in a septic tank located in White’s back yard.

Corporate Executive Board Company v. Virginia Department of Taxation, No. 171627. Pending appeal from the decision of the Arlington Circuit Court to grant summary judgment in favor of the Department of Taxation. Petitioner alleges that the Commonwealth’s corporate income tax statutes operate to attribute too large a portion of its nationwide income to Virginia, and that Virginia’s “relief statute” required the Department of Taxation to grant their request for an alternative apportionment.

Dennis v. Commonwealth, No. 171599. Pending appeal from the decision of the Court of Appeals to deny a petition for a writ of actual innocence challenging 1998 convictions for attempted murder, malicious wounding, and use of a firearm based on a proffer of “real” perpetrator.

Dufresne v. Commonwealth, No. 161633. Pending appeal from a decision of the Court of Appeals affirming a conviction for grand larceny.

Farnsworth v. Walrath, No. 180345. Pending appeal of the circuit court’s dismissal of a petition for a writ of habeas corpus challenging the loss of telephone and visitation privileges.

Garcia-Tirado v. Commonwealth, No. 170458. Pending appeal from the decision of the Court of Appeals that videotaped statements of an interrogation were admissible at trial without testimony of the interpreter involved in the interrogation and that the defendant’s Miranda waiver was knowing and voluntary.

Gerald v. Commonwealth, No. 161844. Pending appeal of the decision of the Court of Appeals to affirm the defendant’s conviction for perjury, where the defendant asserts that Albemarle County was an improper venue because the Albemarle County Courthouse where the crime occurred is located inside the City of Charlottesville.
Gerald v. Commonwealth, No. 170356. Pending appeal of the decision of the Court of Appeals to affirm the defendant’s convictions for perjury and driving on a suspended license, where the defendant asserts that Albemarle County was an improper venue because the Albemarle County Courthouse where the crimes occurred is located inside the City of Charlottesville.

Griffin v. Jacobs, No. CL17-447. Appeal of a Virginia Tort Claims Act case that was dismissed by the circuit court.

Gurdak v. Commonwealth, ex. rel. Moll, No. 171411. Pending appeal of a decision of the Circuit Court for Fairfax County in favor of the Commonwealth. At issue is whether a post-retirement, non-fatal disease is compensable under the Virginia Line of Duty Act.

Harris v. Pearson, No. 171384. Original jurisdiction; petition for a writ of habeas corpus challenging the denial of credit on the defendant’s current sentences for time served on separate unrelated offenses for which he ultimately received no active sentence.

Holloway v. Commonwealth, No. 170258. Pending appeal from the decision of the Court of Appeals contesting the sufficiency of the evidence to convict the defendant of felony child neglect and asserting an unconstitutional traffic stop led to his arrest.

Hook v. Bennett, Record No. 171208. Seeking writ of mandamus to compel the Virginia Parole Board to review a determination of parole ineligibility.

In re: Brown, No. 161422. Original jurisdiction; claim of actual innocence based on partial DNA profile in a 1969 murder case from Albemarle County.

In re: Clark, No. 170886. Pending petition for rehearing following the dismissal of a petition for a writ of prohibition seeking to prevent a circuit court judge from implementing administrative courthouse safety measures.

In re: Lee, No. 171558. Pending petition for a writ of mandamus seeking to compel a circuit court judge to enter the petitioner’s pre-appeal written statement of facts.
In re: McGarry, No. 171233. Pending petition for a writ of mandamus seeking to reverse a circuit court judge’s decisions relating to real estate and to compel the judge to convene a hearing on the petitioner’s motion for sanctions.

In re: Minor, No. 171334. Pending petition for a writ of prohibition seeking to enjoin a circuit court from exercising jurisdiction in a domestic relations proceeding.

In re: Phillips, No. 171438. Original jurisdiction; claim of actual innocence based on partial DNA profile in a 1991 rape case from the City of Virginia Beach.

In re: Scott, No. 171286. Original jurisdiction; claim of actual innocence based on partial DNA profile in a 1975 rape case from Fairfax County.

In re: Thomas. Pending petition for a writ of mandamus seeking to compel a circuit court judge to reduce the time of petitioner’s prison sentence.

In re: Watford, No. 161187. Original jurisdiction; claim of actual innocence from a 1977 rape conviction on guilty plea from the City of Portsmouth.

Jackson v. Clarke, No. 170843. Original jurisdiction; seeking writ of habeas corpus alleging trial counsel rendered ineffective assistance of counsel when challenging the sufficiency of the evidence to support the charge for possession of a firearm by a felon under Virginia Code § 18.2-308.2.

Jordan v. Commonwealth, No. 161527. Pending appeal from a decision of the Greyson County Circuit Court denying an inmate’s motion for a name change on grounds that it would frustrate legitimate law-enforcement purposes.

Jones v. Commonwealth ex. rel. Moll, No. 170639. Pending appeal from the decision of the Circuit Court for the City of Hampton upholding the Comptroller’s denial of a retired firefighter’s application for benefits under the Virginia Line of Duty Act. At issue is whether a post-retirement, non-fatal disease is compensable under the Act.

Lewis v. Commonwealth, No. 170518. Pending appeal from the decision of the Court of Appeals to affirm the defendant’s conviction of assault and battery of a family member, third or subsequent offense, on the grounds that he was statutorily required to be sentenced, not just convicted, of the prior offenses at the time of trial.

Mills v. Commonwealth, No. 171616. Pending appeal from the decision of the Court of Appeals of Virginia to deny a petition for a writ of actual innocence that challenged 2004 convictions for aggravated malicious wounding, malicious wounding (2 counts), use of a firearm (3 counts), and maliciously discharging a firearm at an occupied dwelling based on the proffered recantation of the victim.

Osburn v. Virginia Department of Alcoholic Beverage Control, No. 161777. Pending appeal of the decision of the Court of Appeals to uphold ABC’s termination of an employee for violating the Fourth Amendment rights of a license applicant during the search of the premises to be licensed.

Overton v. Bennett, Record No. 171207. Petition for a writ of mandamus regarding the discretionary nature of a review of parole ineligibility by the Virginia Parole Board.

Paternoster-Cozart v. Roberts, No. 161436. Seeking a writ of habeas corpus challenging jail credits and the time computation of his sentence.

Romain v. Clarke, No. 170691. Petition for a writ of mandamus asserting that the defendant is entitled to an earlier release date, because the Department of Corrections miscalculated his prison sentences.

Secret v. Commonwealth, No. 170540. Pending appeal from the decision of the Court of Appeals to affirm the defendant’s convictions in the circuit court for arson and nine counts of attempted first degree murder.

Severance v. Commonwealth, No. 170829. Pending appeal from the decision of the Court of Appeals to affirm the defendant’s convictions in the circuit court for two capital murders, first degree murder, four firearm counts, malicious wounding, and two counts of possession of a firearm by a convicted felon.

Shepherd v. Harold Clarke, No. 171072. Petition for a writ of habeas corpus upon the basis that the defendant should receive credit for time served on a
separate unrelated offense that was dismissed.

*Strebe v. Kanode*, Case No. CL17-60. Pending appeal of the circuit court’s dismissal of a petition for declaratory judgment challenging the inmate mail policy.

*Terry v. Commonwealth*, No. 170279. Pending appeal claiming that the Court of Appeals erred in holding that it lacked jurisdiction to hear the defendant’s appeal from the circuit court and challenging the circuit court’s denial of the defendant’s motion to vacate his drug conviction several years after it was final, due to alleged perjury by a police detective in obtaining a search warrant for the defendant’s residence.

*Turner v. Commonwealth*, No. 161804. Pending appeal of the decision of the Court of Appeals to affirm the defendant’s conviction for hanging a noose in a public place with the intent to intimidate; the defendant challenges his conviction on First Amendment and statutory interpretation grounds.

*Vesilind v. Virginia State Board of Elections*, No. 170697. Pending appeal from the decision of the Richmond City Circuit Court that a group of challenged House of Delegates and Senate districts do not violate the compactness requirement in Article II, § 6 of the Constitution of Virginia.

*Williams v. Clarke*, No. 171433. Petition for a writ of habeas corpus alleging that the defendant’s sentence was not properly calculated with respect to good conduct credit, and that the defendant is entitled to a detailed numerical breakdown of the sentencing calculations.
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: 2017 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.
An employer does not have discretion under § 51.1-124.13 of the Code of Virginia and Form VRS-180 (Rev. 12/15) regarding whether or not to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee was convicted of a felony associated with the performance of his job duties. This conclusion holds despite the language found on the prior Form VRS-180 (Rev. 12/11), because the statutory language in § 51.1-124.13 clearly mandates the forfeiture of all benefits awarded under Title 51.

Section 51.1-124.13 mandates that an employer, who relied on the permissive language of Form VRS-180 (Rev. 12/11) rather than the plain wording of the statute, notify the VRS Board of its final determination that an employee was convicted of a felony that “arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.”

ANDREW R. MCROBERTS, ESQUIRE
ESSEX COUNTY ATTORNEY

JANUARY 18, 2017

ISSUES PRESENTED

You ask three questions regarding the interpretation of § 51.1-124.13 of the Code of Virginia, which requires the forfeiture of pension, retirement, and related benefits provided under the Virginia Retirement System (“VRS”) to public employees convicted of certain felonies:

1) Does an employer have discretion under § 51.1-124.13 and Form VRS-180 (“Employer Request for Forfeiture of Member Benefits”) to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee’s felony conviction was associated with the performance of the employee’s job duties;

2) Does the response to the first question above change based on the language of Form VRS-180, in effect on February 4, 2014, indicating “if an employee is convicted of a felony for
misconduct occurring on or after July 1, 2011 and you have determined that the felony was in association with the performance of the employee’s job duties, you may request the employee forfeit all VRS benefits . . ." (emphasis added); and

3) Must an employer which relied on the permissive language of Form VRS-180 (Rev. 12/11) as described above in electing not to seek the forfeiture of employee VRS benefits in 2014 now reconsider the forfeiture of VRS benefits issue?

**APPLICABLE LAW AND DISCUSSION**

Title 51.1 of the *Code of Virginia* establishes pension, retirement, and related benefits for various public employees, including benefits for public employees in positions covered under the Virginia Retirement System. Section 51.1-124.13 of the *Code of Virginia*, enacted in 2011, requires that a person otherwise entitled to VRS benefits under Title 51.1 forfeit those benefits if they are convicted of a felony arising from misconduct that occurred in any position covered under VRS. Specifically, the statute provides in pertinent part that:

No person shall be entitled to any of the benefits of this title as provided in this section if (i) he is convicted of a felony and (ii) the person’s employer determines that the felony arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.[3]

Pursuant to the statute, the employer is tasked with determining whether a felony conviction arose from misconduct in a covered position on or after July 1, 2011. Before making such a determination, the employer must provide the employee with “reasonable prior written notice and . . . an opportunity to be

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2 For example, Title 51.1 establishes the Virginia Retirement System (§§ 51.1-100 through 51.1-169), the Government Employees Deferred Compensation Plan (§§ 51.1-600 through 51.1-605), and the Cash Match Plan (§§ 51.1-607 through 51.1-613).

heard.”⁴ If the employer then makes a determination against the employee, the employee has the right to appeal the determination by submitting a notice to the circuit court within five working days. The employer’s determination against the employee becomes “final” after ten days if no appeal is sought, or upon the date of the circuit court’s decision if an appeal is sought and the determination is affirmed. Upon the employer notifying the Board of Trustees of VRS (the “Board”) of the final determination against the employee, the Board must proceed to implement the forfeiture of benefits “as soon as practicable.”⁵

1. No employer discretion to file Form VRS-180.

You ask whether an employer participating in VRS has discretion under § 51.1-124.13 to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee’s felony conviction arose out of misconduct in a covered position. As noted in a prior opinion of this Office, it “is a ‘principal rule of statutory interpretation . . . that courts will give statutory language its plain meaning.’”⁶ Section 51.1-124.13 is clear that “[n]o person shall be entitled to any of the benefits of [Title 51.1] . . . if (i) he is convicted of a felony and (ii) the person’s employer determines that the felony arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.”⁷ In addition, the statute goes on to mandate that VRS implement the forfeiture “as soon as practicable after the employer notifies the Board” of the final determination.⁸ Implicit in this directive is a clear requirement that the employer notify VRS once a determination has been made final against the employee.

Accordingly, the statute allows for no discretion on the part of the employer once a final determination has been made that the felony arose from

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⁴ Id.
⁵ Section 51.1-124.13(C).
⁷ Section 51.1-124.13(A) (emphasis added).
⁸ Section 51.1-124.13(C). The only exception to a forfeiture of benefits is when an employee “is or becomes a member in service after relinquishment of benefits under subsection C, [in which case] he shall be entitled to the benefits under [Title 51.1] based solely on his service occurring after the relinquishment.” Section 51.1-124.13(D).
misconduct in a VRS-covered position with the employer. In the absence of statutory language creating such discretion, I must conclude from the plain language of the forfeiture statute that an employer is required to notify VRS of any final determination against an employee.

2. Form VRS-180 (Rev. 12/11) conflicts with statutory prohibition.

You next inquire about the effect of language in Form VRS-180 ("Employer Request for Forfeiture of Member Benefits") (Rev. 12/11), in effect on February 4, 2014, which indicated that “[i]f any employee is convicted of a felony for misconduct occurring on or after July 1, 2011 and you have determined that the felony was in association with the performance of the employee’s job duties, you may request the employee forfeit all VRS benefits . . . .” (Emphasis added.)

Form VRS-180 (Rev. 12/11) is an administrative guidance document. Although interpretations of statutes contained in administrative guidance documents are not binding and do not have the force of law, they are entitled to some deference by the courts according to their persuasive effect. No deference, however, is given if the interpretation is inconsistent with the statute. “When an agency’s statutory interpretation conflicts with the language of the statute . . . the usual deference accorded to an agency’s interpretation should be withheld.”

Form VRS-180 (Rev. 12/11) is inconsistent with § 51.1-124.13 of the Code of Virginia to the extent that it suggests the employer has discretion whether to file the form. As the VRS Form interprets the statute in a manner that creates a conflict, it must not be given deference here. I note that a current version of Form VRS-180 (Rev. 12/15) does not contain the discretionary language. Rather, it directs a covered employer to “[c]omplete this form to notify VRS that a member has been convicted of a felony for misconduct associated with the member’s performance of job duties and that all VRS related benefits must be

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9 VA. CODE ANN. § 2.2-4001 (2014) (definition of “guidance document”).


forfeited.”¹² By removing the discretionary language, VRS has expressed its recognition that the mandatory interpretation of § 51.1-124.13 controls.

3. Reconsideration of election not to seek forfeiture of employee VRS benefits based on language of Form VRS-180 is required.

Finally, you ask whether an employer who relied on the permissive language of Form VRS-180 (Rev. 12/11) in electing not to seek the forfeiture of employee VRS benefits in 2014 must now reconsider the forfeiture. As discussed above, § 51.1-124.13 does not grant an employer any discretion to determine whether an employee’s benefits are forfeited. The only determination an employer is permitted to make is deciding whether the felony arose from misconduct in a covered position. Once the employer has provided the person prior written notice and an opportunity to be heard, and the determination becomes final, the employer must notify the VRS Board.

Once the determination becomes final,¹³ the statute provides no explicit timeframe for notifying the VRS Board. Rather, employers and the Board are instructed to comply with the statute “as soon as practicable.”¹⁴ A misinterpretation of statute does not waive the employer’s obligation to notify the Board of its final determination. Thus, the County must complete and transmit Form VRS-180 (Rev. 12/15) to the VRS Board notwithstanding a prior decision to decline to do so.

CONCLUSION

Accordingly, it is my conclusion that an employer does not have discretion under § 51.1-124.13 of the Code of Virginia and Form VRS-180 (Rev. 12/15) regarding whether or not to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee was convicted of a felony associated with the performance of his job duties. This conclusion does not change despite the language found on the prior Form VRS-180 (Rev. 12/11), seemingly making such a filing discretionary, because the statutory language in § 51.1-124.13 clearly mandates the forfeiture of all benefits awarded under


¹³ Section 51.1-124.13(A).

¹⁴ Section 51.1-124.13(C).
Title 51. Finally, § 51.1-124.13 mandates that an employer, who relied on the permissive language of Form VRS-180 (Rev. 12/11) rather than the plain wording of the statute, notify the VRS Board of its final determination that an employee was convicted of a felony that “arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.”

**OP. NO. 16-029**

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

A provision in a restrictive covenant limiting the use of lots in residential areas for residential purposes exclusively is enforceable, subject to the exception that a home office that does not generate customer or client traffic is deemed a residential use.

**THE HONORABLE R. LEE WARE, JR.**  
**MEMBER, VIRGINIA HOUSE OF DELEGATES**

**JANUARY 18, 2017**

**ISSUE PRESENTED**

A restrictive covenant of the Brandermill planned community provides that property in a residential area may be used only for residential purposes. You ask whether this covenant is legally enforceable.

**BACKGROUND**

Brandermill is a planned community in Chesterfield County. A restrictive covenant in its declaration requires that property in a residential area be used exclusively for “residential purposes,” except that an office that does not generate customer or client traffic (a “home office”) is deemed a residential use:

15 Section 51.1-124.13(A).
All lots in said Residential Areas shall be used for residential purposes exclusively. The use of a portion of a dwelling on a lot as an office by the owner or tenant thereof shall be considered a residential use if such use does not create customer or client traffic to and from the lot.\[1\]

**APPLICABLE LAW AND DISCUSSION**

The Virginia Property Owners’ Association Act (the “Act”)\[2\] governs the operation and management of a property owners’ association (a “POA”) in Virginia. A POA has no inherent power; it has only those powers delegated to it by the General Assembly under the Act.\[3\] The primary document for any POA is the declaration.\[4\] A declaration may include restrictions on the uses of property.\[5\] The Act also specifically provides that a POA may prohibit any lot owner from operating a home-based business within his personal residence if the prohibition

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\[1\] Brandermill Declaration of Rights, Restrictions, Affirmative Obligations and Conditions: Multiple Family Covenants, Part II (Restrictions), Paragraph 2(a) (August 30, 1974).


\[4\] See § 55-513.2 (Supp. 2016). The Act defines the term “declaration” as “any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that either (i) imposes on the association maintenance or operational responsibilities for the common area or (ii) creates the authority in the association to impose on lots, or on the owners or occupants of such lots, or on any other entity any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of some or all of the lots, the owners or occupants of the lots, or the common area. ‘Declaration’ includes any amendment or supplement to the instruments described in this definition. ‘Declaration’ shall not include a declaration of a condominium, real estate cooperative, time-share project or campground.” Section 55-509 (Supp. 2016).

\[5\] While the Act does not explicitly say that restrictive covenants may be included in a declaration, that concept is embedded in the fabric of the Act: perhaps it was so obvious that the General Assembly did not see the need for it to be stated. See § 55-508 (2012) (‘‘Covenants,’ ‘deed restrictions,’ or ‘other recorded instruments’ for the management, regulation and control of a development shall be deemed to correspond with the term ‘declaration.’’). See also § 55-509.5(A)(9) (Supp. 2016) (The disclosure packet of a homeowners’ association shall include “[a] statement that any . . . uses made of the lot . . . are not in violation of the declaration . . . .”). The Supreme Court of Virginia has repeatedly, without question, treated restrictive covenants contained in declarations as enforceable. See, e.g., Tvardek v. Powhatan Village Homeowners Ass’n, 291 Va. 269, 276 (2016); Lovelace v. Orange Cty. Bd. of Zoning Appeals, 276 Va. 155, 159 (2008).
is contained in a recorded declaration. Thus, since the restrictive covenant in question is in the declaration, all nonresidential uses in residential areas are barred, with the qualification that a home office not creating customer or client traffic to and from the lot is deemed a residential use.

It is well settled in Virginia that restrictive covenants are not favored. Furthermore, the Supreme Court of Virginia has stated that restrictive covenants “are to be strictly construed.”

But although restrictive covenants are disfavored, they are permissible. The Supreme Court of Virginia has held that “courts of equity will enforce restrictive covenants where the intention of the parties is clear and the restrictions are reasonable.” A Virginia circuit court has held that members of a POA must abide by the association’s governing documents. A prior opinion of this Office concluded that a homeowners’ association may limit the use of housing units through a restrictive covenant.

In my view, the restrictive covenant identified in your request is reasonable, as it comports with the authority specifically granted to a POA under the Virginia Code to restrict uses to residential purposes, and it provides a reasonable exception by deeming an office that does not create customer or client traffic to and from the lot to be a residential use. Further, even when strictly construed, the covenant is non-ambiguous. “Residential” is a clear and

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6 “Except to the extent the declaration provides otherwise, no association shall prohibit any lot owner from operating a home-based business within his personal residence.” Section 55-513.2 (emphasis added).


8 Deitrick v. Leadbetter, 175 Va. 170, 175 (1940) (citing Whitehurst v. Burgess, 130 Va. 572, 576 (1921)).


10 Farran v. Olde Belhaven Towne Owners Ass’n, 80 Va. Cir. 508, 511 (Fairfax City 2010).

11 2011 Op. Va. Att’y Gen. 163, 164 (opining that the restrictive covenant in question placed a limit on the number of housing units a single owner could own and offer for rent).

12 See Gillespie v. Commonwealth, 272 Va. 753, 758 (2006) (citing Brown v. Lukhard, 229 Va. 316, 321 (1985)) (“Language is ambiguous if it admits of being understood in more than one way, refers to two or more things simultaneously, is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness.”). See also Scott, 274 Va. at 213 (quoting Schwarzschild, 186 Va.
unambiguous term of common usage. I therefore conclude that this restrictive covenant is enforceable as written under the circumstances you have presented.

I express no opinion about whether any particular use of any particular property is for “residential purposes,” because that is a question of fact rather than an interpretation of law. “Attorneys General consistently have declined to render official opinions on specific factual matters . . . .”

CONCLUSION

For the reasons set forth above, it is my opinion that Paragraph 2(a) of Part II of Brandermill’s restrictive covenants limiting the use of lots in residential areas for residential purposes exclusively is enforceable, subject to the exception that a home office that does not generate customer or client traffic is deemed a residential use.

OP. NO. 16-035

ADMINISTRATION OF GOVERNMENT: INVESTMENT OF PUBLIC FUNDS ACT

Political subdivisions such as counties, cities, and towns may invest in securities unconditionally guaranteed by the United States government or a federal agency in accordance with § 2.2-4501(A)(2), and the fact that such a security may be asset-backed does not disqualify it as a permitted investment. However, investment by a political subdivision in any other asset-backed security is not authorized.

at 1058) (“[S]ubstantial doubt or ambiguity [in restrictive covenants] is to be resolved in favor of the free use of property and against restrictions.”).

13 The Supreme Court of Virginia has held the term “residential” to encompass the short-term rental of residential properties (Scott, 274 Va. at 219), a four-unit apartment house (Jernigan v. Capps, 187 Va. 73, 81 (1948)), and the rental of rooms without meals (Schwarzschild, 186 Va. at 1064-65), but not the commercial operation of a tourist home (Deitrick, 175 Va. at 177).


ISSUE PRESENTED

You ask whether localities such as Arlington County are permitted to invest in asset-backed securities guaranteed by a United States government agency pursuant to § 2.2-4501(A)(2) of the Code of Virginia.

APPLICABLE LAW AND DISCUSSION

The Virginia Investment of Public Funds Act (“the Act”) regulates the investment of public moneys by the Commonwealth, public officers, municipal corporations, political subdivisions, and all other public bodies. A prior opinion of the Attorney General notes that “the purpose of the [A]ct as a whole is to safeguard monies belonging to the Commonwealth and its subdivisions by requiring investment in safe and reliable devices, and by establishing standards of care by which such monies must be invested.”

Section 2.2-4501(A)(2) of the Act authorizes political subdivisions, a term that includes localities such as Arlington County, to invest in “[b]onds, notes

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2 2012 Op. Va. Att’y Gen. 4, 6. See § 2.2-4514 (2014) (Commonwealth and its political subdivisions as trustee of public funds; standard of care in investing such funds). See also §§ 2.2-4500 (2014) (permitting sinking funds to be invested in, among other things, federal and state debt, and Virginia municipal debt where there is no evidence of default); 2.2-4502 (2014) (permitting investment in prime quality commercial paper, and other commercial paper, provided that certain safeguards are taken); 2.2-4510 (2014) (permitting investment in high quality corporate notes, provided that strict investment guidelines are established).
3 See § 15.2-952 (2012) (“[A]ny locality . . . or other political subdivision may, by ordinance or resolution, authorize the acquisition and purchase [of federal property] . . . .” (emphasis added). See also 3232 Page Ave. Condo. Unit Owners Ass’n v. City of Va. Beach, 284 Va. 639, 646 (2012) (quoting § 25.1-100) (“[T]he definition of ‘[p]erson applicable to eminent domain proceedings . . . specifically includes . . . any . . . city, county, town, or other political subdivision . . . .’” (emphasis added). Black’s Law Dictionary defines “political subdivision” as “[a]
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and other obligations of the United States, and *securities unconditionally guaranteed as to the payment of principal and interest by the United States, or any agency thereof*.”\(^4\) It does not authorize any public entity to invest in “asset-backed securities” and does not even use that term.

The term “asset-backed securities” is used in a different statute, § 2.2-4511, which authorizes some—but not all—public entities to invest in some—but not all—asset-backed securities:

> Notwithstanding any provision of the law to the contrary, any qualified public entity of the Commonwealth may invest any and all moneys belonging to it or within its control, other than sinking funds, in *asset-backed securities* with a duration of no more than five years and a rating of no less than AAA by two rating agencies, one of which must be either Moody’s Investors Service, Inc., or Standard and Poors, Inc.

As used in this section, “qualified public entity” means any state agency, institution of the Commonwealth or statewide authority created under the laws of the Commonwealth having an internal or external public funds manager with professional investment management capabilities.[5]

This second statute authorizes only “qualified public [entities] of the Commonwealth” to invest in asset-backed securities.\(^6\) It defines the term “qualified public entity” as a “state agency, institution of the Commonwealth or statewide authority . . . having an internal or external public funds manager with professional investment management capabilities.”

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\(^4\) Section 2.2-4501(A)(2) (Supp. 2016) (emphasis added).

\(^5\) Section 2.2-4511 (2014) (emphasis added).

\(^6\) Section 2.2-4511. The statute does not define the term “asset-backed securities.” As a general rule, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning. Moyer v. Commonwealth, 33 Va. App. 8, 35 (2000) (citing McKeon v. Commonwealth, 211 Va. 24, 27 (1970)). *Black’s Law Dictionary* defines “asset-backed security” as “[a] debt security . . . that is secured by assets that have been pooled and secured by the assets from the pool.” *Black’s Law Dictionary* p. 1560 (Bryan A. Garner et al. eds., 10th ed. 2014).
professional investment management capabilities.”

That description cannot be reasonably interpreted to include political subdivisions such as counties, cities, and towns. Indeed, had the General Assembly intended to include political subdivisions, it could have used that term, as it did in § 2.2-4501(A), discussed above, which specifically mentions political subdivisions. We must “‘assume that the legislature chose, with care, the words it used when it enacted the . . . statute.’” The maxim *expressio unius est exclusio alterius* “‘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.’” Here, we must assume that the General Assembly chose with care its words when it did not include political subdivisions or localities in the definition of “qualified public entities.”

For securities that are backed only by assets, investors do not enjoy the extra protection afforded by the credit of the United States, and in the event of default investors might have to seek recourse through foreclosure on the underlying assets. This would be inherently more risky, and it may explain why the General Assembly chose to limit the field of investors to state-level entities with a certain degree of financial sophistication. Moreover, even for these sophisticated investors, the securities must be of short duration and carry the highest credit ratings.

Your inquiry is whether a political subdivision such as Arlington County may invest in asset-backed securities guaranteed by a United States government agency. Because political subdivisions are authorized by the Act to invest in unconditionally backed obligations of a United States government agency, I conclude that such an investment is permitted by the Act. When choosing to invest in these securities, political subdivisions are protected by the credit of the federal government. In the event of default, a political subdivision would have recourse against the federal government or one of its agencies. The authorization for investment in such federal securities applies, regardless of whether the federally backed security is also asset-backed or not. The fact that an authorized federal security is coincidentally backed by assets does not

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7 Section 2.2-4511.
10 Section 2.2-4511.
disqualify it as a permissible investment for a political subdivision. In the event of default, recourse would lie against the federal government or federal agency, and there would be no need to foreclose on the underlying assets backing the security.

CONCLUSION

Accordingly, it is my opinion that political subdivisions such as counties, cities, and towns may invest in securities unconditionally guaranteed by the United States government or a federal agency in accordance with § 2.2-4501(A)(2), and the fact that such a security may be asset-backed does not disqualify it as a permitted investment. However, investment by a political subdivision in any other asset-backed security is not authorized.

OP. NO. 17-003

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON - ABORTION

If enacted, HB 1473 would not withstand constitutional scrutiny. The Act would impose a general prohibition on a woman’s ability to have an abortion prior to viability, and therefore would impose an undue burden on a woman’s right to choose to have an abortion, in violation of prevailing Supreme Court precedent. If enacted, the legislation would likely result in a significant, costly, and successful constitutional challenge against the Commonwealth.

THE HONORABLE CHARNIELE L. HERRING
MEMBER, VIRGINIA HOUSE OF DELEGATES

JANUARY 23, 2017

ISSUE PRESENTED

You have asked whether the general prohibition of abortions after 20 weeks’ gestation proposed by House Bill 1473 (“HB 1473”) would withstand constitutional scrutiny, in light of U.S. Supreme Court case law.

BACKGROUND

HB 1473 seeks to create the Pain-Capable Unborn Child Protection Act (the “Act”), which would prohibit an abortion of a fetus more than 20 weeks
after fertilization “unless, in reasonable medical judgment, [the pregnant woman] has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment.”¹ The Act makes it a Class 4 felony for any person to perform or induce an abortion in violation of that prohibition, and prescribes civil remedies, including injunctive relief and actual and punitive damages, against any person performing or inducing an abortion in violation of the Act.²

**APPLICABLE LAW AND DISCUSSION**

The Supreme Court has repeatedly recognized that States may not unduly restrict a woman’s access to an abortion before the point of viability. In 1973, in *Roe v. Wade,*³ the Supreme Court established a woman’s right “to choose to have an abortion before viability and to obtain it without undue interference from the State.”⁴ It explained that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”⁵ Twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Court reaffirmed viability as the touchstone of its abortion jurisprudence. The Court stated that “no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips.”⁶ In 2007, in *Gonzales v. Carhart,* the Supreme Court again said that, before viability, a State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy.”⁷ And in *Whole Woman’s Health v. Hellerstedt,* handed down just last year, the Supreme Court reiterated its adherence to the viability framework, striking down two restrictions in a

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² *Id.*, lines 136-61.
³ 410 U.S. 113 (1973).
⁵ *Id.*
⁶ *Id.* at 861. See also *Id.* at 871 (opinion of O’Connor, Kennedy, and Souter, JJ.) (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade.* It is a rule of law and a component of liberty we cannot renounce.”).
Texas statute that “place[d] a substantial obstacle in the path of women seeking a previability abortion.”

The Supreme Court has defined viability as “the time ‘when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus’[s] sustained survival outside the womb, with or without artificial support.’” The Court further has instructed that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

If enacted, HB 1473 would impose, with only limited exceptions, a flat rule prohibiting abortions after 20 weeks following fertilization—the point when, according to the bill’s preliminary clauses (and as reflected in the Act’s title), evidence suggests that a fetus is capable of experiencing pain. But whether that point is defined in terms of weeks or as the point at which the drafters contend a fetus can experience pain, it is before the time that fetuses are generally viable. Accordingly, the undue-burden standard would apply and,

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8 136 S. Ct. 2292, 2300 (2016). See also id. at 2320 (“[W]e . . . use ‘viability’ as the relevant point at which a State may begin limiting women’s access to abortion for reasons unrelated to maternal health.”).

9 MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773 (8th Cir. 2015) (quoting Colautti v. Franklin, 439 U.S. 379, 388 (1979)), cert. denied, 136 S. Ct. 981 (2016). See also Casey, 505 U.S. at 870 (stating that viability “is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb”).


12 See Stenehjem, 795 F.3d at 773 (accepting declarations from two doctors that “viability occurs at about 24 weeks”); Isaacson v. Horne, 716 F.3d 1213, 1218 n.4 (9th Cir. 2013) (“The parties to this suit agree that no fetus is viable at twenty weeks gestational age and that a healthy fetus typically attains viability at twenty-three or twenty-four weeks, at the earliest.”), cert. denied, 134 S. Ct. 905 (2014); see also Casey, 505 U.S. at 860 (“[V]iability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic...
because the Act would contravene settled Supreme Court precedent, it would very likely be struck down as unconstitutional.

I note that laws in other States similar to HB 1473 have been found unconstitutional. In 1996, the U.S. Court of Appeals for the Tenth Circuit struck down a Utah law that defined 20 weeks’ gestation as the point of viability, ruling that the law “is directly contrary to . . . Supreme Court authority.”13 It further explained:

The State’s arguments to the contrary are disingenuous and unpersuasive because they are grounded on its continued refusal to accept governing Supreme Court authority holding that viability is a matter to be determined by an attending physician, and that until viability is actually present the State may not prevent a woman from choosing to abort.[14]

In 2013, the U.S. Court of Appeals for the Ninth Circuit struck down an Arizona law that prohibited abortions after 20 weeks, explaining that there was “no doubt that the twenty-week law operates as a ban on pre-viability abortion and that it cannot stand under the viability rule enunciated repeatedly by the Supreme Court, this circuit, and other circuits.”15 The Supreme Court declined to disturb the result in that case.16 And in 2015, the Ninth Circuit struck down a similar law enacted by Idaho because it “prohibits abortions of fetuses of twenty or more weeks postfertilization . . . regardless of whether the fetus has attained viability.”17 It found the statute unconstitutional because it “place[d] an arbitrary time limit on when women can obtain abortions.”18

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14 Id. at 1118.
15 Isaacson, 716 F.3d at 1226.
16 134 S. Ct. 905 (2014).
17 McCormack v. Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015).
18 Id. See also Stenberg, 795 F.3d at 773 (finding unconstitutional a North Dakota statute prohibiting abortions after point when fetal heartbeat can be detected because it was “bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions”); Edwards v.
CONCLUSION

It is my opinion that, if enacted, HB 1473 would not withstand constitutional scrutiny. The Act would impose a general prohibition on a woman’s ability to have an abortion prior to viability, and therefore would impose an undue burden on a woman’s right to choose to have an abortion, in violation of prevailing Supreme Court precedent. If enacted, the legislation would likely result in a significant, costly, and successful constitutional challenge against the Commonwealth.

OP. NO. 16-010

TAXATION: VIRGINIA RECORDATION TAX ACT

The grantor’s tax may not be assessed on a deed conveying real property from a private bank to the Commonwealth, following VDOT’s purchase of the property for public use on a highway improvement project.

THE HONORABLE REBECCA P. HOGAN
CLERK, FREDERICK COUNTY CIRCUIT COURT

MARCH 9, 2017

ISSUE PRESENTED

You ask whether grantor’s tax should be assessed on a deed conveying real property from a private bank to the Commonwealth in connection with a highway project carried out by the Virginia Department of Transportation (“VDOT”). In the scenario you present, VDOT purchased the real property from the bank for public use on the highway improvement project.

Beck, 786 F.3d 1113, 1115, 1117 (8th Cir. 2015) (affirming permanent injunction against enforcement of the Arkansas Human Heartbeat Protection Act; noting that “[b]y banning abortions after 12 weeks’ gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability”), cert. denied, 136 S. Ct. 895 (2016).
In Virginia, deeds recorded in circuit court are subject to the recordation taxes established in the Virginia Recordation Tax Act (the “Act”). Among other things, the Act provides generally that the grantor in a conveyance of real estate must pay a grantor’s tax, which is sometimes described as a “transfer tax.” Pursuant to the Act, “[t]he rate of the tax, when the consideration or value of the interest . . . exceeds $100, [is] 50 cents for each $500 or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale . . . .”

The Act, however, establishes several exemptions to the grantor’s tax. Relevant here is the exemption in § 58.1-811(C)(5), which provides that no grantor’s tax shall be assessed on a “conveyance of real estate to the Commonwealth or any county, city, town, district, or other political subdivision thereof, if such political unit is required by law to reimburse the parties taxable [as grantors].” Applying the language of the exemption to your inquiry, I conclude that no grantor’s tax shall be assessed if the conveyance 1) is to the Commonwealth, and 2) the Commonwealth is required by law to reimburse the grantor for the tax.

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3 Section 58.1-802 (“The rate of the tax, when the consideration or value of the interest, whichever is greater, exceeds $100, shall be 50 cents for each $500 or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale, whether such lien is assumed or the realty is sold subject to such lien or encumbrance.”).
5 Although it is not immediately clear whether the exemption applies to any conveyance of real estate to the Commonwealth, or only a conveyance in which the Commonwealth is required by law to reimburse the grantor for the tax, a well-established canon of statutory construction favors the latter interpretation. According to the canon of meaningful variation, if the legislature “uses two different terms in the same act, those terms are presumed to have distinct and different meanings.” Indus. Dev. Auth. v. Bd. of Supvrs., 263 Va. 349, 353 (2002) (citing Shelor Motor Co. v. Miller, 261 Va. 473, 480 (2001)); see generally LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 130-31 (2d ed. 2013). Here, the General Assembly chose the term “political unit” rather than repeating the term “political subdivision.” Thus, according to the canon of meaningful variation, the two terms should be construed as referring to different things. The only entity in the statute that may (in context) be construed as a “political unit” but not a “political subdivision” is the Commonwealth. Accordingly, the term “political unit” should be read to include the Commonwealth, making the
In the circumstances you describe, the conveyance is clearly to the Commonwealth, as the Commonwealth is grantee in connection with a highway project carried out by VDOT, a state agency. With respect to reimbursement, §§ 25.1-401 and 25.1-418, together with VDOT’s interpretation of those statutes, provide that when VDOT purchases real property for a transportation project, it is required to reimburse the seller for recording fees and transfer taxes, if paid by the owner. Thus, in the scenario you present, VDOT—an agency of the Commonwealth—would be required by law to reimburse the grantor for the tax, if assessed. Because it is required by law to reimburse the grantor for the tax, § 58.1-811(C)(5) provides that the tax should not be assessed.

CONCLUSION

For the foregoing reasons, it is my opinion that the grantor’s tax may not be assessed on a deed conveying real property from a private bank to the Commonwealth, following VDOT’s purchase of the property for public use on a highway improvement project.
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OP. NO. 17-007

FISHERIES AND HABITAT OF THE TIDAL WATERS: COMPACTS AND JOINT LAWS WITH OTHER STATES - POTOMAC RIVER COMPACT; RELATED LAWS

The National Oceanic and Atmospheric Administration (NOAA) has the authority to regulate fishing in the Mallows Bay-Potomac River National Marine Sanctuary (the “Potomac Sanctuary”) but has not chosen to exercise that authority. While NOAA cannot enter into a binding agreement in which it bargains away its authority, the Governor of Maryland is empowered under the National Marine Sanctuaries Act to effectively veto any attempt by NOAA to directly regulate fishing in the Potomac Sanctuary.

THE HONORABLE JOHN M.R. BULL
COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION

MARCH 15, 2017

ISSUES PRESENTED

You inquire about the effect of the designation of an area of the Potomac River as a national marine sanctuary. Specifically, you ask whether the sanctuary designation could displace the authority of the Potomac River Fisheries Commission (the “Commission”) to regulate fisheries in the area; if so, whether the proposal does, in fact, do so; and, if the proposal does not displace the Commission’s authority, whether the federal government could be bound by an agreement not to do so in the future.

BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA”) has proposed to designate a part of the Potomac River as the Mallows Bay-Potomac River National Marine Sanctuary (the “Potomac Sanctuary”). 1 By designating the area as a sanctuary, NOAA aims to protect the cultural heritage resources found in the area—principally, historic shipwrecks potentially dating back to the American Revolution and the remains of the largest “ghost fleet” of wooden

steamships built for the United States Emergency Fleet during World War I.\(^2\) Fishermen and other interested parties have expressed concern that the proposal will interfere with the regulatory authority of the Potomac River Fisheries Commission (“Commission”) over fisheries in the river.

The Commission was created by the Potomac River Compact of 1958, an agreement between the State of Maryland and the Commonwealth approved by Congress in 1962.\(^3\) It has the authority to regulate the taking of fish and shellfish in designated tidal waters of the Potomac River.\(^4\) The law enforcement agencies of both Maryland and Virginia are responsible for the enforcement of the Commission’s regulations, and each state’s courts have jurisdiction to hear cases involving a regulatory violation.\(^5\)

**APPLICABLE LAW AND DISCUSSION**

The National Marine Sanctuaries Act\(^6\) (“NMSA”) establishes NOAA’s authority to designate marine sanctuaries. NMSA enables NOAA to provide for more stringent fishing regulations in a sanctuary than are provided by existing authorities. In this instance, however, NOAA is not proposing to exercise that authority. Although NOAA cannot enter into a binding agreement to restrict its ability to exercise that authority in the future, NMSA establishes certain checks on NOAA that could stop any future effort to regulate fishing.

1. **NOAA may regulate fishing within a national marine sanctuary.**

NOAA has the authority to regulate fishing activity in an area it properly designates as a sanctuary.\(^7\) When it enacted NMSA, Congress recognized that

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\(^2\) Id. at 2255-56.


\(^4\) VA. CODE ANN. § 28.2-1001, art. II & art. III, § 2.

\(^5\) Section 28.2-1001, art. V, §§ 1, 3.


\(^7\) There is little doubt that the Potomac Sanctuary is an area that may be designated as a sanctuary. Under NMSA, NOAA “may designate any discrete area of the marine environment as a national marine sanctuary . . . .” 16 U.S.C. § 1433(a). The term “marine environment” is defined as including, among other things, coastal waters. Id. § 1432(3). The term “coastal waters,” in turn, is
certain areas of the marine environment possess important conservation, historical, scientific, cultural, or other qualities that give them national significance.\textsuperscript{8} It further recognized that the kind of resource-specific legislation that had been enacted up to that time had failed to adequately protect those resources.\textsuperscript{9} To remedy that problem, Congress enacted NMSA “to provide authority for comprehensive and coordinated conservation and management of [sanctuaries], and activities affecting them, in a manner which complements existing regulatory authorities.”\textsuperscript{10} In other words, NMSA was designed to provide for a single federal agency to coordinate the efforts of other regulators and, if the efforts of those regulators were insufficient, to provide comprehensive regulations to manage all activities in, and features of, a marine sanctuary, including recreational and commercial fishing.\textsuperscript{11} Thus, NMSA provides NOAA with the authority to supplement or displace the Commission’s fishing regulations in the Potomac Sanctuary.

2. NOAA is not proposing to exercise that authority in the Potomac Sanctuary.

While NOAA has the authority to regulate fishing in a sanctuary, it has not proposed to exercise that authority in the Potomac Sanctuary and has not taken the necessary predicate steps to do so. In fact, NOAA has disclaimed any intent
defined in the Coastal Zone Management Act as “those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of seawater, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.” \textit{Id.} § 1453(3). A water quality monitoring station near the downstream extremity of NOAA’s preferred boundary reflects a mean surface water salinity ranging between 1 part per thousand (“ppt”) to 4 ppt. \textit{Maryland Department of Natural Resources, Fixed Station Monthly Monitoring Data, Lower Potomac River – Maryland Point, Eyes on the Bay,} available at http://eyesonthebay.dnr.maryland.gov/bay_cond/bay_cond.cfm?param=sal&station=RET22 (last visited Feb. 28, 2017). A monitoring station near the upstream limit of the Potomac Sanctuary shows a much lower, albeit still measurable, mean salinity. \textit{Maryland Department of Natural Resources, Fixed Station Monthly Monitoring Data, Lower Potomac River – Quantico, Eyes on the Bay,} available at http://eyesonthebay.dnr.maryland.gov/bay_cond/bay_cond.cfm?param=sal&station=TF24 (last visited Feb. 28, 2017). Thus, the waters that will ultimately comprise the Potomac Sanctuary are coastal waters subject to designation under NMSA.

\textsuperscript{8} 16 U.S.C. § 1431(a)(2).
\textsuperscript{9} \textit{Id.} §1431(a)(3).
\textsuperscript{10} \textit{Id.} § 1431(b)(2).
\textsuperscript{11} \textit{See id.} § 1434(a)(5) (providing NOAA with the ability to promulgate fishing regulations applicable in sanctuaries in cooperation with other fishery management authorities).
to regulate fishing at all.\footnote{12}{Notice of Proposed Sanctuary, \textit{supra} note 1, at 2268 ("Fishing in the Sanctuary shall not be regulated as part of the Sanctuary management regime authorized by the Act.").} The proposed regulations for the Potomac Sanctuary only apply to historical resources,\footnote{13}{\textit{Id.} at 2264.} which are defined as “any resource possessing historical, cultural, archaeological or paleontological significance, including sites, contextual information, structures, districts, and objects significantly associated with or representative of earlier people, cultures, maritime heritage, and human activities and events.”\footnote{14}{15 C.F.R. § 922.3 (2017).} Notably, other resources included as protected resources in other sanctuaries, such as fish, marine mammals, and seabirds, are not defined as sanctuary resources in the Potomac Sanctuary.\footnote{15}{Notice of Proposed Sanctuary, \textit{supra} note 1, at 2261-62, 64.} Because the proposed regulations apply only to designated historical resources,\footnote{16}{\textit{Id.} at 2264 (forbidding the “moving, removing, recovering, altering, destroying, possessing, or otherwise injuring” historical resources within the Potomac Sanctuary). The proposed regulations would also prohibit attempting to do any of the prohibited actions toward historical resources, damaging or displacing any signs or other markers related to the sanctuary, and obstructing investigations related to the enforcement of the regulations or of NMSA. \textit{Id.} at 2264-65.} fishing, which does not involve exploiting historical resources, is not regulated.\footnote{17}{Of course, this does not mean that commercial and recreational fishing will not be impacted at all by the designation of the Potomac Sanctuary. While NOAA has said that it does not expect the designation to impact any commercial or recreational fishing activity, \textit{id.} at 2261, some fishing gear is anchored to, or disturbs, submerged land and could damage the historical resources in the river. A fisherman is unlikely to use such gear in such a way that it would damage a historical resource for fear of damaging or destroying his gear. Nevertheless, a fisherman may mistakenly do so and, in so doing, violate the strict liability provisions of NMSA. \textit{See} United States v. Great Lakes Dredge & Dock Co., 259 F.3d 1300, 1304 (11th Cir. 2001) ("In this case, the United States seeks damages from defendants for a violation of § 1443 of the NMSA, which imposes strict liability for damage or injury to any sanctuary resource."). As NOAA notes, perhaps the best way to limit the danger of such an occurrence is to provide education to fishermen in the area so that they can avoid the protected resources. \textbf{OFFICE OF NATIONAL MARINE SANCTUARIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,} Proposed Mallows Bay – Potomac River National Marine Sanctuary Designation: Draft Environmental Impact Statement and Draft Management Plan, 32 (2016), available at http://sanctuaries.noaa.gov/mallows-bay/mallows-proposed-deis-dmp.pdf.}
must include, among other things not relevant here, the types of activities that will be subject to regulation in the proposed sanctuary in the designation document that establishes the sanctuary.\textsuperscript{18} The proposal for the designation document establishing the Potomac Sanctuary does not list either commercial or recreational fishing among the activities that will be subject to regulation.\textsuperscript{19}

3. NOAA cannot enter into a binding agreement not to regulate fisheries, but Maryland has effective checks on NOAA’s authority to stop any future effort to do so.

NOAA cannot be stopped from exercising its authority over fisheries in the future through a binding agreement, but it would be unable to regulate fishing in the Potomac Sanctuary in the future absent Maryland’s concurrence. As with any other administrative agency, NOAA has only the authority delegated to it by Congress.\textsuperscript{20} While NMSA authorizes NOAA to enter into cooperative agreements and other contracts with, among other entities, states and regional agencies, such agreements must be entered into to aid in carrying out the purposes and policies set forth in NMSA.\textsuperscript{21} Given that one of the policies of NMSA is to provide for comprehensive management of sanctuaries and the activities occurring in them,\textsuperscript{22} an agreement in which the entity responsible for managing the Potomac Sanctuary agrees not to exercise its authority to regulate a particular activity occurring therein would not be authorized and would be unenforceable. Of course, the Commission could still enter into a cooperative agreement with NOAA to set forth each party’s understanding of the proper regulation of fishing in the Potomac Sanctuary, but it may not insist that NOAA bargain away its regulatory authority in that agreement.

This inability to contractually limit NOAA’s authority over fishing must be considered in the larger legal context. Specifically, should NOAA decide in the

\textsuperscript{18} 16 U.S.C. § 1434(a)(4).

\textsuperscript{19} See Notice of Proposed Sanctuary, supra note 1, at 2268 (stating that the activities that will be subject to regulation in the Potomac Sanctuary are damaging sanctuary resources, damaging sanctuary property, and interfering with or otherwise obstructing an investigation or law enforcement measure in the Potomac Sanctuary).

\textsuperscript{20} See Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“Thus, if there is no statute conferring authority, a federal agency has none.”).

\textsuperscript{21} 16 U.S.C. § 1442(a).

\textsuperscript{22} Id. § 1431(b)(2).
future to regulate fishing within the Potomac Sanctuary, it would need the concurrence of Maryland to proceed. As noted above, NOAA has not included commercial or recreational fishing as activities subject to regulation in the designation document. It cannot regulate those activities until they are added to the designation document, and the designation document cannot be amended without going through the same process that NOAA went through to promulgate it in the first place. Thus, the modification would have to be published for public comment, a public hearing would have to be held in the area of the Potomac Sanctuary, and the proposal would have to be submitted to certain committees of Congress and the governor of Maryland. Because the Potomac Sanctuary is entirely within Maryland waters, the governor of Maryland could eliminate any proposed amendment to the designation document to provide for NOAA regulation of fishing by certifying to the Secretary of Commerce that the proposed amendment is unacceptable.

CONCLUSION

Accordingly, it is my opinion that NOAA has the authority to regulate fishing in the Potomac Sanctuary but has not chosen to exercise that authority in this instance. While NOAA cannot enter into a binding agreement in which it bargains away its authority, the Governor of Maryland is empowered under NMSA to effectively veto any attempt by NOAA to directly regulate fishing in the Potomac Sanctuary.

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23 See supra note 19 and accompanying text.

24 16 U.S.C. § 1434(a)(4) (“The terms of designation of a sanctuary shall include . . . the types of activities that will be subject to regulations by [NOAA] to protect [the characteristics of the sanctuary]. The terms of the designation may be modified only by the same procedures by which the original designation is made.”).

25 Id. § 1434(a)(1), (3), (6), (b)(1).

26 See id. § 1434(b)(1) (“The designation . . . shall take effect and become final . . . unless, in the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.”).
OP. NO. 16-047

PROPERTY AND CONVEYANCES:
DISPOSITION OF UNCLAIMED PROPERTY

Unclaimed funds belonging to former inmates of the Petersburg City Jail that are held by the Sheriff’s Office in the inmate trust account constitute abandoned property that should be reported and remitted to the State Treasurer.

THE HONORABLE VANESSA R. CRAWFORD
SHERIFF, CITY OF PETERSBURG

MARCH 20, 2017

ISSUE PRESENTED

You inquire how the City of Petersburg Sheriff’s Office (the “Sheriff’s Office”) should dispose of funds presently held in an inmate trust account for former inmates of the Petersburg City Jail.

BACKGROUND

Prior to the closure of the Petersburg City Jail on May 1, 2015, all inmates were transferred to Riverside Regional Jail. The funds in their individual accounts were transferred with them. However, the Sheriff’s Office is still holding in an inmate trust account money belonging to some former jail inmates who were released prior to the closing of the jail. Their forwarding addresses are invalid, and their current addresses are unknown.

APPLICABLE LAW AND DISCUSSION

Virginia’s Uniform Disposition of Unclaimed Property Act (the “Act”) safeguards abandoned property on behalf of its rightful owner. The Act establishes when property is presumed abandoned. For property held by a governmental entity, § 55-210.9 of the Act creates a one-year “dormancy
period” for abandonment by providing that “[a]ll intangible property held for the
owner by any government or governmental subdivision or agency, public
corporation, or public authority that has remained unclaimed by the owner for
more than one year after it became payable is presumed abandoned.”

Funds are deemed “payable” under the Act on “the earliest date upon which the owner
of property could become entitled to the payments, possession, delivery, or
distribution of such property” from the holder of the property. For a prisoner,
that date would be the date of release. The holder of property that is deemed
abandoned must report and remit the property to the custody of the
Commonwealth. The state agency to which the funds are to be reported and
remitted is the State Treasurer.

Under the statutory one-year dormancy period, the unclaimed funds in
question are presumed abandoned one year from the date of an inmate’s release.
Because the inmates on whose behalf the Sheriff’s Office is holding the funds
were released prior to the jail’s closing on May 1, 2015, the one-year dormancy
period expired no later than May 1, 2016. Thus, the funds now constitute
abandoned property under the Act and should be reported and remitted to the
State Treasurer.

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2 Section 55-210.9 (2012) (emphasis added). The holding period between the date that the
property becomes payable and the date on which the property is presumed abandoned is commonly
referred to as the dormancy period. While the dormancy period sometimes depends on the type of
property (i.e., payroll and salary, bank accounts, securities, or outstanding checks, etc.), see, e.g.,
§ 55-210.3:2, the one-year dormancy period contained in § 55-210.9 is applicable across the board to
this particular holder—the government or a governmental subdivision—regardless of the type of
property.

3 Section 55-210.2 (2012).

4 Section 55-210.12(A) (2012) (“Every person holding funds or other property, tangible or
intangible, presumed abandoned under this chapter shall report and remit [the property] to the
administrator . . . ”). Any unclaimed intangible property that is presumed abandoned under the Act
becomes subject to the custody of the Commonwealth when the “last known address, as shown on
the records of the holder, of the apparent owner is in [the] Commonwealth . . . .”
Section 55-210.2:2(1) (2012). When the last known address of the property owner is unknown or
lies outside of the Commonwealth, then the property may still be reportable to the Commonwealth
pursuant to § 55-210.2:2(3) to (6).

5 Section 55-210.2 defines “administrator” as “the State Treasurer or his designee.”
CONCLUSION

For the reasons stated, it is my opinion that the unclaimed funds belonging to former inmates of the Petersburg City Jail that are presently held by the Sheriff’s Office in the inmate trust account constitute abandoned property that should be reported and remitted forthwith to the State Treasurer.

OP. NO. 16-067

TAXATION: LOCAL TAXES – TAX EXEMPT PROPERTY

WATERS OF THE STATE, PORTS AND HARBORS: VIRGINIA PORT AUTHORITY

Assets transferred to the Virginia Port Authority under an installment sales contract and related lease agreement between the Authority and Virginia International Gateway, Inc., are owned by the Authority for purposes of taxation, and are exempt from local business tangible personal property taxes and local real estate taxes.

THE HONORABLE FRANK W. WAGNER
MEMBER, SENATE OF VIRGINIA

MARCH 20, 2017

ISSUES PRESENTED

You ask whether assets transferred to the Virginia Port Authority (the “Authority”) under an installment sale contract and related lease agreement between the Authority and Virginia International Gateway, Inc., are considered owned by the Authority for tax purposes. You also ask whether such assets are exempt from local business tangible personal property taxes and local real estate taxes, should the Authority have ownership of them.

BACKGROUND

You state that the Authority recently executed an Amended and Restated Deed of Facilities Lease Agreement, an Installment Sale Contract, and a Construction Authority Agreement with Virginia International Gateway, Inc., to
address the lease of the Virginia International Gateway port terminal, maintenance of the port facilities, future development of the Port, and the transfer of certain assets from Virginia International Gateway, Inc., to the Authority. You relate that the Authority will be responsible for operating the terminal, as well as future build out and construction, under these Agreements. You also state that several assets will be immediately conveyed to the Authority for use in operating the terminal. While Virginia International Gateway will hold a security interest in these assets to secure their payment, the Authority will hold legal title and is responsible for insuring them. The Authority’s operating agent, Virginia International Terminals, LLC, is responsible for maintenance and repair of the assets.

**APPLICABLE LAW AND DISCUSSION**

Prior opinions of this Office have concluded that “[t]axation is based on ownership, not on possession alone.”¹ A taxpayer is not required to hold title “to possess an ownership interest sufficient to confer taxable status.”² Holding an equitable or beneficial interest in property, as well as bearing the risk of loss, are relevant factors to determine ownership for purposes of taxation.³ Under the facts you present, the Authority has ownership of the transferred assets for taxation purposes. The Authority not only holds legal title to the transferred assets per the Installment Sale Contract, but it also has possession and control of the assets and bears the risk of loss. Therefore, precedent and applicable law require a conclusion that the Authority is the owner of the transferred assets for purposes of the local business tangible personal property tax and the local real estate tax.

Having determined that the Authority is the owner of the transferred assets, you next inquire whether such assets are exempt from local business tangible personal property taxes and local real estate taxes. The Constitution of Virginia exempts “[p]roperty owned directly or indirectly by the Commonwealth or any political subdivision thereof” from state and local taxation.⁴ The Code of Virginia classifies real and personal property owned by political subdivisions of

⁴ VA. CONST. art. X, § 6(a)(1).
the Commonwealth as exempt from taxation.\(^5\) The Authority is a political subdivision of the Commonwealth whose exercise of power constitutes the performance of essential governmental functions.\(^6\) Accordingly, “the Authority shall not be required to pay any taxes or assessments upon the project or any property acquired or used by the Authority under the provisions of this chapter or upon the income therefrom.”\(^7\) Applicable law therefore requires a conclusion that real and personal property owned by the Authority is exempt from local real property taxes and local business tangible personal property taxes.\(^8\)

**CONCLUSION**

Accordingly, it is my opinion that the assets transferred to the Virginia Port Authority under the sales contract are owned by the Authority and are exempt from local business tangible personal property taxes and local real estate taxes.

**OP. NO. 16-056**

**COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES - COURTHOUSES**

Virginia law requires voter approval to relocate the Augusta County Courthouse, which is located in the City of Staunton, to a contiguous parcel of land that is also in the City. Such approval may not be sought for ten years following the election on November 8, 2016, pursuant to the requirements of Virginia Code § 15.2-1655.

**JAMES BENKAHLA, ESQUIRE**

**AUGUST COUNTY INTERIM ATTORNEY**

**MARCH 30, 2017**

**ISSUE PRESENTED**

You ask whether the Augusta County Courthouse, which is located in the

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\(^7\) Section 62.1-145 (2014) (emphasis added).  
\(^8\) In lieu of real property taxes, § 58.1-3403 authorizes localities to impose a service charge on real property owned by the Authority within a locality. This opinion does not address liability for, or calculation of, that service charge.
City of Staunton, may be relocated to a contiguous parcel of land within the city without a referendum.¹

**BACKGROUND**

You have disclosed that the Augusta County Courthouse is located in the downtown area of the City of Staunton. Augusta County surrounds Staunton, with the two localities sharing a common border around the entire circumference of the city. The courthouse is not contiguous to any border between the city and the county.

On May 12, 2016, the county petitioned the circuit court for a writ of election to relocate the courthouse pursuant to § 15.2-1644 of the *Code of Virginia*. The petition set forth several bases for the courthouse being inadequate for the administration of justice. If approved by the voters of the county, the election would have authorized removing the courthouse from the city to a particular location in the county. An order for the writ of election was entered on June 14, 2016. On November 8, 2016 the county voters rejected the writ and voted against removing the courthouse from the city to that location in the county.

The county must now decide whether to repair and renovate the courthouse at its present location or instead build a new courthouse on land in the city that is contiguous to the present courthouse. The question you have presented is whether a referendum is required to relocate the courthouse to contiguous property in the city.

**APPLICABLE LAW AND DISCUSSION**

Counties and cities in Virginia are governed by laws that sometimes differ. While relocating a city courthouse does not require approval by the voters, relocating a county courthouse does:

Whenever a number of voters equal to at least one third of the voters of a county registered in the county on the January 1 preceding filing of the petition, petition the circuit court of such county, or whenever the governing body of any county by resolution duly adopted requests the circuit court for such

¹ Use of the term “courthouse” herein shall mean only the courthouse of a circuit court.
county, for an election in such county on the question of the removal of the courthouse to one or more places specified in the petition or resolution, such court shall issue a writ of election . . . which shall fix the day of holding such election.[2]

This statute requires voter approval for all relocations of county courthouses. It does not contain an exception for a county courthouse located in a city. There is, however, an exception to the requirement of voter approval when a county courthouse is to be relocated to a contiguous property, but only if the contiguous property is in the county, stating, “[t]he relocation of a courthouse to land contiguous with its present location . . . and within the same county is not such a removal as to require authorization by the electorate.”3

Here, while the site you have described is contiguous to the present location of the courthouse, thus meeting one of the two requirements of this exception, it is in the city and is not “within the . . . county,” and thus it does not meet the second requirement of the exception.4 “It is firmly established that a court must accept a statute’s plain meaning when the statute is clear and unambiguous.”5 Accordingly, it is my view that this statute requires voter approval to relocate the county courthouse to a property in the city that is contiguous to the present courthouse.

However, while an election by the voters would be required to relocate the courthouse to the city site in question, the law further provides that once there has been an election for relocation of the courthouse, no other election may occur for ten years, stating, “[a]fter an election has been held in any county upon the question of the removal of its courthouse, no other such election shall be held within ten years.”6 Since the election for relocating the county courthouse occurred on November 8, 2016, with the voters voting against relocation to the site that was then in question, the Code of Virginia prohibits another election for ten years, even though the election would be for a different site than the one proposed in the 2016 election.

[4] Id.
CONCLUSION

Accordingly, it is my opinion that under the present statutory framework enacted by the General Assembly, voter approval would be required to relocate the courthouse to the city site in question, and such approval may not be sought for ten years for the reasons stated.

OP. NO. 16-036

ADMINISTRATION OF GOVERNMENT:
VIRGINIA PUBLIC PROCUREMENT ACT

Section 2.2-4345(A)(14) removes the Virginia Public Procurement Act’s competitive process requirements when public bodies need a stand-alone procurement for delivery of services directly to an individual recipient under the Children’s Services Act, and the volume of such service acquired by the public body is not so high as to warrant an expectation of price or other concessions. Public bodies enjoy broad discretion to determine in good faith the goods or services needed and the feasibility of combining the direct personal service needs of multiple participants, but arbitrarily splitting a single procurement into a series of single purchases for the purpose of avoiding the statutory limitations of § 2.2-4345(A)(14) is not authorized. When the exception in § 2.2-4345(A)(14) applies, the Children’s Services Act still requires some method of assuring that the rates agreed to are determined by competition of the market place, but the formal process of competitive negotiation or competitive sealed bidding need not be used.

BERNARD A. PISHKO, ESQUIRE
NORFOLK CITY ATTORNEY

APRIL 6, 2017

ISSUES PRESENTED

You ask whether, under § 2.2-4345(A)(14) (a provision of the Virginia Public Procurement Act), a local public body can stop competitively procuring certain personal services known in advance to be needed by multiple individuals, and instead non-competitively procure service as each individual recipient’s need arises. You ask whether services can be disaggregated for the purpose of avoiding competitive procurement requirements. You also ask whether “bulk” procurement, as used in that section, refers to services needed for more than a single recipient.
BACKGROUND

Your inquiry relates to the purchase of personal services pursuant to the Children’s Services Act (the “CSA”). The CSA provides that rates paid for such services “shall be determined by competition of the market place . . . .” The CSA does not prescribe specific methods for establishing competitive rates.

Requirements for specific methods of procurement are found in the Virginia Public Procurement Act (the “VPPA”). Two key methods of procurement are competitive sealed bidding and competitive negotiation. These competitive procedures may result in a term contract that allows public bodies to place orders for services as needed, at rates previously established through the competitive process. Certain public bodies are exempt from some or all of the VPPA. This opinion interprets § 2.2-4345(A)(14) for public bodies that have not been exempted from that provision.

APPLICABLE LAW AND DISCUSSION

Section 2.2-4303 of the VPPA provides that all public contracts with nongovernmental contractors for the purchase of services shall be awarded after competitive sealed bidding or competitive negotiation “unless otherwise authorized by law.” One such law is § 2.2-4345(A)(14), which exempts the following public bodies from the requirement to use those two methods of procurement:

2 See § 2.2-5214 (Supp. 2016).
3 See id.; see also § 2.2-5206(7) (Supp. 2016) (directing community policy and management teams to establish procedures for obtaining bids on the development of new services).
5 See §§ 2.2-4302.1 (Supp. 2016) (process for competitive sealed bidding) and 2.2-4302.2 (Supp. 2016) (process for competitive negotiation).
6 See, e.g., § 2.2-4343(A)(9)–(12) (Supp. 2016) (exempting, or providing a process to exempt, certain local government entities from most of the VPPA).
7 Section 2.2-4345(A)(14) (Supp. 2016). No opinion is expressed about whether the local public body that you represent has met the prerequisites to exempt itself from the VPPA and § 2.2-4345(A)(14).
8 See § 2.2-4303(A) (Supp. 2016).
Public bodies administering public assistance and social services programs as defined in § 63.2-100, community services boards as defined in § 37.2-100, or any public body purchasing services under the Children’s Services Act (§ 2.2-5200 et seq.) or the Virginia Juvenile Community Crime Control Act (§ 16.1-309.2 et seq.) for goods or personal services for direct use by the recipients of such programs if the procurement is made for an individual recipient. Contracts for the bulk procurement of goods or services for the use of recipients shall not be exempted from the requirements of § 2.2-4303.

When applicable, this exception merely exempts public bodies from the VPPA’s requirement to use competitive sealed bidding or competitive negotiation. It does not exempt public bodies from the CSA’s requirement to assure that the rates they pay are determined by competition of the market place.\(^9\)

To qualify for the above exemption from competitive sealed bidding or competitive negotiation, services purchased under the CSA must be (1) personal services for direct use by program recipients; (2) purchased through a procurement that is made for an individual recipient; and (3) at a level that is below “bulk procurement.”\(^10\) Your inquiry does not address direct use,\(^11\) but

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\(^9\) See § 2.2-5214. The CSA directs the State Executive Council for Children’s Services to approve a service fee directory. See id.; see also § 2.2-5200(B). An appropriate approval process could assure that rates were determined by competition of the market place. But the currently-posted service fee directory recites that its content “was supplied by . . . the service provider. It has not been . . . evaluated . . . by the Commonwealth and its listing in this directory does not constitute . . . approval . . . of the . . . fees by the Commonwealth.” See OFFICE OF CHILDREN’S SERVICES, Service Fee Directory, available at http://www.csa.virginia.gov/sfd/service_fee_directory.cfm. (last visited April 4, 2017), see also § 2.2-5206(7) (directing community policy and management teams to establish procedures for obtaining bids on development of new services).

\(^10\) See § 2.2-4345(A)(14).

\(^11\) In general, therapy delivered directly to a program recipient qualifies as personal service for direct use by a program recipient. This is in contrast to consulting reports about an individual, which are procured for delivery to a public body to help the public body carry out its responsibilities pertaining to that individual. This opinion expresses no conclusion about whether services mentioned in your inquiry are for direct use of program recipients.
rather, focuses on the “individual recipient” and “bulk procurement” limitations in the above exception.

Turning first to the “individual recipient” requirement, you ask for an opinion on whether § 2.2-4345(A)(14) authorizes public bodies to stop competitively procuring services known in advance to be needed by multiple individuals and instead procure the service for each individual on a non-competitive basis as each individual’s need arises. You indicate in your opinion that “services cannot be disaggregated for the purpose of avoiding competitive requirements.”

A public body’s knowledge that the same service will be needed by multiple individuals, and its prior practice of using a combined procurement for multiple individuals, are factors favoring a combined procurement. But these factors do not necessarily preclude the possibility of appropriate contrary considerations, such as prior experience showing that term contract awardees turned out to be suitable for only a small number of the needs they were intended to fill. Accordingly, in my opinion, knowledge that a service will be needed by multiple recipients, or a prior practice of using term agreements, weigh against, but do not necessarily preclude, appropriate use of the exception in § 2.2-4345(A)(14).

You also ask whether § 2.2-4345(A)(14) can be used for the purpose of avoiding competition. In general, public bodies enjoy broad discretion to determine the goods or services needed, the feasibility of combining requirements, and ultimately to determine in good faith whether they need a stand-alone procurement to obtain the services needed. However, splitting a single procurement into multiple transactions for the purpose of avoiding the statutory limitations in § 2.2-4345(A)(14) is not authorized. The VPPA has a number of purposes, one of which is “that competition be sought to the

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12 Typical procurement planning includes developing awareness of opportunities to combine requirements where feasible. Combining purchases into a single, larger solicitation presents an opportunity to gain the benefits of enhanced competition, public confidence from more open procedures, and the administrative efficiency of a single procurement and contract. These opportunities appear greatest if one anticipates that the same provider may be the best choice for many individuals. Of course, public bodies that have a term contract might still later use a separate procurement, if the provider already on contract would not be the best choice to meet a particular individual’s needs.
A purpose of the VPPA and its exceptions is to tailor competitive process requirements to the nature of the goods or services needed by a public body. The availability of exceptions is not intended as authorization for public bodies to alter their determination of needs in order to manipulate the competitive process to be followed.  

Turning next to the bulk procurement limitation, § 2.2-4345(A)(14) provides in part: “Contracts for the bulk procurement of goods or services for the use of recipients shall not be exempted from the requirements of § 2.2-4303.” You ask for an interpretation of this requirement and whether “bulk” refers to any number greater than an individual recipient.

The VPPA does not define “bulk” or “bulk procurement.” An important principle of statutory construction is that “words in a statute are to be construed according to their ordinary meaning, given the context in which they are used.” In ordinary usage, “bulk” refers to a large quantity of material. It does not refer to the number of recipients but rather the quantity procured. Although “bulk” ordinarily refers to physical material, in the context of § 2.2-4345(A)(14), it clearly refers also to a large quantity of personal services for direct use by the recipients of the programs identified in that section.

Because personal services are not identical to one another in the same way that physical goods may be, § 2.2-4345(A)(14) requires evaluation of whether multiple services are of the same type for purposes of “bulk procurement.” This limitation in § 2.2-4345(A)(14) should be applied in a manner that promotes its

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13 See § 2.2-4300(C) (2014) (declaring “intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered”).

14 Cf. id. (declaring “intent of the General Assembly . . . that specifications reflect the procurement needs of the purchasing body”).


16 See, e.g., MERRIAM WEBSTER’S COLLEGIATE DICTIONARY, at 150 (10th ed. 1996) (defining “bulk” as “of or relating to materials in bulk” and defining “in bulk” as “in large quantities”).

17 See § 2.2-4345(A)(14).
apparent purpose of requiring compliance with the VPPA’s competitive process requirements when large enough quantities of some type of service are procured. Therefore, contracts should be viewed as procuring some type of personal service in bulk if the nature of the personal services and billing method make it feasible to procure them satisfactorily as a single type of service, and the volume is high enough to expect price or other concessions compared to what is offered on a “retail” basis.18

CONCLUSION

Accordingly, it is my opinion that § 2.2-4345(A)(14) removes the VPPA’s competitive process requirements when public bodies need a stand-alone procurement for delivery of services directly to an individual recipient under the CSA, and the volume of such service acquired by the public body is not so high as to warrant an expectation of price or other concessions. Public bodies enjoy broad discretion to determine in good faith the goods or services needed and the feasibility of combining the direct personal service needs of multiple participants, but arbitrarily splitting a single procurement into a series of single purchases for the purpose of avoiding the statutory limitations of § 2.2-4345(A)(14) is not authorized. When the exception in § 2.2-4345(A)(14) applies, the CSA still requires some method of assuring that the rates agreed to are determined by competition of the market place, but the formal process of competitive negotiation or competitive sealed bidding need not be used.

OP. NO. 16-037

COURTS NOT OF RECORD:
JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS - IMMEDIATE CUSTODY, ARREST, DETENTION AND SHELTER CARE

Section 16.1-254 of the Code of Virginia authorizes the chief judge of a juvenile and domestic relations district court to order that local law enforcement personnel shall be responsible for

[18] If desired, public bodies can develop specific guidance for their procurement officers’ fulfillment of the “bulk procurement” limitation when procuring particular types of service. See § 2.2-4302 (2014) (providing that “[t]his chapter may be implemented by ordinances, resolutions or regulations consistent with this chapter and with the provisions of other applicable law promulgated by any public body empowered by law to undertake the activities described in this chapter”).
transporting violent and disruptive juveniles to court-ordered out-of-state destinations. When a local law enforcement officer is transporting a prisoner in another state, he has only such law enforcement authority over the prisoner as may be provided by the laws of that state.

THE HONORABLE C.T. WOODY, JR.
SHERIFF, CITY OF RICHMOND

APRIL 6, 2017

ISSUES PRESENTED

You ask whether § 16.1-254 of the Code authorizes the chief judge of a juvenile and domestic relations district court to order that local law enforcement personnel shall be responsible for the transportation of violent and disruptive juveniles to out-of-state destinations. If so, you ask whether a local law enforcement officer retains law enforcement authority while transporting a juvenile in another state.

APPLICABLE LAW AND DISCUSSION

Virginia law authorizes juvenile and domestic relations district court judges to order the out-of-state placement of juveniles in certain circumstances. This is consistent with the principle that a judge generally has broad discretionary powers when crafting dispositions in cases involving juveniles.\(^1\) For example, §§ 16.1-278.4, 16.1-278.5, 16.1-278.8, and 16.1-286—which appear most relevant to your inquiry—set forth procedures permitting a judge to order that a juvenile who is adjudicated as delinquent, or found to be a child in need of services or supervision, shall be assigned to an out-of-state placement.\(^2\)

\(^1\) See VA. CODE ANN. § 16.1-227 (2015) (stating that a juvenile and domestic relations district court judge “shall possess all necessary and incidental powers and authority” to effectuate the purposes of Chapter 11 of Title 16.1); see also B.P. v. Commonwealth, 38 Va. App. 735, 738 (2002) (noting the broad powers of a juvenile district court over crime prevention and juvenile rehabilitation).

\(^2\) These statutes place specific conditions on out-of-state placement. For instance, a judge may not transfer legal custody of a juvenile to a qualified out-of-state entity without the approval of the Commissioner of Social Services (in the case of a child in need of services or supervision), or the Director of the Department of Juvenile Justice (in the case of a delinquent juvenile). See §§ 16.1-278.4 (2015); 16.1-278.5(B)(1) (2015); 16.1-278.8 (2015). See also § 16.1-286 (2015) (establishing other conditions on out-of-state placement, including compliance with “the appropriate provisions of Chapter 11 (§ 63.2-1100 et seq.) of Title 63.2 [relating to the Interstate Compact on the
Often, this type of placement occurs when the juvenile has extraordinary or special needs that must be addressed at a specialized location outside the Commonwealth.3

If the juvenile is considered “violent and disruptive,” then § 16.1-254(B) governs who shall be responsible for providing transportation. It provides that “the chief judge of the juvenile and domestic relations district court, on the basis of guidelines approved by the Board [of Juvenile Justice], shall designate the appropriate agencies in each county, city and town, other than the Department of State Police, to be responsible for . . . the transportation of violent and disruptive children . . . .” The Board’s guidelines, in turn, provide that violent and disruptive juveniles “may be transported only by detention home staff or by law enforcement personnel other than the State Police.”4 Accordingly, the chief judge may designate that local law enforcement personnel shall provide transportation to violent and disruptive juveniles assigned to out-of-state destinations.5

I next turn to your inquiry with respect to the law enforcement authority of a local officer transporting a juvenile in an out-of-state jurisdiction. In general, a law enforcement officer loses his arrest authority when he travels outside the boundaries of his territorial jurisdiction.6 Once in another state, he has only

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3 See § 16.1-286.
4 Va. Dep’t of Juvenile Justice, Guidelines for Transporting Juveniles in Detention, at Part II(A). The Guidelines correctly suggest that appropriate transportation of violent and disruptive juveniles under § 16.1-254(B) may include “destinations in other states.” The Board’s listing of local law enforcement as an appropriate agency to provide such transportation is consistent with the principle that a sheriff in Virginia is “an officer of the court[,] subject to its orders and directions.” 1997 Op. Va. Att’y Gen. 60, 61 (quoting Malbon v. Commonwealth, 195 Va. 368, 371 (1953)). Furthermore, a sheriff is required under § 16.1-278 to cooperate and render such assistance as the judge orders to effectuate the purpose of juvenile district court law.
5 There is a right of appeal to circuit court for such orders. See § 16.1-278.
6 Hudson v. Commonwealth, 266 Va. 371, 377-78 (2003) (“[A] law enforcement officer acting outside his or her territorial jurisdiction . . . has the same authority to arrest as does a private citizen . . . .”) (internal quotation marks and citation omitted); see also Am. Jur. 2d, Arrest, § 50 (stating that, as a general rule, a peace officer acting outside the territorial boundaries of his or her jurisdiction has no official powers to apprehend offenders).
those arrest powers provided by the laws of that state. 7 Most states have laws in place that may allow for extraterritorial arrest in certain circumstances, but they differ from state to state. Consequently, I cannot provide advice on this subject that would be applicable in all states. Any particular inquiry into the authority of a law enforcement officer transporting a prisoner in another state will depend on the laws of that state.8

CONCLUSION

Accordingly, it is my opinion that § 16.1-254 of the Code authorizes the chief judge of a juvenile and domestic relations district court to order that local law enforcement personnel shall be responsible for transporting violent and disruptive juveniles to court-ordered out-of-state destinations. When a local law enforcement officer is transporting a prisoner in another state, he has only such law enforcement authority over the prisoner as may be provided by the laws of that state.

OP. NO. 16-022

CRIMINAL PROCEDURE: RECOVERY OF FINES AND PENALTIES

CRIMINAL PROCEDURE:
SENTENCE; JUDGMENT; EXECUTION OF SENTENCE (RESTITUTION)

For civil enforcement of a fine or costs imposed by a circuit court in a traffic or criminal prosecution, the statute of limitations is twenty years, beginning on the date of offense or delinquency. This limitation period is not tolled when the debtor is incarcerated.

7 See, e.g., AM. JUR. 2d, Criminal Law, § 425 (discussing the general principle that states have authority to enact and enforce criminal laws only within their own borders, and may not intrude upon the sovereign authority of another state); 1960 Op. N.M. Att’y Gen. 423, 423 (“Since extra-territorial police activities constitute an invasion of the neighboring state’s sovereign power, they are lawful, only when permitted by the laws of the neighboring state.”).

8 Attorneys General traditionally have refrained from commenting on matters requiring additional facts to resolve. See, e.g., 2013 Op. Va. Att’y Gen. 218, 220 n.8; 2010 Op. Va. Att’y Gen. 56, 58. I also note that this analysis does not take into account any lawful compacts or agreements that may exist authorizing jurisdiction-sharing across state lines.
For civil enforcement of restitution imposed by a circuit court in a traffic or criminal prosecution, there is a twenty-year statute of limitations, commencing when the restitution order is docketed. This limitation period is extendable upon motion and by court approval in twenty-year increments. It is not tolled during incarceration, unless the court stays enforcement until the debtor/defendant is released.

THE HONORABLE RICHARD L. FRANCIS
CLERK, COUNTY OF SOUTHAMPTON/CITY OF FRANKLIN CIRCUIT COURT

APRIL 27, 2017

ISSUE PRESENTED

You ask whether the statutes of limitations governing the civil enforcement of fines, costs, and restitution imposed by a circuit court in traffic or criminal prosecutions are tolled when the debtor is incarcerated.

APPLICABLE LAW AND DISCUSSION

1. Civil enforcement of fines and costs imposed by a circuit court

With respect to fines and costs imposed by a circuit court, §§ 19.2-340 and 19.2-341 of the Code of Virginia together establish the applicable limitation period governing enforcement by means of civil execution. Section 19.2-340 provides that “[f]ines imposed and costs taxed in a criminal or traffic prosecution . . . for committing an offense shall constitute a judgment and, if not paid at the time they are imposed, execution may issue thereon in the same manner as upon any other monetary judgment, subject to the period of limitations provided by § 19.2-341.”¹ Section 19.2-341 in turn provides that “[n]o such proceeding of any nature . . . shall be brought or had for the recovery of such [amounts] due the Commonwealth or any political subdivision thereof, unless within twenty years from the date of the offense or delinquency giving rise to imposition of such [judgment] if imposed by a circuit court, or within ten years if imposed by a general district court.”² Thus, for fines and costs imposed by a circuit court in traffic or criminal proceedings, the General Assembly has imposed a twenty-year limitations period on civil enforcement, beginning on the

date of offense or delinquency. There is no statutory provision, whether in § 19.2-341 or elsewhere in the Code, that tolls the running of this limitation period when the debtor is incarcerated.3

2. Civil enforcement of a circuit court restitution order

A different analysis applies to your inquiry regarding civil enforcement of restitution imposed by a circuit court, as a more complex statutory scheme provides for potentially longer periods of enforcement.

Section 19.2-305.2 provides that “[a]n order of restitution may be docketed as provided in § 8.01-446 when so ordered by the court or upon written request of the victim and may be enforced by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.”4 Because civil enforcement of a docketed restitution order generally is governed by the same provisions as a judgment in a civil action, the twenty-year limitations period in § 8.01-251 for the enforcement of a circuit court judgment applies to a docketed restitution order.5 But accrual of this period does not begin until the restitution order is docketed pursuant to §§ 19.2-305.2 and 8.01-446.6 The limitation period may be extended in twenty-year increments upon motion and approval of the court, and there is no statutory limitation on the number of extensions that may be approved.

Regarding your inquiry as to tolling of this period for civil enforcement of restitution obligations, I am aware of no statute that tolls the twenty-year limitation period in § 8.01-251 when the debtor/defendant is incarcerated.

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3 See id. Exceptions to the operation of a statute of limitations generally must be found in the statute itself. See Barley v. Duncan, 177 Va. 202, 203 (1941); Clark v. Nave’s Creditors, 116 Va. 838, 841-42 (1914).


5 See VA. CODE ANN. § 8.01-446 (2015) (stating that a docketed restitution order “shall have the same force and effect as a specific judgment for money”).

6 See VA. CODE ANN. §§ 8.01-446, 19.2-305.2 (providing that the docketing of a circuit court restitution order is the relevant event that empowers the victim to initiate civil enforcement proceedings on the order); see also 1981-1982 Op. Va. Att’y Gen. 135, 136, with 1987-1988 Op. Va. Att’y Gen. 305, 306-07 (together affirming the proposition that a restitution order is not itself a civil judgment; rather, docketing a circuit court restitution order is the triggering event that assigns it the character of a civil judgment).
Section 8.01-251(D), however, provides generally that the limitation period is tolled during “any time during which the right to sue out execution on the judgment is suspended by the terms thereof . . . .” Therefore, if the circuit court suspends enforcement of a restitution order until the debtor/defendant is released from incarceration and incorporates that suspension in the restitution order, the limitations period would be tolled for the amount of time in which the debtor/defendant is incarcerated.

CONCLUSION

For the foregoing reasons, it is my opinion that for civil enforcement of a fine or costs imposed by a circuit court in a traffic or criminal prosecution, the statute of limitations is twenty years, beginning on the date of offense or delinquency. This limitation period is not tolled when the debtor is incarcerated.

For civil enforcement of restitution imposed by a circuit court in a traffic or criminal prosecution, there is a twenty-year statute of limitations, commencing when the restitution order is docketed. This limitation period is extendable upon motion and by court approval in twenty-year increments. It is not tolled during incarceration, unless the court stays enforcement until the debtor/defendant is released.

7 VA. CODE ANN. § 8.01-251(D) (2015).

8 Although the focus of your inquiry is on the civil recovery of unpaid fines, costs, and restitution imposed by a circuit court, I note that enforcement by civil execution is not the only mechanism for the recovery of court-ordered fines, costs, and restitution. The trial judge retains authority to bring criminal proceedings against an individual to recover these debts. Section 19.2-306 provides that the judge may bring proceedings to revoke a suspended sentence or probation which is conditioned on payment of fines, costs, or restitution if the debtor/defendant fails to pay during the period of suspension or probation. With respect to a failure to pay fines and costs, such proceedings must be brought “within one year after the expiration of the period of probation or . . . suspension” or, “in the case of a failure to pay restitution, within three years after such expiration.” VA. CODE ANN. § 19.2-306(B) (Supp. 2016). There is no statute tolling these limitation periods during the debtor/defendant’s incarceration. In addition, § 19.2-358 provides yet another judicial remedy by which payment be enforced. It provides that if an individual fails to make installment or deferred payments on fines, costs, or restitution, he may be fined or imprisoned. No statute of limitations applies to the authority of the trial court to bring contempt proceedings under § 19.2-358. Porter v. Commonwealth, 65 Va. App. 467, 477 (2015).
Prisons and Other Methods of Correction: Local Correctional Facilities – Duties of Sheriffs

While local correctional facilities must ensure inmates receive appropriate medical care for communicable diseases, serious medical needs, or life threatening conditions, whether pre-existing or not, those facilities are not liable for the cost of such treatment by outside healthcare providers if such disease, medical need or condition existed prior to local incarceration.

The Honorable David R. Hines
Sheriff, Hanover County
April 27, 2017

Issue Presented

You ask whether a sheriff or regional jail superintendent is responsible under § 53.1-126 of the Code of Virginia for the payment of medical expenses incurred by an inmate for treatment at a hospital outside of the local correctional facility, where such treatment is for a pre-existing medical condition.

Applicable Law and Discussion

Sheriffs and regional jail superintendents are constitutionally obligated to provide inmates with adequate medical care.\(^1\) Under Virginia law, the duty of sheriffs, regional jail superintendents, and local governments to ensure treatment is received under such circumstances applies to inmates with pre-existing

In many instances, medical care is provided on an in-house basis within the local correctional facility. In the event that a local correctional facility is unable to adequately provide medically necessary services in-house, an inmate must be transported to an outside hospital or medical facility, and you question only the matter of liability for payment of the expense for such outside treatment.

Section 53.1-126 of the Code of Virginia directly addresses your question. In 2003, the General Assembly amended the statute to make clear that sheriffs, regional jails, and localities are not required to pay for outside treatment for inmates’ pre-existing medical conditions, but that they must nevertheless ensure that inmates receive treatment for “communicable diseases, serious medical needs, and life threatening conditions,” even if pre-existing:

> Nothing herein shall be construed to require a sheriff, jail superintendent or a locality to pay for the medical treatment of an inmate for any injury, illness or condition that existed prior to the inmate’s commitment to a local or regional facility, except that medical treatment shall not be withheld for any communicable diseases, serious medical needs, or life threatening conditions."^[4]

Thus, the plain language of the applicable statute exempts jails from liability for payment for medical treatment for an inmate’s pre-existing condition. We must assume that the legislature chose with care the words it

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2 See Scott v. Clarke, 64 F. Supp. 3d 813 (W.D. Va. 2014). In this case, inmates at Fluvanna Correctional Center for Women claimed that the Virginia Department of Corrections provided them with inadequate medical care. Id. at 815. On summary judgment, the court held that the Virginia Department of Corrections has a non-delegable constitutional duty to provide adequate medical treatment to inmates’ serious medical needs, and that deliberate indifference to those needs would be a violation of the Eighth Amendment. Id. at 822.

3 See § 53.1-126; 1986-1987 Op. Va. Att’y Gen. 255, 255 ("[Sheriffs] are responsible for the medical needs of . . . prisoners . . . [and] should rely on the professional advice of [the] jail physician in determining the degree and circumstance upon when outside medical care is reasonably required."). The Eighth Amendment further obligates sheriffs to transport inmates to health care providers outside of the jail in order to receive medically necessary services, if such services cannot be adequately provided within the local correctional facility. See, e.g., supra note 1; Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982).

used when enacting a statute\textsuperscript{5} and that those words express the legislature’s intent.

Also, § 53.1-126 respects the constitutional prohibition against denying medical care for serious medical conditions as it requires that inmates receive medical care for serious medical conditions, as well as for communicable diseases and life-threatening conditions, whether pre-existing or not. It merely excuses sheriffs, jail superintendents, and localities from paying for medical treatment for such conditions by outside providers when the conditions pre-exist incarceration, leaving that responsibility with the inmate or others acting on the inmate’s behalf. Accordingly, the statute is enforceable as written.\textsuperscript{6} To the extent this conclusion is inconsistent with the 2004 opinion of this Office referenced in your request, that opinion is overruled.

**CONCLUSION**

For the foregoing reasons, it is my opinion that while local correctional facilities must ensure inmates receive appropriate medical care for communicable diseases, serious medical needs, or life threatening conditions, whether pre-existing or not, those facilities are not liable for the cost of such treatment by outside healthcare providers if such disease, medical need or condition existed prior to local incarceration.

**OP. NO. 16-062**

**AMERICANS WITH DISABILITIES ACT**

**ARCHITECTURAL BARRIERS ACT**


\textsuperscript{6} While this is my interpretation of the plain language of the statute, sheriffs, regional jail superintendents, and localities should be mindful of the possibility that declining to pay outside providers for treatment of an inmate’s serious health condition, even if pre-existing, may give rise to a constitutional claim of denial of adequate medical care under the Eighth Amendment if refusal to pay impedes access to treatment. Any such determination is, of course, factually dependent and not the subject of this opinion.
HOUSING: UNIFORM STATEWIDE BUILDING CODE

Under current law, a locality lacks authority to enact an ordinance requiring the retrofitting of commercial facilities with manual entry door hardware, where the facilities were constructed prior to the effective date of the Americans with Disabilities Act. Further, under current law, a locality lacks authority to enact an ordinance mandating the retrofitting of federal commercial facilities constructed prior to the effective date of the Architectural Barriers Act.

THE HONORABLE CHRISTOPHER P. STOLLE, M.D.
MEMBER, VIRGINIA HOUSE OF DELEGATES

MAY 4, 2017

ISSUE PRESENTED

You inquire whether a locality has authority to enact an ordinance mandating the retrofitting of commercial facilities with manual entry door hardware, where the facilities were constructed prior to the effective dates of the Americans with Disabilities Act (the “ADA”) and the Architectural Barriers Act (the “ABA”).

APPLICABLE LAW AND DISCUSSION

The ADA is a federal civil rights law that prohibits discrimination upon the basis of physical or mental disability. It generally does not apply retroactively; only commercial facilities designed and constructed for first occupancy after January 26, 1993 are subject to ADA standards. Nevertheless, it does provide that existing facilities “shall remove architectural barriers” for disabled

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2 42 U.S.C.S. § 12183(a)(1); 28 C.F.R. § 36.401(a)(1) (“[D]iscrimination for purposes of this part includes a failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities.”). See also 28 C.F.R. § 36.401(a)(2) (clarifying when a building is deemed “designed and constructed for first occupancy”).
3 28 C.F.R. § 36.104(3)(iii) (2017) (defining the term “existing facility” to mean “a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.”).
persons when such changes would be “readily achievable.” It lists examples of changes deemed “readily achievable,” one of which includes “[i]nstalling accessible door hardware.” Thus, it provides for limited retroactive application by requiring the retrofitting of manual entry door hardware for commercial facilities constructed prior to the effective date of the Act. It is enforceable by individual lawsuits or the United States Attorney General.

Another federal law, the ABA, serves “to insure whenever possible that physically handicapped persons will have ready access to, and use of, [buildings].” It generally covers federal buildings and facilities—specifically, those constructed, leased, or financed by the United States Government, when such buildings are intended to be “accessible to the public, or may result in the employment or residence therein of physically handicapped persons . . . .” It is enforceable through regulations that may be issued by certain federal agencies and enforced by another federal agency. Federal facilities are exempt from local building requirements.

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5 28 C.F.R. § 36.304(a) (defining “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense”).

6 28 C.F.R. § 36.304(b)(11).

7 An individual may file suit under the ADA to compel renovation of a commercial facility that is not “readily accessible to and usable by individuals with disabilities.” See 42 U.S.C. § 12183 (providing that commercial facilities are subject to ADA standards); 42 U.S.C. § 12181 (defining the term “commercial facilities” to mean facilities “that are intended for nonresidential use . . . and . . . whose operations will affect commerce’’); and 42 U.S.C.S. § 12188(a)(1) (“[A]ny person who is being subjected to discrimination on the basis of disability in violation of [the ADA]” may bring a civil action to seek remedies under the Act.); 42 U.S.C.S. § 12188(a)(2) (Injunctive relief is available and “shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by [the ADA].”). See also 28 C.F.R. § 36.501. Enforcement power under the ADA also lies with the United States Attorney General. See 42 U.S.C. § 12188(b); 28 C.F.R. §§ 36.502, 36.503.


9 42 U.S.C.S. § 4152.

10 42 U.S.C.S. § 4151. The ABA may also apply to non-federal buildings, but only when such buildings are built or altered with grants or loans provided by a federal agency that retains the ability to establish facility standards. Id. § 4151(3). See also About the ABA Standards, UNITED STATES ACCESS BOARD, available at https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-aba-standards (last visited May 3, 2017).

11 See 42 U.S.C.S. §§ 4152 to 4154a (authorizing the promulgation of standards for design, construction, and alteration of buildings). See also 29 U.S.C.S. § 792 (LexisNexis through Pub. L. No. 115-29) (establishing the Access Board in order to “ensure compliance with the standards
Neither of these federal laws expressly grants enforcement authority to localities.

Against this background, you have asked whether a Virginia locality has the authority to enact an ordinance requiring the retrofitting of door hardware on commercial facilities constructed prior to the effective date of the ADA or the ABA. Virginia follows the Dillon Rule of strict construction, which “provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.” \(^{13}\) A corollary to the Dillon Rule provides that “the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.” \(^{14}\) Therefore, whether a locality may enact the ordinance described in your request depends upon delegation of the requisite authority by the General Assembly.

Here, the General Assembly has not delegated such authority. In Virginia, the construction and retrofitting of buildings are governed by the Uniform Statewide Building Code (the “USBC”) and the Statewide Fire Prevention Code (the “SFPC”). \(^{15}\) The Code of Virginia provides that the USBC and the SFPC shall supersede the regulation of building construction and retrofitting by localities. \(^{16}\) “In keeping with the precepts of the Dillon Rule, where the General


\(^{12}\) See Arizona v. California, 283 U.S. 423, 451 (1931) (“The United States may perform its functions without conforming to the police regulations of a State.”); see also United States v. City of Chester, 144 F.2d 415, 421 (3rd Cir. 1944) (recognizing federal “immunity from local building restrictions or ordinances . . . .”).


\(^{14}\) Bd. of Supvr.s v. Horne, 216 Va. 113, 117 (1975) (citations omitted). See also Bd. of Zoning Appeals v. Bd. of Supvr.s., 276 Va. 550, 554 (2008) (citations omitted) (The corollary to the Dillon Rule applies “the rule to other public bodies such as boards of supervisors . . . in addition to municipal corporations.”).

\(^{15}\) 13 VA. ADMIN. CODE § 5-63-20(A). The purpose of the USBC is to “protect the health, safety and welfare of the residents of the Commonwealth of Virginia,” in part through “barrier-free provisions for the physically handicapped . . . .” See also VA. CODE ANN. § 36-99 (2014).

\(^{16}\) VA. CODE ANN. § 36-98 (2014) (The USBC “shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions . . . .”); see also
Assembly expressly limits the power of a locality, rather than enabling it, the express limitation must be given effect.”

Thus, a locality may not enact the type of ordinance about which you inquire.

CONCLUSION

For the reasons set forth above, and in response to your inquiry about local authority to enact ordinances on this subject, it is my opinion that under current law a locality lacks authority to enact an ordinance requiring the retrofitting of commercial facilities with manual entry door hardware, where the facilities were constructed prior to the effective date of the ADA. It is my further opinion that under current law a locality lacks authority to enact an ordinance mandating the retrofitting of federal commercial facilities constructed prior to the effective date of the ABA.

OP. NO. 17-010

CONSERVATION:  AIR POLLUTION CONTROL BOARD

The State Air Pollution Control Board is legally authorized to regulate greenhouse gas emissions, including establishing a statewide cap on such emissions for all new and existing fossil fuel electric generating plants.

THE HONORABLE DAVID J. TOSCANO  
MINORITY LEADER, VIRGINIA HOUSE OF DELEGATES  

MAY 12, 2017

13 VA. ADMIN. CODE § 5-63-20(B). VA. CODE ANN. § 27-97 (2016) (“The Fire Prevention Code shall supersede fire prevention regulations heretofore adopted by local governments or other political subdivisions.”); see also 13 VA. ADMIN. CODE § 5-51-21. Section 27-97 does reserve for localities the narrow authority to “adopt fire prevention regulations that are more restrictive or more extensive in scope than the [SFPC] provided such regulations do not affect the manner of construction, or materials to be used in the erection, alteration, repair, or use of a building or structure . . . .” However, this meager exception—permitting onlymin fire prevention regulations that do not affect construction or materials—does not enable a locality to require the retrofitting of commercial building entryways with manual entry door hardware.

You have asked several questions regarding the degree to which state law provides authority for the Virginia State Air Pollution Control Board (the “Board”) to regulate carbon pollution. Specifically, you ask whether, upon what conditions, and the degree to which the Board has the legal authority to regulate greenhouse gas emissions from new and existing fossil fuel electric generating units via a “statewide cap” on emissions or through other means.

In Virginia, the Board is the governmental entity legally authorized to regulate the emission of air pollutants. 1 The Board is authorized to develop comprehensive programs for the “abatement[,] and control of all sources of air pollution in the Commonwealth.”2 The Board exercises this authority pursuant to § 10.1-1308(A), which allows the Board to promulgate regulations “abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth . . . .”3

Pursuant to this authority, the Board has promulgated numerous regulations, ranging from various programs addressing criteria pollutants such as sulfur dioxide and particulate matter, to hazardous air pollutants such as formaldehyde.4 The Board’s regulations require that sources of air pollution obtain a permit prior to a facility’s construction or modification.5 Since 2011, the Board has also regulated the emission of carbon pollution and greenhouse gases (“GHGs”),6 which include carbon dioxide, nitrous oxide, methane,

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2 VA. CODE ANN. § 10.1-1307(A).

3 VA. CODE ANN. § 10.1-1308(A).

4 See generally Administrative Code of Virginia, Title 9, Agency 5.

5 9 VA. ADMIN. CODE § 5-40-420.

hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.\textsuperscript{7} Its GHG regulations are part of its Prevention of Significant Deterioration ("PSD") program.\textsuperscript{8} These regulations require that major stationary sources being constructed or undergoing a modification apply for a permit and that the source utilize the "best available control technology" for GHGs.\textsuperscript{9}

You ask about the extent of state authority to address carbon pollution. The Board is authorized to regulate "air pollution," which is defined as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property."\textsuperscript{10} It is well settled that GHGs fall within this definition. The overwhelming body of scientific literature demonstrates a growing consensus among scientists studying carbon dioxide that it contributes to elevated global temperatures and may be harmful to the welfare of people, animals, and property.\textsuperscript{11} Thus, I conclude that GHGs, including carbon emissions, are air pollution by definition and can be regulated by the Board.

\textsuperscript{7} See, e.g., 9 VA. ADMIN. CODE § 5-85-30(C) (providing that "'[g]reenhouse gases (GHGs)’ means the aggregate group of six greenhouse gases,” which are identified above in the text). This section further provides that “GHGs shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tons per year . . . [of] CO\textsubscript{2} equivalent emissions . . .” 9 VA. ADMIN. CODE § 5-85-30(C)(1).


\textsuperscript{9} 9 VA. ADMIN. CODE § 5-85-40; 9 VA. ADMIN. CODE § 5-80-1605; 9 VA. ADMIN. CODE § 5-80-1705.

\textsuperscript{10} VA. CODE ANN. § 10.1-1300 (Supp. 2016) (defining "air pollution"). This definition was adopted verbatim in the Board’s regulations. See 9 VA. ADMIN. CODE § 5-10-20.

You ask specifically about regulation of emissions from new and existing fossil fuel electric generating plants through a statewide cap on GHG emissions. Although the Board has to date chosen to exercise its authority to regulate GHG emissions through its PSD program, its authority is not limited to establishing and maintaining only a permitting system. Indeed, the Board has broad statutory authority to abate and “control [] all sources of air pollution in the Commonwealth . . . .” Specifically, the law requires the Board to make “such investigations and inspections and do such other things as are reasonably necessary to carry out the provisions of this chapter . . . including the achievement and maintenance of such levels of air quality as will protect human health, welfare and safety and to the greatest degree practicable prevent injury to plant and animal life and property . . . .” And it empowers the Board to promulgate regulations “abating, controlling and prohibiting air pollution . . . .” Based on these authorities, I conclude that the Board has the authority to establish a statewide cap on GHG emissions for all new and existing fossil fuel electric generating plants as a means of abating and controlling such emissions.


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12 See, e.g., 9 VA. ADMIN. CODE § 5-80-370 (defining “[f]ossil fuel” as “natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material” and “[f]ossil fuel-fired” as “the combustion of fossil fuel or any derivative of fossil fuel, alone or in combination with any other fuel, independent of the percentage of fossil fuel consumed in any calendar year (expressed in mmBtu).” See also 9 VA. ADMIN. CODE § 5-80-1615(C) (defining, in the PSD Article, “[e]lectric utility steam generating unit” as “any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale.”).


14 VA. CODE ANN. § 10.1-1307(A).

15 VA. CODE ANN. § 10.1-1306.

16 VA. CODE ANN. § 10.1-1308(A).

17 The validity of any regulation depends on the basis for it in the administrative record. The Board is required to act reasonably and to take due account of certain statutory factors in rulemaking. See Commonwealth ex rel. State Water Control Bd. v. Cnty. Utils. Corp., 223 Va. 534, 546 (1982) (holding that “the Board’s authority to establish and enforce standards was at all times to require that rules be promulgated which are reasonable, practicable of attainment, based upon a fair weighing of the economic and social costs and benefits involved, and of uniform application to all affected parties similarly situated”).
For the foregoing reasons, it is my opinion that the State Air Pollution Control Board is legally authorized to regulate GHG emissions, including establishing a statewide cap on GHG emissions for all new and existing fossil fuel electric generating plants.

**CONCLUSION**

**OP. NO. 17-023**

**CONSTITUTION OF VIRGINIA: ARTICLE X, § 10**

**PENINSULA AIRPORT COMMISSION ACT**

The Peninsula Airport Commission’s guarantee of a bank loan to People Express Airlines is an extension of public credit within the ambit of the prohibition in the Credit Clause, and is impermissible because the General Assembly has not specifically authorized the Commission to insure or guarantee such extensions of public credit under the exception to the Credit Clause.

**THE HONORABLE AUBREY L. LAYNE, JR.**

**SECRETARY OF TRANSPORTATION**

**JUNE 2, 2017**

**ISSUE PRESENTED**

You ask whether the guarantee of a private loan to People Express Airlines (“PEX”) by the Peninsula Airport Commission (the “Commission”) is permitted under Virginia law.

**BACKGROUND**

You have provided several documents, including: a loan commitment letter, a line of credit agreement, a line of credit note, and a commercial guarantee of a $5,000,000 loan to PEX by the Commission. The loan was made by TowneBank, a state-chartered bank (the “Bank”). You state that without the loan guarantee of the Commission, the Bank would not have made the loan to PEX.
You state that when the bank loan was called into default, the Commission, as the guarantor, repaid the Bank the entire loan amount. The Commission utilized certain airport entitlement funds to pay the bank balance. Those funds are public funds allocated to the airport from the Commonwealth. You also state the Commission made several monthly interest payments on behalf of PEX (when PEX failed to make the payments due) from additional airport entitlement funds prior to the loan being called into default.

**APPLICABLE LAW AND DISCUSSION**

As a result of Virginia’s long and troubled history of incurring debt by investing public money in private turnpike, canal, and railroad companies, the Commonwealth sought to curb such practices through various laws, including a provision of Article X, § 10 of the Constitution of Virginia, commonly known as the “Credit Clause.” It provides as follows:

> Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation . . . .

An exception to the Credit Clause provides that “[t]his section shall not be construed to prohibit the General Assembly from establishing an authority with

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1 Section 58.1-638(A)(3) of the *Code of Virginia* creates in the Department of the Treasury from sales and use tax revenue “a special non-reverting fund which shall be part of the Transportation Trust Fund and which shall be known as the Commonwealth Airport Fund. . . . The funds shall be allocated by the Virginia Aviation Board to any Virginia airport which is owned by the Commonwealth, or a governmental subdivision thereof,” in this case the Commission.


power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.”

The Supreme Court of Virginia has considered a number of cases involving the Credit Clause. They include cases involving the purchase of securities when the purchase was made in the Commonwealth’s interest, namely, the Virginia Supplemental Retirement System; the lease of Virginia Port Authority facilities by a private company; the issuance of bonds by a public school authority; and the loan and bond commitments with the City of Charlottesville designed to support a private hotel in the redevelopment of a blighted neighborhood.

In each of these cases, the Court relied heavily on the “moving consideration and motivating cause of [the] transaction.” Illustrative of the Court’s analysis is the case of the City of Charlottesville v. DeHaan, where the Supreme Court of Virginia held that “[w]hen the underlying and activating purpose of the transaction and the financial obligation incurred are for the State’s benefit, there is no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or the spirit of the ‘credit clause’ prohibition.” However, the inverse also is true: if the obligation was incurred primarily to benefit a private enterprise rather than

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4 Id. This exception was added by amendment in 1969 in response to the case of Button v. Day, 208 Va. 494 (1968). See 2 A. E. Dick Howard, Commentaries on the Constitution of Virginia 1127-29 (1974). That case held that under the then-current version of the Credit Clause, it was not constitutionally permissible for the Virginia Industrial Building Authority to guarantee loans for industrial projects. The crux of the Court’s holding was that a fund designed “for the sole purpose of guaranteeing future payment of defaulted loans of private debtors” was invalid under the Credit Clause. Button, 208 Va. at 504. Despite the amendment in question, the analysis in Button v. Day remains a legal cornerstone in the application of the Credit Clause.


9 Id. at 585 (quoting Almond, 197 Va. at 790).

10 City of Charlottesville, 228 Va. at 586 (quoting Almond, 197 Va. at 791).
the public body, then the Credit Clause does apply. As the Attorney General opined in 1991:

“[T]he moving consideration and motivating cause of a transaction are the chief factors by which to determine if it is prohibited by [the Credit Clause]. Whether or not a transaction contravenes the ‘credit clause’ . . . depends upon its animating purpose and the object that it is designed to accomplish.”

[...]

“[T]o state the matter another way, its purpose is to see that public money is used only for public purposes.” If the purpose is clearly to foster and encourage the operation of a private enterprise, however, then the Supreme Court has not hesitated to declare the transaction violative of [the Credit Clause of the Constitution].[11]

Given your description of the facts at hand, the Court’s analysis in Button v. Day, as discussed in the 1991 opinion of the Attorney General, is especially informative. Here, the Commission guaranteed the Bank loan of $5,000,000 to PEX. Without that guarantee, the Bank would not have provided the loan to PEX. While the loan to PEX was reportedly for operating expenses, the loan transaction documents also list significant debts of PEX for repayment. Indeed, based upon the information presently available, the loan appears to also largely refinance existing debt of PEX. Accordingly, the “moving consideration and motivating cause”[12] of the guarantee was to facilitate the refinancing of existing debt of PEX, in addition to providing some startup operating costs. That is, the loan guarantee was for the purpose of “[encouraging] the operation of a private enterprise,”[13] which brings it within the ambit of the Credit Clause prohibition.

Because the loan guarantee is subject to the prohibition in the Credit Clause, the precise question presented is whether the General Assembly has authorized the Commission to “insure and guarantee loans to finance industrial

12 See DeHaan, 228 Va. at 585.
development and industrial expansion,” acts which are permissible for Virginia public authorities under the exception to the Credit Clause.

The legal authority to insure and guarantee such industrial loans has been granted by the General Assembly only in limited circumstances using specific language. For example, the Virginia Small Business Financing Authority is empowered to provide “loans, guarantees, insurance and other assistance to small and other eligible businesses” as part of its mission to promote industrial development in the Commonwealth.\(^{14}\)

The General Assembly has not enacted comparable language for the Commission.\(^{15}\) Without that specific grant of authority, I must conclude that the

\(^{14}\) VA. CODE ANN. § 2.2-2280(A) (2014) (emphasis added). Comparable authority has been granted by the General Assembly in a number of other situations. For example, see the Industrial Development and Revenue Bond Act (VA. CODE ANN. §§ 15.2-4900 to 15.2-4920 (2012 & Supp. 2016). Also, the Economic Development Authority of the City of Newport News created by the 1972 Acts of Assembly, ch. 726 (as the Oyster Point Development Corporation), as amended, has such specific powers under § 4(e) of their legislative authority. See http://law.lis.virginia.gov/authorities/economic-development-authority-of-newport-news/. The Virginia Port Authority has such powers under § 62.1-132.1(A)(6) of the Code. The Chesapeake Port Authority created by the 1987 Acts of Assembly, ch. 397, as amended, has such powers under § 6, paragraphs 21 and 22 of their legislative authority; and the City of Chesapeake under § 7 of that legislative authority may “make such appropriations and provide such funds for the operation and carrying out the purposes of the Authority as its Council may deem proper, either by outright donation or by loan.” See http://law.lis.virginia.gov/authorities/chesapeake-port-authority/. Interestingly, the Portsmouth Port and Industrial Commission created by the 1954 Acts of Assembly, ch. 157, (as the Portsmouth Port Commission), as amended, has the independent power “[t]o provide financing by leasing, selling, which shall include selling by pocket deeds, or making loans for facilities for a § 501(c)(3) organization, including all items of cost for such facilities and for working capital for use by such § 501(c)(3) organization, and to adopt such resolutions and to enter into indentures, contracts, instruments and agreements as may be expedient to issue qualified § 501(c)(3) bonds and to provide for such loans and any security therefor.” Those powers are found at § 25(a) of their legislative authority. See http://law.lis.virginia.gov/authorities/portsmouth-port-and-industrial-commission/.

\(^{15}\) The Commission is empowered to “do all things necessary or convenient to the purposes of this Act. Grant of regulatory authority by this Act, including regulations that displace, eliminate or limit competition by or among persons or entities, is based on the policy of the Commonwealth to provide for the safe, adequate, economical and efficient provision of air transportation and related facilities and services to the public.” Peninsula Airport Commission Act, at § 3(t) (1946 Va. Acts ch. 22; 1964 Va. Acts ch. 270; 1968 Va. Acts ch. 777; 1989 Va. Acts ch. 270). This language cannot
Commission is not authorized to utilize public funds to insure and to guarantee loans to a private airline.\textsuperscript{16}

**CONCLUSION**

For the foregoing reasons, it is my opinion that the action of the Peninsula Airport Commission in guaranteeing a bank loan to People Express Airlines is an extension of public credit within the ambit of the prohibition in the Credit Clause contained in Article X, § 10 of the Constitution of Virginia. As such, it is permissible only if the General Assembly has specifically authorized the Commission to insure or guarantee such extensions of public credit under the exception to the Credit Clause. It is my further opinion that the General Assembly has not so authorized the Commission.

**OP. NO. 17-014**

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

Where a retailer does nothing to promote or otherwise make customers aware of a cigarette manufacturer’s sweepstakes opportunity, and where the only way a customer likely learns of the sweepstakes in the retail store is by seeing it on the back of a pack of cigarettes after purchase, the retailer has not used the sweepstakes “for the purpose of promoting, furthering or advertising” the sale of the cigarettes in violation of § 18.2-242.

reasonably be interpreted to authorize the Commission to guarantee private credit, since doing so is not one of “the purposes of [the] Act.” Further, the General Assembly could easily have given the Commission the explicit power to guarantee private debt as it did for the Virginia Small Business Financing Authority, yet it chose not to do so. When interpreting legislation, one must “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) (internal quotation marks omitted). Further, under the doctrine of *expressio unius est exclusio alterius*, the “mention of specific item in a statute implies that omitted items were not intended to be included within the scope of a statute.” GEICO v. Hull, 260 Va. 349, 355 (2000) (internal quotation marks omitted). The clause in question does authorize certain specific activities—such as limiting competition and providing safe air transportation—but it does not mention guaranteeing private debt.

\textsuperscript{16} Nor does the Commission, as a political subdivision of the Commonwealth, have the implied authority under the Dillon Rule to insure or guarantee such a loan. \textit{See} Commonwealth v. Cty. Bd. of Arlington Cty., 217 Va. 558, 562 (1977); 1985-1986 Op. Va. Att’y Gen. 91, 93.
ISSUE PRESENTED

You inquire whether it would be a violation of § 18.2-242 of the Code of Virginia for a cigarette manufacturer to offer a sweepstakes contest, when the sweepstakes material would be available only on the back of the cigarette package.

BACKGROUND

You relate that a cigarette manufacturer proposes to provide notice on the back of its cigarette packages of a sweepstakes contest offered on the company’s website. The sweepstakes would be open only to smokers who are at least twenty-one years old, and no consumer purchase would be necessary to participate. You further relate that communication regarding the sweepstakes in a Virginia retail establishment would be only on the cigarette package itself, not anywhere else in the retail establishment.

APPLICABLE LAW AND DISCUSSION

Section 18.2-242 of the Code of Virginia is a criminal statute that prohibits retail establishments from using various games of chance to promote the sale of retail products subject to a federal and state excise tax:

(a) No retail establishment in this Commonwealth shall use any game, contest, lottery or other scheme or device, whereby a person or persons may receive gifts, prizes or gratuities as determined by chance for the purpose of promoting, furthering or advertising the sale of any product or products having both a federal and state excise tax placed upon it, and the fact that no purchase is required in order to participate in such game, contest, lottery or scheme shall not exclude such game, contest, lottery or scheme from the provisions of this section.
(b) Any person violating the provision of this section shall be
guilty of a Class 3 misdemeanor.\[1\]

A 2002 opinion of this Office concluded that the statute would be violated
where a cigarette manufacturer conducted a sweepstakes, and the sweepstakes
material was available not only on the cigarette package, but also at the retail
establishment counter.\[2\] Under those facts, this Office concluded that “the
retailer [would be] availing itself or using the manufacturer’s promotion in order
to further the sale of cigarettes”\[3\] and, thereby, would violate § 18.2-242.\[4\]

Applying the law to the question you pose and the facts you present, I first
observe that § 18.2-242 applies only to retail establishments.\[5\] It does not apply
to cigarette manufacturers. Thus, unless a cigarette manufacturer owns and
operates a retail establishment, it is not subject to the statute.

The statute targets the conduct of retailers, and requires some affirmative
action by a retail establishment to use a game of chance to sell products subject
to state and federal excise taxes, which include cigarettes.\[6\] By the plain
language of § 18.2-242, the establishment must “use” the game of chance “for
the purpose of promoting, furthering or advertising” the sale of the product.\[7\]
We must “assume that the [General Assembly] chose with care the words it used
when it enacted [this] statute”\[8\] and, as a criminal law, it must be strictly
construed against the state.\[9\]

On the facts you provide, there is no “use” of the game by the retailer for
promotion or advertising of the cigarettes. The notice of the availability of the

\[1\] VA. CODE ANN. § 18.2-242 (2014).
\[3\] Id. at 139.
\[4\] See id.
\[5\] “No retail establishment in this Commonwealth shall . . . .” VA. CODE ANN. § 18.2-242.
\[7\] See VA. CODE ANN. § 18.2-242.
of Motor Vehicles v. Athey, 261 Va. 385, 388 (2001)).
sweepstakes appears only on the cigarette packages, and not anywhere else in the retail establishment. Thus, the facts here are readily distinguishable from those underlying the 2002 opinion where, in addition to information on the package, there was also a retail counter display. Also, as federal regulations adopted after the 2002 opinion prohibit retailers from selling cigarettes through self-service displays,\(^ {10}\) the sweepstakes notice on the cigarette package is more likely post-purchase notice, and the retailer would not, therefore, be “availing itself or using the manufacturer’s promotion” to stimulate cigarette sales as in the circumstances underlying the earlier opinion.

**CONCLUSION**

For these reasons, I conclude that where a retailer does nothing to promote or otherwise make customers aware of a cigarette manufacturer’s sweepstakes opportunity, and where the only way a customer likely learns of the sweepstakes in the retail store is by seeing it on the back of a pack of cigarettes after purchase, the retailer has not used the sweepstakes “for the purpose of promoting, furthering or advertising”\(^ {11}\) the sale of the cigarettes. The retailer has merely sold the cigarettes and does not violate § 18.2-242.

**OP. NO. 16-060**

**TAXATION: LOCAL TAXES – ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES**

**TAXATION: REAL PROPERTY TAX - EXEMPTION FOR DISABLED VETERANS**

A disabled veteran, or the surviving spouse of a disabled veteran, who has complied with all applicable requirements for the real property tax exemption in §§ 58.1-3219.5 and 58.1-3219.6, is entitled to enjoy that tax exemption, beginning on the date of the disability rating, including all prior years back to and including 2011.

\(^{10}\) 21 C.F.R. §§ 1140.16 (2010) and 1140.14 (2016) (Note—that there are limited exceptions to the requirement for direct face-to-face sales, including in facilities where a retailer ensures that no person under 18 years old is present, or permitted to enter, at any time—often referred to as adult-only facilities, see 21 C.F.R. §§ 1140.16(C)(2) (2010)).

\(^{11}\) VA. CODE ANN. § 18.2-242.
An erroneous assessment arising from a mistake of a taxpayer is entitled to administrative correction under § 58.1-3980.

THE HONORABLE PRISCILLA S. BELE
COMMISSIONER OF THE REVENUE, CITY OF NEWPORT NEWS

JUNE 22, 2017

ISSUES PRESENTED

You inquire whether the real property tax exemption for disabled veterans and surviving spouses contained in § 58.1-3219.5 of the Code of Virginia is limited to the current tax year in which the disabled veteran or surviving spouse applies for the tax exemption plus the three preceding tax years; or, whether it is retroactive in application to January 1, 2011. You also inquire whether there may be administrative correction of erroneous assessments resulting from a mistake made by the taxpayer.

BACKGROUND

Section 58.1-3219.5 of the Code of Virginia sets forth a real property tax exemption for the principal residences of fully disabled veterans and surviving spouses, under certain conditions:

A. Pursuant to subdivision (a) of Section 6-A of Article X of the Constitution of Virginia, and for tax years beginning on or after January 1, 2011, the General Assembly hereby exempts from taxation the real property, including the joint real property of husband and wife, of any veteran who has been rated by the U.S. Department of Veterans Affairs or its successor agency pursuant to federal law to have a 100 percent service-connected, permanent, and total disability, and who occupies the real property as his principal place of residence. [. . .]

B. The surviving spouse of a veteran eligible for the exemption set forth in this article shall also qualify for the exemption, so long as the death of the veteran occurs on or after January 1, 2011, the surviving spouse does not remarry,
and the surviving spouse continues to occupy the real property as his principal place of residence.\(^1\)

The veteran or surviving spouse is required to file with the commissioner of the revenue for the locality in which the real property is located an affidavit or written statement containing certain information in order to qualify for the exemption.\(^2\)

The statute addresses the matter of refunds that are owed to qualified veterans or surviving spouses, and clearly contemplates that a veteran who has submitted the required affidavit or written statement showing entitlement to the exemption is entitled to a refund, back to the time when he or she first became eligible for it, with the only limitation being that the locality shall not be liable for interest on any refund for taxes paid prior to the filing of the affidavit or written statement:

If the veteran’s disability rating occurs after January 1, 2011, and he has a qualified primary residence on the date of the rating, then the exemption for him under this section begins on the date of such rating. However, no county, city, or town shall be liable for any interest on any refund due to the veteran for taxes paid prior to the veteran’s filing of the affidavit or written statement required by § 58.1-3219.6.\(^3\)

The tax exemption statute has a lengthy legislative history. Initially, the Constitution of Virginia, which limits the granting of certain tax exemptions, was amended in 2011 to permit enactment of a tax exemption for disabled veterans and surviving spouses of qualifying veterans.\(^4\) Pursuant to the


\(^2\) See § 58.1-3219.6 (2013). Official documentation of the veteran’s disability status also is required; in addition, in the case of a surviving spouse who applies for the exemption, the surviving spouse must provide documentation that the veteran’s death occurred on or after January 1, 2011. See id.


constitutional amendment, the statute was adopted in 2011. It had an emergency clause\(^5\) and was made applicable “for tax years beginning on and after January 1, 2011.”\(^6\)

The statute was subsequently amended in 2012, with the amendment clarifying whether, when, and the extent to which the tax exemption would apply under different circumstances.\(^7\) In 2014, the statute was again amended to change the way in which the Constitution of Virginia was cited.\(^8\) In 2016 the statute was amended yet again to apply the tax exemption to manufactured homes, even if the veteran does not own the land on which the home is situated, and also to certain real property improvements, beginning January 1, 2017. The 2011 exemption “start date” remained in the statute.\(^9\)

Regarding your assessment correction inquiry, I note that a statute for the administrative correction of assessments has a three-year limit for correcting prior assessments. It is set forth in § 58.1-3980, which provides as follows:

Any person . . . assessed by a commissioner of the revenue . . . with any local tax authorized by this title . . . [who is] aggrieved by any such assessment, may, within three years from the last day of the tax year for which such assessment is made, or within one year from the date of the assessment, whichever is later, apply to the commissioner of the revenue

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\(^6\) Id.

\(^7\) 2012 Va. Acts chs. 75, 263, 782, 806.

\(^8\) 2014 Va. Acts ch. 757. The change in citation was necessitated by a constitutional amendment authorizing a tax exemption for the surviving spouses of soldiers killed in action. Pursuant to that amendment, the General Assembly enacted that exemption, but in different statutes from the present statute, which deals only with fully disabled veterans, not soldiers who were killed in action. See VA. CODE ANN. §§ 58.1-3219.9 through 58.1-3219.12 (Supp. 2016).

or such other official who made the assessment for a correction thereof.[10]

APPLICABLE LAW AND DISCUSSION

Initially, I note that the tax exemption statute is retroactive on its face: despite having been amended in 2012, 2014, and 2016, it still applies to tax years going back to 2011. Additionally, it directly addresses the subject of refunds that may be due to qualified veterans for certain prior years. While not favored, retroactivity of statutes is not impermissible per se, and certain statutes may be applied retroactively, if that is the clear intent of the General Assembly.11

Thus, the remaining question is whether the three-year limit on correcting prior assessments applies to the statute granting the tax exemption for veterans with disabilities determined as of 2011 and their surviving spouses.

Consideration of the legislative history of the exemption statute is necessary to address this question. The 2011 disability rating date was set forth in the statute upon its adoption in 2011, and that date remained in the statute following subsequent amendments. The 2016 amendment is particularly significant: it became effective January 1, 2017, and it allowed a new and expanded tax exemption, going back to 2011, for manufactured homes. Thus, this amendment, as duly adopted by the General Assembly, covered six preceding years. This time period is inconsistent with the general three-year limitation for correcting prior assessments—which would be back to 2014, but not beyond. To say that the three-year limitation period applies to the tax exemption would render meaningless the explicit statutory language adopted

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10 Section 58.1-3980 (2013) (emphasis added).
11 There are limited circumstances in which retroactivity is not permissible, such as ex post facto laws (VA. CONST. art. I, § 9), laws impairing the obligation of contracts (VA. CONST. art. I, § 11), and laws interfering with existing rights of action, suits, or vested property rights (see, e.g., Bailey v. Spangler, 289 Va. 353, 359 (2015)). Retroactive laws have been approved on occasion. “As a general rule statutes relating to remedies and procedure are given a retrospective construction.” Walke v. Dallas, Inc., 209 Va. 32, 35 (1968) (internal citations and quotation marks omitted). However, “[a]bsent an express manifestation of intent by the legislature, [courts] . . . will not infer the intent that a statute is to be applied retroactively.” Bailey, 289 Va. at 359 (citing Ferguson v. Ferguson, 169 Va. 77, 86-87 (1937)).
with an effective date of 2017, making the tax exemption apply to all tax years back to and including 2011—a six-year period.

If one statute addresses a subject in a general way, and another in a more specific way, the latter prevails. Here, we have a general statute imposing a three-year limitation on correcting assessments and a second statute that—even after being amended in 2016—specifically allows a tax exemption going back to 2011, beginning on the date of the disability rating. The specificity of the second statute (creating the tax exemption going back to 2011) thus prevails over the general language of the first statute (imposing a three-year limit on correcting assessments).

We must assume that the General Assembly chose with care the words it used when it enacted a statute and legal effect must be given to legislative intent “as expressed by the language used in the statute.” Therefore, I must conclude that it was the intent of the General Assembly that the three-year limitation period not apply to this tax exemption statute.

Regarding your second inquiry, it is my opinion that an erroneous assessment arising from a mistake of the taxpayer is still entitled to administrative correction pursuant to § 58.1-3980. This section does not

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12 Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 481 (2008) (quoting Alliance to Save the Mattaponi v. Commonwealth Dep’t of Envtl. Quality ex rel. State Water Control Bd., 270 Va. 423, 439-40 (2005) (“A cardinal rule of statutory interpretation is that ‘[w]hen one statute addresses a subject in a general manner and another addresses a part of the same subject in a more specific manner, the two statutes should be harmonized, if possible, and when they conflict, the more specific statute prevails.’”)


attempt to allocate fault. It merely allows a taxpayer who is “aggrieved by [an] assessment” to apply for its “correction.” Thus, any taxpayer aggrieved by an assessment—regardless of cause or fault, if any—may apply for correction.

CONCLUSION

Accordingly, it is my opinion that a disabled veteran, or the surviving spouse of a disabled veteran, who has provided the required affidavit or written statement showing compliance with all applicable requirements for the tax exemption provided by the General Assembly in §§ 58.1-3219.5 and 58.1-3219.6, is entitled to enjoy that tax exemption, beginning on the date of the disability rating, including all prior years back to and including 2011. The locality is not liable for any interest on any refund due to the veteran for taxes paid prior to the veteran’s filing of the required affidavit or written statement. Further, an erroneous assessment arising from a mistake of a taxpayer is entitled to administrative correction under § 58.1-3980.

OP. NO. 17-013

CONSTITUTION OF VIRGINIA: ARTICLE VII, § 9

The City of Richmond’s proposed conveyance to the Commonwealth of a permanent easement for the purpose of construction, maintenance, and repair of the Emancipation Proclamation and Freedom Monument is permissible under Article VII, § 9 of the Constitution of Virginia without a supermajority vote of City Council, and neither term limits nor competitive bidding are required.

THE HONORABLE JENNIFER L. MCCLELLAN
MEMBER, SENATE OF VIRGINIA

JULY 13, 2017

ISSUE PRESENTED

You ask whether Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 of the Code of Virginia prohibit the City of Richmond from

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16 Section 58.1-3980.
granting a permanent easement to the Commonwealth of Virginia. The easement would be for the purpose of facilitating state construction, repair, and maintenance of a monument to the Emancipation Proclamation.

BACKGROUND

You relate that the City of Richmond (the “City”) has agreed to convey fee simple title to certain real estate on Brown’s Island, a public park, to the Commonwealth of Virginia (the “Commonwealth”). A commission of the General Assembly intends to construct the Emancipation Proclamation and Freedom Monument on the property. The only route by which the Commonwealth will have access to the property, for the purposes of constructing, repairing, and maintaining the Freedom Monument, will be across a portion of the public park. The Commonwealth seeks a permanent easement authorizing such access.

The question presented is whether constitutional and statutory restrictions on cities and towns conveying public property would apply to the proposed easement.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia, in Article VII, § 9, limits the ability of cities and towns to convey publicly owned real property:

No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all members elected to the governing body.

No franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years [. . .]. Before granting any such franchise or privilege for a term in excess of
Article VII, § 9 contains two related but different restrictions. First, a supermajority vote is required to convey a city or town’s rights in and to its “public places” (the “supermajority requirement”). Second, no right to use public property in a manner not permitted to the general public shall be for a term longer than forty years, and the grant of any such right for longer than five years must be by competitive bids (the “term-limit and competitive-bid requirement”). Your inquiry necessarily invokes examining both of these requirements.

1. The supermajority requirement

Professor A. E. Dick Howard, the former Executive Director of the Virginia Commission on Constitutional Revision, explains that the context of these restrictions was a period in our history when public property was sometimes conveyed to private, for-profit interests, to the detriment of the public. The restrictions reflect a desire to protect against such abuses:

Like the Corporations article, which came into [the] Constitution as a result of a fear of legislative willingness to knuckle under to special interests, [the restrictions] reflected a belief that municipal councils could not be counted on faithfully to safeguard the public interest when dealing with corporations and utilities. The malaise of American cities at the turn of the century is well known. [The restrictions] seem[ ] to have arisen out of a desire to keep unscrupulous municipal councils from disposing of property at a fraction of its worth, as had happened in certain cities.

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1 Va. CONST. art. VII, § 9 (quoted here in relevant part). Restrictions that parallel these are also imposed by statute. See VA. CODE ANN. § 15.2-2100 (2012). Any references herein to Article VII, § 9 shall also apply to this statute, and vice versa.


A prior opinion of this Office, relying on Professor Howard’s reasoning, concluded that the supermajority requirement did not apply when Charlottesville proposed to convey park land to the Virginia Department of Transportation for construction of a highway that would later be deeded back to the City. The reason for this conclusion was that the City’s conveyance to a state agency would be “for the benefit of, and use by, the general public”:

In the specific facts you provide, there cannot be any suggestion that the city council is disposing of valuable public property at a fraction of its worth for private benefit, or that some private business interests are being favored over the public interests in the specific property of the city’s public park property. Clearly, the city simply is changing the use of its park property to city highway property. Both of these uses are for the benefit of, and use by, the general public. Although you suggest that council members have argued that the conversion of the city property from park use to highway use will not benefit the public, I cannot conclude that the provisions of Article VII, § 9 . . . are implicated in any manner in this specific factual context. Accordingly, I must conclude that an affirmative vote of three fourths of all members elected to the Charlottesville city council is not required for passage of an ordinance authorizing the sale of city park property to the Commonwealth for construction of a public road that will ultimately be deeded back to the city.[5]

2. The term-limit and competitive-bid requirement

The term-limit and competitive-bid requirement applies when a proposed grant involves the right to use public property for a term of years in a manner

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5 Id. at 41-42 (emphasis added); see also generally 10 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 28.44 (3d ed. 1981) (“[A] transfer of municipal property to another public agency is not required to be made in strict compliance with statutes designed to regulate transfers generally of municipal property, or, as the rule is sometimes phrased, the statutes are not applicable to transfers among agencies representing the common interest, i.e., the public.”).
not permitted to the general public. When it applies, no easement may be granted for longer than forty years, and an easement may not be granted for a term longer than five years without advertisement and competitive bids.

The facts you have presented involve the grant of a permanent easement by the City of Richmond to the Commonwealth. Prior opinions of this Office have reached two conclusions that are directly relevant to the term-limit and competitive-bid requirement.

First, the conveyance of a permanent easement in the facts you present is the equivalent of conveying fee simple title for purposes of Article VII, § 9: it “effectively results in a permanent dedication of the public property involved” that is “tantamount to a sale of municipal property.”

Second, because the permanent easement is to be treated as a fee simple conveyance for the purposes of the constitutional provision, the supermajority requirement may apply, but the term-limit and competitive-bid requirement does not: when a permanent easement is conveyed, “the provisions of Article VII, § 9, relating to the recorded three-fourths affirmative vote requirement for the sale of municipal property” may “apply to the grant in issue.” As previously discussed, however, not even that limitation applies to the City’s proposed conveyance of the permanent easement in question here, as the grant is to the Commonwealth in furtherance of continued public use.

In summary, under the facts you have presented, where a permanent easement would be conveyed from a city to the Commonwealth for a manifestly public purpose, namely construction, maintenance, and repair of a public monument on public property, neither the supermajority-vote requirement nor the term-limit and bidding requirement for conveyances of municipal property imposed by Article VII, § 9 of the Virginia Constitution and § 15.2-2100 of the Code of Virginia apply.

**CONCLUSION**

For the foregoing reasons, it is my opinion that the City of Richmond’s proposed conveyance to the Commonwealth of a permanent easement for the

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purpose of construction, maintenance, and repair of the Emancipation Proclamation and Freedom Monument is permitted; only a simple majority vote of City Council is required; and competitive bids are not required.

**OP. NO. 17-021**

**CONSTITUTION OF VIRGINIA – ARTICLE I, § 15-A**

**DOMESTIC RELATIONS – UNLAWFUL MARRIAGES GENERALLY**

**GENERAL ASSEMBLY: VIRGINIA CODE COMMISSION**

**UNITED STATES CONSTITUTION: DUE PROCESS**

**UNITED STATES CONSTITUTION: EQUAL PROTECTION**

Sections §§ 20-45.2 and 20-45.3 of the Code of Virginia are obsolete within the meaning of § 30-151 because they have been held unconstitutional and therefore lack any legal force.

The prohibition on same-sex marriage in Article I, § 15-A of the Constitution of Virginia violates the U.S. Constitution, under the holdings of both the Fourth Circuit in *Bostic v. Rainey* and the United States Supreme Court in *Obergefell v. Hodges*.

**THE HONORABLE JOHN S. EDWARDS**

**MEMBER, SENATE OF VIRGINIA**

**AUGUST 11, 2017**

**ISSUES PRESENTED**

You have asked in your capacity as Chairman of the Virginia Code Commission (the “Commission”) whether §§ 20-45.2 and 20-45.3 of the *Code of Virginia* “are obsolete within the compass of § 30-151.” You also ask “whether Section 15-A of Article I of the Constitution of Virginia runs afoul of the United States Constitution in light of . . . *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).”
BACKGROUND

Under § 30-151 of the Code of Virginia, the Commission has an “ongoing responsibility” to identify “obsolete statutes and Acts of Assembly” and to recommend appropriate legislative changes to the General Assembly.¹

The Commission shall review the Code of Virginia and uncodified provisions in the Virginia Acts of Assembly to identify obsolete chapters, articles, sections, or enactments. The Commission shall from time to time, but not less than every four years, make such recommendation to the General Assembly through legislation amending or repealing such statutes or acts as the Commission deems appropriate.²

I understand from your request that among the statutes that the Commission is considering identifying as “obsolete” are §§ 20-45.2 and 20-45.3 of the Code of Virginia, which limit marriage in Virginia to one man and one woman. Section 20-45.2 provides that “[a] marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”³

Section 20-45.3 similarly prohibits any “civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage.”⁴ Those statutes have a corresponding provision in the Constitution of Virginia. Article I, § 15-A provides, in part, that “only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”⁵

Three years ago, those provisions were struck down as unconstitutional by a federal trial court sitting in Virginia and the federal appeals court with jurisdiction over Virginia. On February 13, 2014, in Bostic v. Rainey, the U.S. Supreme Court held that Virginia’s ban on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment.

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¹ VA. CODE ANN. § 30-151 (2015).
² Id.
³ VA. CODE ANN. § 20-45.2 (2016).
⁴ VA. CODE ANN. § 20-45.3 (2016); see also id. (providing that “[a]ny such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable”).
⁵ VA. CONST. art. I, § 15-A.
District Court for the Eastern District of Virginia:


Accordingly, the court permanently enjoined enforcement of the laws.7 On July 28, 2014, the U.S. Court of Appeals for the Fourth Circuit agreed, likewise concluding that the laws “violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples’ lawful out-of-state marriages.”8 The Fourth Circuit “therefore affirm[ed] the district court’s grant of the Plaintiffs’ motion for summary judgment and its decision to enjoin enforcement of the Virginia Marriage Laws.”9 On October 6, 2014, the U.S. Supreme Court declined to review the case, leaving in place the Fourth Circuit’s judgment that Virginia’s various prohibitions on same-sex marriage are unconstitutional.10 The permanent injunction took effect that day.

Other States’ similar prohibitions were also struck down by other federal courts of appeals, and the Supreme Court again declined to disturb the results.11 Not until the U.S. Court of Appeals for the Sixth Circuit upheld same-sex-marriage prohibitions in Michigan, Kentucky, Ohio, and Tennessee did the U.S. Supreme Court take up the issue in Obergefell v. Hodges, ultimately holding that laws limiting marriage to one man and one woman are unconstitutional:

7 Id.
8 Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014).
9 Id. It defined “Virginia’s Marriage Laws” to include “Virginia Code sections 20–45.2 and 20–45.3, the Marshall/Newman Amendment [Va. Const. art. I, § 15-A], and any other Virginia law that bars same-sex marriage or prohibits the State’s recognition of otherwise-lawful same-sex marriages from other jurisdictions.” Id. at 368 (internal quotation marks omitted).
The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.\[12\]

Since the Supreme Court issued its decision on June 26, 2015, prohibitions on same-sex marriage have been unconstitutional and unenforceable nationwide.

**APPLICABLE LAW AND DISCUSSION**

I respond to your two questions in corresponding sections below.

1. Whether Code §§ 20-45.2 and 20-45.3 are obsolete within the meaning of Code § 30-151.

   The essence of your first question is whether §§ 20-45.2 and 20-45.3 are obsolete, given that they have been held unconstitutional by federal courts. The term “obsolete” is not defined in the *Code of Virginia*, and I am not aware of case law from Virginia courts, opinions of the Attorney General, or other authorities addressing the term’s meaning in § 30-151 specifically. Nevertheless, for the reasons set forth below, it is my opinion that those statutes “are obsolete within the compass of § 30-151.”

   First, an unconstitutional statute fits comfortably within the plain and natural meaning of “obsolete” because it lacks any legal force.\[13\] Black’s Law Dictionary defines “obsolete” to mean “[n]o longer in general use; out-of-date.”\[14\] Consistent with that definition, the Supreme Court of Virginia has explained that when an act is “unconstitutional, ‘it is not a law . . . ; it is, in legal contemplation, as inoperative as though it had never been passed.’”\[15\] And the Court has held, and previous Attorneys General have opined, that judicial

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13 See, e.g., McKeon v. Commonwealth, 211 Va. 24, 27 (1970) (when a word “is not defined in the statute, [it] must . . . be given its ordinary meaning in determining the legislative intent in the use of the word . . .”).
14 *BLACK’S LAW DICTIONARY* 1246 (Brian A. Garner et al. eds., 10th ed. 2014).
precedents and statutes are “obsolete” when they no longer have any legal effect. In my opinion, a statute is no less obsolete when it has been rendered inoperative by a final judicial decision, rather than by a subsequent legislative enactment. Because §§ 20-45.2 and 20-45.3 have been declared unconstitutional and are no longer enforceable, they fall squarely within the plain meaning of “obsolete.”

Second, the General Assembly has used the term “obsolete” before to describe a provision of the Virginia Constitution that was previously declared unconstitutional. In 2002, in *Falwell v. Miller*, the U.S. District Court for the Western District of Virginia concluded that Article IV, § 14(20) of the Virginia Constitution—prohibiting the incorporation of churches and religious denominations—violated the First Amendment to the United States Constitution. Several years later, the General Assembly acted to eliminate the provision, adopting a joint resolution to place a repeal measure on the ballot in the November 2006 general election. The adopted ballot language demonstrates the General Assembly’s assumption that provisions ruled unconstitutional have been rendered “obsolete”:

The ballot shall contain the following question: “Question: Shall Section 14 of Article IV of the Constitution of Virginia be amended by deleting the provision that prohibits the incorporation of churches, a provision that was ruled to be unconstitutional and therefore now is obsolete?”

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18 *Id.* at 632-33. The Court noted that the defendant, the Chairman of the State Corporation Commission, represented by the Attorney General, “has chosen not to defend the constitutional merits of Article IV, § 14(20)” and “does not contest the merits of Plaintiffs’ legal argument that § 14(20) violates the U.S. Constitution.” *Id.* at 627, 632.
That same understanding was shared by the Commission on Constitutional Revision (the “CCR”), which fifty years ago was tasked with suggesting amendments to the Constitution of Virginia that the General Assembly then debated whether to propose to the people of Virginia.\(^\text{21}\) Among other recommendations in its final report, the CCR “propose[d] the deletion of a number of obsolete sections of the present Constitution.”\(^\text{22}\) In the course of discussing those “obsolete sections,” the CCR made clear that it had included provisions held unconstitutional by federal courts:\(^\text{23}\)

Some of these sections are obsolete because the conditions which gave rise to them no longer obtain. This is the case, for example, with those sections concerned with dueling. Other sections are obsolete because of federal law, such as federal court decisions regarding the poll tax or those regarding segregation in public schools.\(^\text{24}\)

Thus, both the General Assembly and the CCR have understood that statutes are obsolete if, like Virginia’s prohibitions on same-sex marriage, they have been found unconstitutional by a federal court.

For those reasons, I answer your question in the affirmative and conclude that §§ 20-45.2 and 20-45.3 “are obsolete within the compass of § 30-151.”

Finally, although it does not affect my opinion, I note that the General Assembly has granted the Commission substantial discretion in performing its duties. Section 30-151 empowers the Commission to “identify obsolete

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\(^{22}\) Id. at 13.

\(^{23}\) Id.

\(^{24}\) Id. The poll-tax and segregation cases referred to are Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (provisions in Constitution of Virginia making payment of poll taxes a qualification for eligibility to vote violate the Equal Protection Clause), and Davis v. County School Board, 347 U.S. 483 (1954) (Virginia constitutional provisions and laws requiring segregation of black and white students in public schools violate the Fourteenth Amendment). See also Report of the Commission on Constitutional Revision at 16 (“Obsolete or unnecessary parts of the present Franchise article, for example, those relating to the poll tax, are deleted.”); id. at 233 (“The restrictions on the size of county magisterial districts are obsolete after the recent one-man, one-vote decisions of the United States Supreme Court.”).
chapters, articles, sections, or enactments” and make “recommendation[s] to the General Assembly” regarding “such [obsolete] statutes or acts as the Commission deems appropriate.”25 That discretion is permissible because the General Assembly is not bound to accept the Commission’s recommendations; the General Assembly exercises its independent judgment whether to act on those recommendations and whether to adopt or reject them in whole or in part. Given the discretion committed to the Commission, and in light of the reasons discussed above, the Commission certainly would be within its authority to conclude that §§ 20-45.2 and 20-45.3 are obsolete within the meaning of § 30-151.

How the Commission should exercise its discretion, however, is not a proper subject for me to opine on, and instead is a matter for the Commission to decide. But I do note one practical consideration that the Commission may wish to take into account: if these unconstitutional provisions remain in the Code of Virginia, there is a possibility that citizens of the Commonwealth could be misled into believing that they remain valid law, which, of course, they do not.


Both Bostic and Obergefell confirm that Article I, § 15-A of the Constitution of Virginia violates the U.S. Constitution. Article I, § 15-A provides, in part, “[t]hat only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”26 As stated above, in Bostic, the Fourth Circuit held unconstitutional Virginia’s marriage laws—including Article I, § 15-A—“to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples’ lawful out-of-state marriages,” and the Supreme Court let that decision stand.27 Along with its statutory prohibitions on same-sex marriage, Virginia’s constitutional prohibition has not been in force since October 6, 2014.

25 VA. CODE ANN. § 30-151 (emphasis added).
26 VA. CONST. art. I, § 15-A.
27 Bostic, 760 F.3d at 384, cert. denied, 135 S. Ct. 286, 308, 314.
What the Fourth Circuit held in Bostic with respect to Virginia’s laws in particular became settled law nationwide a year later, when the U.S. Supreme Court confirmed in Obergefell that the Constitution “does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”\textsuperscript{28} Thus, Article I, § 15-A is invalid under Obergefell “to the extent [it] exclude[s] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”\textsuperscript{29}

\section*{Conclusion}

It is my opinion that §§ 20-45.2 and 20-45.3 of the Code of Virginia are obsolete within the meaning of § 30-151 because they have been held unconstitutional and therefore lack any legal force. It is also my opinion that the similar prohibition on same-sex marriage in Article I, § 15-A of the Constitution of Virginia violates the U.S. Constitution, under the holdings of both the Fourth Circuit in Bostic and the Supreme Court in Obergefell.

\section*{OP. NO. 17-032}

\section*{Counties, Cities and Towns: Buildings, Monuments and Lands Generally}

Local governments must consider a number of potential restrictions that may apply to removal or relocation of a war or veterans monument.

\textsc{Julie Langan}
\textsc{Director, Virginia Department of Historic Resources}

\textsc{August 25, 2017}

\section*{Issue Presented}

You have asked how the provisions of § 15.2-1812 of the Code of Virginia, or other legal restrictions, may impact the authority of a locality to remove or relocate war or veterans monuments on property owned or controlled

\textsuperscript{28} Obergefell, 135 S. Ct. at 2607.

\textsuperscript{29} Id. at 2605.
by the locality.1

APPLICABLE LAW AND DISCUSSION

A number of factors may impact a locality’s ability to remove or relocate a war or veterans monument, and each likely presents a unique circumstance that would require careful analysis to determine which, if any, might limit local authority. Without regard to their application in an individual case, there are three categories of legal restrictions that may affect the authority of a local government. First, discussed more fully below, is the application of § 15.2-1812 of the Code of Virginia to the particular monument. Second, a number of monuments are subject to individual Acts of Assembly governing their construction and maintenance. Finally, some monuments may be subject to restrictions found in instruments transferring ownership of the monument to the locality or local governmental entity or restrictions imposed as a result of subsequent actions of the locality. A careful investigation of the circumstances surrounding the individual monument must be completed by the locality to determine which legal restrictions may apply.

1. Code § 15.2-1812

a. History of the Code Section

The historical antecedent to this Code section first appeared as Section 2742 of the Code of Virginia. By an act of the General Assembly passed in February 1904, the circuit court of a county, with the concurrence of the county’s board of supervisors, could authorize “the erection of a Confederate monument upon the public square of such county at the county seat thereof.”2 Once such a monument was “so erected,” the statute provided that “thereafter” the locality “or any other person or persons whatever” could not “disturb or interfere” with the monument, or “prevent the citizens of [the] county from taking all proper measures and exercising all proper means for the protection, preservation, and care of the same.”3

1 Nothing contained herein should be construed to evaluate or opine upon removal or relocation of monuments located upon state or federal property.


3 Id.
The General Assembly subsequently enacted a number of changes to this statute. In 1910, it added the ability of a county’s board of supervisors to appropriate funds “to complete or aid in the erection of a monument to the Confederate soldiers of such county,” and the ability of the board to impose a special levy for these purposes, or to assist private persons, Confederate veterans, or other organizations in building such a monument. The amendment also specified that a county could finance a monument to be placed either upon the “public square” or “elsewhere at the county seat,” but it did not similarly expand the protective language contained in the first paragraph of the statute. In 1930, the statute was amended to include monuments to the “World War,” as well as a change in terminology from “soldiers” to “veterans” in the section concerning funding. Near the end of World War II, the reference became to a “monument or memorial” and the General Assembly included two additional conflicts, the Spanish-American War and World War II. In 1982, it added the “Korean War and Viet Nam War” to the list, and made certain non-substantive grammatical changes to the statute.

In 1988, the General Assembly added three additional conflicts (the Revolutionary War, War of 1812, and Mexican War) and also changed the protective language from “if such shall be erected it shall not be lawful thereafter” to disturb or interfere with the monument or memorial, to “[i]f such are erected, it shall be unlawful” to disturb or interfere with the same. Other non-substantive grammatical changes appear in this Act as well.

During a recodification of Code provisions pertaining to local governments in 1997, the General Assembly made several notable changes to this Code

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5 Id.
6 1930 Va. Acts ch. 76.
8 1982 Va. Acts ch. 19. By the time of this amendment, the statute had been recodified twice, first as § 15-696 and then as § 15.1-270 of the Code of Virginia. In 1962, when the statute was recodified as § 15.1-270, the General Assembly replaced the term “board of supervisors” with “the governing body” of the county. 1962 Va. Acts ch. 623.
9 Non-substantive grammatical changes also appear in the 1910, 1930, 1945, and 1962 amendments to the statute.
section. First, it now applied to any “locality,” not just a county.\textsuperscript{11} It also moved the list of conflicts encompassed to a different section of the Code (former § 2.1-21), which expanded the list,\textsuperscript{12} and it applied protections to “monuments or memorials for any war or engagement” therein. It further provided that the monument or memorial could be placed on “any” of the locality’s property and receive the protections of the statute.\textsuperscript{13} It otherwise simplified the language used in the section, but did not alter the prospective phrasing (“[i]f such are erected”) of the statute’s protection.

A year later, the General Assembly broadened the scope of the statute considerably by permitting localities to authorize the erection of “monuments or memorials for any war or conflict, or . . . any engagement of such war or conflict.”\textsuperscript{14} It returned the list of conflicts to the statute (as expanded in accordance with § 2.1-21),\textsuperscript{15} but the list now served only to provide well-known examples of covered conflicts. The General Assembly also expanded the locality’s authority to authorize or permit such monuments to the “geographical limits” of the locality, not just the locality’s own property.\textsuperscript{16} Finally, it added a definition of “disturb or interfere” to include “placement of Union markings or monuments on previously designated Confederate memorials or the placement of Confederate markings or monuments on previously designated Union memorials.”\textsuperscript{17} Revisions in 2005 and 2010 added specific wars or conflicts to the list in the statute, but otherwise did not alter its language.\textsuperscript{18}

\textsuperscript{11} 1997 Va. Acts ch. 587.

\textsuperscript{12} In particular, it expanded the list by replacing the term “Confederate . . . monuments and memorials” with monuments and memorials to the “War Between the States.” It also added the following wars: Indian Uprising [Algonquin War], French and Indian Wars, and Operation Desert Shield-Desert Storm. \textit{See} 1997 Va. Acts ch. 587 and former VA. CODE ANN. § 2.1-21 (1993) (codified in current form at § 2.2-3300).

\textsuperscript{13} 1997 Va. Acts ch. 587.

\textsuperscript{14} 1998 Va. Acts ch. 752.

\textsuperscript{15} The amendment also made specific mention of “Confederate or Union monuments or memorials of the War Between the States.” \textit{Id.} (emphasis added).

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}

b. Impact of § 15.2-1812

In evaluating the impact of this Code section, it should be noted that the longstanding rule in Virginia is that statutes “are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question.”19 “The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared.”20 When the General Assembly omits a clear manifestation of intent that a statutory change should apply retroactively, it generally should be concluded that the legislature did not intend such an application.21 Additionally, “[i]n determining legislative intent,” Virginia courts look “both to legislation adopted and bills rejected by the General Assembly.”22 This includes House Bill 587 from the 2016 session of the General Assembly that would have expressly made § 15.2-1812 apply retroactively by inserting language providing that “[t]he provisions of this subsection shall apply to all such monuments and memorials, regardless of when erected.” Governor McAuliffe vetoed the legislation on March 10, 2016, and the General Assembly failed to override the veto.23

Coupled with the decidedly prospective language chosen by the General Assembly in the statutory text, applying these rules of construction to the multitude of amendments to the Code section over the years shows that while it does apply to some monuments, there is a range of potential outcomes for individual monuments. First, the Code section does not apply to any monument or memorial constructed prior to 1904. The Circuit Court of Danville ruled in Heritage Preservation Association, Inc. v. City of Danville that it does not apply.

With respect to the history of § 15.2-1812 outlined above, certain substantive amendments not relevant herein have been omitted, but may be found by reference to the cited Acts of Assembly.

19 Arey v. Lindsey, 103 Va. 250, 252 (1904).
21 Id. (“It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention.”) (quotation marks and citation omitted).
to any monument or memorial erected within an independent city prior to 1997. Nor does it apply to a monument or memorial erected on any property other than the “public square” at the county seat before the same year. Finally, the statute applies only to monuments or memorials for wars or conflicts or “war veterans.”

2. Individual Enactments of the General Assembly

Putting aside the impact of § 15.2-1812 of the Code of Virginia, a large number of monuments around the Commonwealth owe their existence to specific Acts of the General Assembly. For example, a monument erected in the City of Alexandria is subject to the provisions of Chapter 119 of the 1890 Acts of Assembly. In 1903, the General Assembly specifically authorized construction of Confederate monuments on the public squares of Mecklenburg, Greensville, Botetourt, Bedford, Campbell, Amelia, and King William counties. Some of these Acts contain restrictions on the disturbance of the monument, others are silent, and in the case of King William,

24 Case No. CL15000500-00 (Dec. 7, 2015). The Supreme Court of Virginia declined to grant a writ in the case (Record No. 160310), both on initial petition (June 17, 2016) and on a request for rehearing (October 7, 2016).

25 No definition of “public square” appears in the current Code, nor apparently historically within the Code. A number of older enactments refer to a public square as an area of land where the county courthouse, clerk’s office and other official county buildings were located. See, e.g., 1890 Va. Acts ch. 632 (describing laying out a public square for the new county seat of Wise County).

26 For example, this Office previously opined that the protections of the current Code section do not extend to “memorials or markers erected to recognize the historical significance of buildings.” 2015 Op. Va. Att’y Gen. 120, 123.

one Act contains such a restriction and a related Act does not.\textsuperscript{34} Several other such enactments are found within the Acts of Assembly, both predating\textsuperscript{35} and postdating\textsuperscript{36} the 1904 passage of what is now § 15.2-1812.

Each jurisdiction, therefore, may find itself in a unique situation as a result of a particular Act of Assembly. The list set forth above is not exhaustive, and any locality evaluating the potential restrictions on its ability to remove or relocate a war or veterans memorial must research whether an individual Act may govern the situation presented.

3. Other Legal Constraints

In addition to the enactments of the General Assembly discussed above, other legal constraints might limit the ability of a locality to remove or relocate a war or veterans monument. For example, a monument may have been donated to the locality subject to reversionary terms or conditions in the transfer instrument triggered by the locality’s attempt to remove or disturb the monument.\textsuperscript{37} Or, the locality might have received funding for the acquisition, maintenance, preservation or enhancement of the monument through a grant program that places restrictions on any alteration of the monument. As an example, a grant received under the National Historic Preservation Act likely includes a Preservation Agreement\textsuperscript{38} imposing certain restrictions on the receiving party, and likely would require recordation of restrictive covenants on the property on which the monument is located. Again, the specific

\textsuperscript{34} Chapter 58 contains a restriction against disturbance or interference, see 1902-1904 Va. Acts ch. 58; Chapter 61, which authorizes the use of county funds for the monument, does not, see 1902-1904 Va. Acts ch. 61. Both passed the General Assembly on the same date.

\textsuperscript{35} See 1897-1898 Va. Acts ch. 320 (Rappahannock County); 1897-1898 Va. Acts ch. 553 (Orange County).

\textsuperscript{36} See 1908 Va. Acts ch. 243 (New Kent County); 1908 Va. Acts ch. 86 (King and Queen County).

\textsuperscript{37} The Supreme Court of Virginia has recognized generally that reversionary clauses in deeds to the Commonwealth are enforceable. See Commonwealth Transp. Comm’r v. Windsor Indus., 272 Va. 64 (2006).

\textsuperscript{38} 54 U.S.C. § 302902(b)(1)(C) (requiring a grant recipient to maintain and administer the property “in a manner satisfactory to the Secretary”). The Secretary of the Interior, through the National Park Service’s Grants Manual, imposes a number of requirements to receive federal funds under the Act, including the necessity of a Preservation Agreement and restrictive covenants.
circumstances of each monument must be investigated thoroughly to determine what restrictions may apply.

CONCLUSION

In my opinion, local governments must consider a number of potential restrictions that may apply to removal or relocation of a war or veterans monument as a function of general law, special Act of Assembly, or other limitations such as those imposed upon the donation or conveyance of the monument or limitations arising from participation in a preservation or funding program by action of the locality. Depending on when the monument was erected and where it is located, § 15.2-1812 of the Code of Virginia may or may not prohibit the locality from such actions. Careful investigation of the history and facts concerning a particular monument in a given locality should be completed to determine what, if any, restrictions might apply.

OP. NO. 17-009

COUNTIES, CITIES AND TOWNS: JOINT ACTIONS BY LOCALITIES - VOLUNTARY ECONOMIC GROWTH-SHARING AGREEMENTS

The only “affected localities” who are required to be parties to a revenue-sharing agreement pursuant to § 15.2-1301 are those that assume obligations arising from terms and conditions of the agreement affecting their rights regarding revenue, tax base, or economic growth.

THERESA J. FONTANA, ESQUIRE
COVINGTON CITY ATTORNEY

SEPTEMBER 1, 2017

ISSUES PRESENTED

You ask what the criteria are for a locality to be an “affected locality” so as to be a necessary party to a revenue sharing agreement. You also ask whether two towns are necessary parties to such an agreement between Allegheny County and the City of Covington.
You relate that Alleghany County (the “County”) and the City of Covington (the “City”) have approved, after negotiation, a joint economic growth-sharing agreement (the “Agreement”). It contemplates their creating a “Development Area” in which tax growth will, in general, be divided equally as “Tax Increment Revenue Sharing.” Other revenue obtained from properties in the Development Area will generally be divided equally. The Development Area is not identified in the Agreement. Instead, it is to be designated at some time in the future “by concurrent ordinance of the governing bodies” of these two localities.

There are two incorporated towns—Clifton Forge and Iron Gate—located within the County. Neither town is a party to the Agreement. If any part of the Development Area is to be within either town, the town’s prior concurrence is required:

[T]he County and the City may designate parcels as part of the Development Area that are within the incorporated areas of the Towns of Clifton Forge and Iron Gate [by concurrent ordinance], provided however that as a condition of such Ordinance going into effect, the Town Council of the relevant Town shall adopt an ordinance concurring in the designation.

Should that occur, town taxes on property within the Development Area will not be affected:

1 The “base tax” received by either locality from any property in the Development Area would continue to go to that locality, with only increased tax receipts above this baseline to be divided equally between the two localities. See Joint Economic Development & Growth-Sharing Agreement, by and between Alleghany County, Virginia and the City of Covington, Virginia, §§ 1.3, 1.4, 1.12, 1.18, 1.19, 3.1, 3.3.

2 Id. §§ 1.12, 2.1.

3 Id. § 2.2.
Taxes laid by the Towns of Clifton Forge and Iron Gate shall not be subject to this Agreement, and the Towns will continue to tax property within Development Areas as all other property within their borders.[4]

The Agreement does not contemplate either town sharing with the City or the County its revenue, tax base, or any aspect of economic growth from the Development Area. If the revenue, tax base, or economic growth of either town is enhanced by the Development Area, the town retains the entire amount of that enhancement.

After the County and the City approved the Agreement, they referred it to the two towns for review and comment. You state that neither town has raised any objections or requested any changes to the Agreement.

The Agreement also was submitted to the Commission on Local Government for review. The Commission issued an advisory report in May of this year stating that it was overall supportive of the Agreement.5

**APPLICABLE LAW AND DISCUSSION**

The statutory authority for the Development Area is § 15.2-1301 of the *Code of Virginia*, which addresses binding agreements for economic growth-sharing:

A. Any county, city or town, or combination thereof, may enter voluntarily into an agreement with any other county, city or town, or combination thereof, whereby the locality may agree for any purpose otherwise permitted, including the provision on a multi-jurisdictional basis of one or more public services or facilities or any type of economic development project, to enter into binding fiscal arrangements for fixed

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4 *Id.* § 3.2.

time periods, to exceed one year, to share in the benefits of the economic growth of their localities.\textsuperscript{[6]}

Under this statute, approval by the “affected localities” is required:

B. The terms and conditions of the revenue, tax base or economic growth-sharing agreement as provided in subsection A shall be determined by the affected localities and shall be approved by the governing body of each locality participating in the agreement . . . .\textsuperscript{[7]}

Subsection A refers to localities that agree to enter into “binding fiscal arrangements . . . to share in the benefits of the economic growth of their localities.” Subsection B states that “the affected localities” of a subsection A agreement must enter into the agreement. Thus, the only locality that is “affected” (subsection B) is one that agrees to be part of a “binding fiscal arrangement/[ . . . to share in the benefits of . . . economic growth” (subsection A). Under the facts you have presented, neither of the two towns in question will be part of a binding fiscal arrangement to share the benefits of economic growth. For that reason alone, neither of those towns is an “affected locality” within the meaning of this statute.

In addition, I note that the phrase “affected localities” appears several times elsewhere in the Code of Virginia. Most relevant are the places it appears in statutes dealing with local status and boundary transitions. For example, § 15.2-2907 requires the review of the Commission on Local Government when certain status transitions are sought. It provides in subsection B that the Commission must “report, in writing, its findings and recommendations to the affected localities, and any other localities likely to be affected by such proposed action.”\textsuperscript{8} The fact that this sentence distinguishes “affected localities” from “any other localities likely to be affected” indicates that the phrase “affected localities” often is a term of art referring to localities whose legal rights are

\textsuperscript{6} VA. CODE ANN. § 15.2-1301(A) (Supp. 2016).

\textsuperscript{7} Section 15.2-1301(B) (emphasis added).

\textsuperscript{8} Emphasis added.
affected.  Here, the proposed growth-sharing agreement would not affect the legal rights of the two towns in question. Thus, while they could possibly be described as “localities likely to be affected” by the growth-sharing agreement, they are not “affected localities,” and thus are not necessary parties to the agreement.

Finally, I note that under the proposed agreement, each town is given the further right of approval or disapproval if any part of the Development Area is to be within its borders.

CONCLUSION

For the reasons set forth above, it is my opinion that the only “affected localities” who are required to be parties to a revenue-sharing agreement pursuant to § 15.2-1301 of the Code of Virginia are those that assume obligations arising from terms and conditions of the agreement affecting their rights regarding revenue, tax base, or economic growth. Based on the facts you have presented, neither Clifton Forge nor Iron Gate would be an “affected locality,” and therefore neither locality is a required party to the proposed revenue-sharing agreement between Allegheny County and the City of Covington.

OP. NO. 17-008

ADMINISTRATION OF GOVERNMENT:
FOUNDATIONS AND OTHER COLLEGIATE BODIES – VIRGINIA INTERNATIONAL TRADE CORPORATION

While the Virginia International Trade Corporation has had legal existence since December 1, 2016, and the Governor has the authority to appoint members of the Board, the total lack of any appropriation for the Corporation at the present time means there would be no practical

9 See also VA. CODE ANN. § 15.2-3108 (Supp. 2016) (dealing with boundary adjustments between localities; the term “affected localities” clearly refers only to the localities whose boundaries are being adjusted); § 15.2-3211 (2012) (dealing with annexation by towns and cities; the term “affected localities” is used in subsection 5 to refer only to arrangements between localities that would share public improvements in annexed areas, even though there might be other parties to a special court action); § 15.2-3534(17) (2012) (dealing with referenda on consolidation issues; the term “affected localities” refers only to the localities whose interests would be directly impacted by the outcome of a referendum).
point in doing so.

THE HONORABLE R. STEVEN LANDES
MEMBER, VIRGINIA HOUSE OF DELEGATES

NOVEMBER 16, 2017

ISSUES PRESENTED

You ask whether the statute creating the Virginia International Trade Corporation is in current effect, and whether the Governor may appoint members to its Board.

BACKGROUND

The 2016 Session of the General Assembly enacted a bill, H.B. 858, creating a new entity, the Virginia International Trade Corporation (the “Corporation”). Upon enactment, the bill was signed by the Governor. As stated in the bill, the Corporation is created as an agency of the Executive Branch of state government, and its purpose is “to promote international trade in the Commonwealth.” Further, the Corporation is to be governed by a Board of Directors (the “Board”) composed of 17 members, as follows:

the Secretaries of Agriculture and Forestry, Commerce and Trade, Finance, Technology, and Transportation, or their designees, serving ex officio with voting privileges, and 12 nonlegislative citizen members appointed by the Governor, subject to confirmation by the General Assembly. The members appointed by the Governor shall have experience as senior management personnel or leaders in the areas of agriculture, finance, development, international business, manufacturing, and trade with at least two having background and experience specific to agriculture. Ex officio members of the Board shall serve terms coincident with their terms of

1 You were the Chief Patron.
3 Section 2.2-2738(A).
office. Appointments to fill vacancies, other than by expiration of a term, shall be for the unexpired terms. After the initial staggering of terms, nonlegislative citizen members shall be appointed for a term of six years. Nonlegislative citizen members shall be citizens of the Commonwealth.\[4\]

The relevant portion of the bill creating the Corporation and providing for appointment of the Board had a delayed effective date of December 1, 2016.\[5\] The portions of the bill creating the powers and duties of the Corporation and authorizing the Commonwealth to make grants to it were made effective April 1, 2017.\[6\] There was no reenactment clause or expiration date attached to the bill, nor was the legal existence of the Corporation or the powers of appointment to the Board made contingent on funding, or other conditions.\[7\]

While H.B. 858 was neither repealed nor amended in any way by the 2017 Session, the appropriation that was originally intended to be transferred to the Corporation from the Virginia Economic Development Partnership was later reversed.\[8\] Under the present budget, there is no funding whatsoever for the operating expenses or staff of the Corporation.

**APPLICABLE LAW AND DISCUSSION**

“When construing a statute, [the] primary objective is ‘to ascertain and

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\[4\] Id., subsection B.


\[6\] Id., cl. 3, affecting §§ 2.2-2740 and 2.2-2741.


give effect to legislative intent,’ as expressed by the language [of] the statute.”

“Under basic rules of statutory construction, we determine the General Assembly’s intent from the words contained in the statute.” Moreover, “[w]e ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’”

Here, when the 2016 Session created the Corporation by enacting H.B. 858, it did so in a clear and straightforward fashion, establishing the Corporation’s legal existence as effective December 1, 2016, and it provided authorization for appointments to the Board, as of that same date. The ability of the corporation to exercise its powers, and the ability of the Commonwealth to make grants to it, do have a later effective date, April 1, 2017. However, this later date affects only the exercise of powers and the awarding of grants. It does not affect either the legal existence of the Corporation or the Governor’s authority to appoint Board members, which became effective by the express terms of H.B. 858 on December 1, 2016.

Thus, while the Corporation does have legal existence, as an abstract legal matter, and the Governor has legal authority to appoint the members of its Board, the absence of any appropriation for the Corporation would make it impossible for the Board to perform any of its statutory functions, if appointed and confirmed, as a practical matter.

CONCLUSION

For the foregoing reasons, it is my opinion that, while the Virginia International Trade Corporation has had legal existence since December 1, 2016, and the Governor has the authority to appoint members of the Board, the total lack of any appropriation for the Corporation at the present time means there would be no practical point in doing so.

You ask whether a sheriff may assign a deputy to provide full-time security at a facility operated by a community services board. The facility is designed for children and adolescents who are referred there by one of two local school divisions.

BACKGROUND

The facility, named The Children’s Campus, is operated by the Highlands Community Services Board1 (“HCSB”) for the City of Bristol and the County of Washington.2 Students are referred there by the public school divisions of those localities for the purpose of receiving a variety of services, including academic and mental health services. The students remain enrolled in their public school divisions of origin, with their attendance at the facility considered a temporary enrollment oriented toward their re-entry into their regular school systems. The facility has two full-time classroom teachers. The two participating school 

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1 A “community services board” is “a public body established pursuant to § 37.2-501 of the Code of Virginia that provides mental health, mental retardation, and substance abuse services to individuals within each city or county that established it.” 12 VA. ADMIN. CODE § 35-180-10.

2 The facility is a therapeutic day treatment program regulated by the Virginia Department of Behavioral Health and Developmental Services and licensed as a mental health school-based therapeutic day treatment service for children and adolescents with serious emotional disturbance. See 12 VA. ADMIN. CODE § 30-60-61(D).
divisions provide student transportation to and from the facility, and students are given breakfast and lunch. Students are not charged tuition.

To enhance the safety of students and staff at the facility, HCSB has entered into an agreement with the Washington County Sheriff for the Sheriff to provide a properly trained and qualified deputy sheriff to be present at the facility. The HCSB intends to make quarterly reimbursement payments to the county in order to fund the deputy’s position. Your inquiry is whether this assignment is legally permissible.

**APPLICABLE LAW AND DISCUSSION**

A prior opinion of this Office states that a sheriff is “authorized to assign specific duties and responsibilities to the deputies under his command. . . . However, his duties and powers are limited to those conferred expressly or by necessary implication by statute: despite a sheriff’s discretion in assigning duties, he may not assign duties that do not fall within the scope of his authority.”³ For example, prior opinions of this Office have concluded that providing full-time security at a private facility does not fall within the scope of a sheriff’s authority and is impermissible for that reason.⁴ Thus, the question presented is whether assignment of a deputy sheriff to enhance and ensure security at a public facility such as The Children’s Campus is within a sheriff’s duties and powers.

The office of the sheriff is established in the Constitution of Virginia, which provides in Article VII, § 4 that “[t]here shall be elected by the qualified voters of each county and city . . . a sheriff . . . [whose] duties . . . shall be prescribed by general law or special act.” It is well-established that a sheriff is a conservator of the peace, even in the absence of specific statutory authority to that effect.⁵ “The office of conservators of the peace is a very ancient one, and their common law authority . . . extends throughout the territory for which they are elected or appointed . . . .”⁶ In addition to his other powers and duties, a

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⁴ Id. at 95. See also 1991 Op. Va. Att’y Gen. 218, 220 (stating that a sheriff may not assign a deputy to function as a correctional officer in a privately owned correctional facility, because such service “is beyond the scope of those duties imposed on [the] sheriff”).
sheriff, “may perform such other duties, not inconsistent with his office, as may be requested of him by the governing body,” ⁷ to include providing security to various public facilities, most notably including jails ⁸ and courthouses; ⁹ and a public school division may contract with the local sheriff for the assignment of officers to provide security during school board meetings. ¹⁰

It is thus clear that one of the foremost duties and powers of a sheriff is to protect public safety at public facilities. That conclusion is manifestly evident from multiple statutory and inherent common law powers of sheriffs, some of which are noted above. I therefore conclude that providing security for students and faculty at The Children’s Campus, a public facility, is within the scope of a sheriff’s authority and is thus permissible. ¹¹

CONCLUSION

Accordingly, it is my opinion that a sheriff may assign a deputy to provide full-time security at a public facility such as a program for students that is operated by a community services board in cooperation with a local public school system.

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⁷ VA. CODE ANN. § 15.2-1609 (2012).
⁸ Section 53.1-116.2 (2013) (“The sheriff of each county or city shall be the keeper of the jail thereof . . . .”); see § 53.1-125 (2013) (indicating that sheriffs are charged with the operation and management of local jails); see also 2006 Op. Va. Att’y Gen. 162.
⁹ Section 53.1-120 (2013) (“Each sheriff shall ensure that the courthouses and courtrooms within his jurisdiction are secure from violence and disruption and shall designate deputies for this purpose . . . . The sheriff shall have the sole responsibility for the identity of the deputies designated for courtroom security.”).
¹¹ Because a sheriff has inherent power to protect public facilities as he sees fit, I need not reach the question of whether a deputy sheriff who is so assigned qualifies the school systems or their localities for matching grants under the School Resource Officer Grants Program and Fund, as per § 9.1-110 (Supp. 2017).
OP. NO. 17-005

INSTITUTIONS OF HIGHER EDUCATION; OTHER EDUCATIONAL AND CULTURAL INSTITUTIONS: VIRGINIA COMMONWEALTH UNIVERSITY HEALTH SYSTEM AUTHORITY

The Supreme Court of Virginia likely would find, in light of the functions and history of the Virginia Commonwealth University Health System Authority (“VCUHSA”), that it is a State agency or arm of the Commonwealth for the purposes of sovereign immunity, and therefore is entitled to absolute immunity from suit. Even if the Court were not to agree, however, VCUHSA also satisfies the criteria of a quasi-municipal corporation and therefore would be entitled to immunity for governmental functions.

The Virginia Tort Claims Act exposes the Commonwealth, but not VCUHSA, to limited liability for the negligent acts of its employees.

THE HONORABLE JAMES P. “JIMMIE” MASSIE, III
MEMBER, VIRGINIA HOUSE OF DELEGATES

DECEMBER 7, 2017

ISSUES PRESENTED

You have asked whether the Virginia Commonwealth University Health System Authority (the “Authority” or “VCUHSA”) has absolute or qualified immunity from lawsuits that may be brought against it. You also have asked whether the amount of any recovery against VCUHSA for damages, loss of property, or personal injury or death caused by a negligent or wrongful act or omission of its employees is limited to $100,000 in accordance with § 8.01-195.3 of the Code of Virginia.

BACKGROUND

1. History

The origins of the health system now known as VCUHSA date to 1838, and for all but a few years of its history it has served the Commonwealth as a public entity. In 1854, the General Assembly granted an independent charter to

1 See VCU School of Medicine, History – Timeline, VIRGINIA COMMONWEALTH UNIVERSITY, http://www.medschool.vcu.edu/about/history/timeline/ (last visited Dec. 5, 2017).
the “Medical College of Virginia” (“MCV”), and six years later, MCV transferred its assets to the Commonwealth in return for an appropriation of $30,000.² Beginning in 1861, MCV opened and operated a series of hospitals and outpatient clinics.³ In 1968, the General Assembly merged MCV with the Richmond Professional Institute to form Virginia Commonwealth University (“VCU” or “the University”).⁴

In 1996, the General Assembly enacted, and Governor Allen signed, legislation establishing the Medical College of Virginia Hospitals Authority (“MCVHA”).⁵ Pursuant to that legislation, MCVHA was “created as a public body corporate and as a political subdivision of the Commonwealth” and was “constituted [as] a public instrumentality, exercising public and essential governmental functions.”⁶ The General Assembly established a deadline of June 30, 1997 “for the transfer of employees to the Authority and for the transfer of hospital facilities, or any parts thereof, to and the assumption, directly or indirectly, of hospital obligations by the Authority.”⁷

In 2000, the name of the authority was changed from MCVHA to “Virginia Commonwealth University Health System Authority.”⁸ Under its current governing statute, recently recodified in Title 23.1,⁹ VCUHSA remains “a public body corporate, public instrumentality, and political subdivision of the Commonwealth with such public and corporate powers as are set forth in [Code §§ 23.1-2400 through 23.1-2428].”¹⁰

² Id.
³ See id.
⁴ 1968 Va. Acts ch. 93 (“The colleges, schools, and divisions heretofore existing as The Medical College of Virginia shall, as of July 1, 1968, be designated The Medical College of Virginia, Health Sciences Division of Virginia Commonwealth University.”).
⁶ Id.
⁷ Id.
2. Governance and Leadership

VCUHSA is governed by a 21-member board of directors (the “Board”), consisting of 19 appointed members and two ex officio members: the President of VCU, and VCU’s Vice President for Health Sciences.\(^{11}\) The rector of VCU appoints five nonlegislative Board members from the VCU Board of Visitors; the Governor appoints six nonlegislative members; the Speaker of the House appoints five Board members; and the Senate Committee on Rules appoints three.\(^{12}\) Five members of the Board must be physicians who are VCU faculty members with hospital privileges; they are among those appointed by the Governor and General Assembly—two by the Governor, two by the Speaker, and one by the Senate Committee on Rules—“after consideration of names from lists submitted by the faculty physicians of the School of Medicine of the University through the Vice-President for Health Sciences of the University.”\(^{13}\) The President of VCU serves as chair of the Board.\(^{14}\)

VCUHSA is “under the immediate supervision and direction of a chief executive officer” who is defined as “the individual who holds the title of Vice-President for Health Sciences” at VCU.\(^{15}\) The selection and removal of the CEO of VCUHSA is “made jointly” by the Board and the VCU Board of Visitors.\(^{16}\) In the event that a majority of both boards do not agree on the selection, removal, or conditions of employment of a CEO, and representatives of the boards cannot resolve the disagreement, then the President of VCU “shall decide upon the matter.”\(^{17}\)

3. Purposes

You correctly relay that, under § 23.1-2401(B) of the Code of Virginia, the purpose of VCUHSA is “to exercise public and essential governmental functions”—specifically,

\(^{11}\) Section 23.1-2402(A) (2016).

\(^{12}\) Id.

\(^{13}\) Section 23.1-2402(A) to (C).

\(^{14}\) Section 23.1-2402(G).

\(^{15}\) Section 23.1-2403(A) (2016).

\(^{16}\) Id.

\(^{17}\) Section 23.1-2403(B).
to provide for the health, welfare, convenience, knowledge, benefit, and prosperity of the residents of the Commonwealth and such other individuals who might be served by the Authority by delivering and supporting the delivery of medical care and related services to such residents and individuals, providing educational opportunities in the medical field and related disciplines, conducting and facilitating research in the medical field and related disciplines, and enhancing the delivery of health care and related services to the Commonwealth’s indigent population.[18]

The General Assembly has further enumerated six purposes of VCUHSA, authorizing it to “perform such public and essential government functions with the power and purpose” to:

1. Provide health care, including indigent care, to protect and promote the health and welfare of the citizens of the Commonwealth;

2. Serve as a high-quality teaching hospital to provide and promote health care by educating medical and health sciences professionals, providing medical services not widely available in the Commonwealth, and treating patients of the type and on the scale necessary to facilitate medical research and attract physicians, faculty members, researchers, and other individuals necessary to maintain quality medical and health sciences education;

3. Facilitate and support the health education, research, and public service activities of the Health Sciences Schools of the University;

4. Serve as the principal teaching and training hospital for undergraduate and graduate students of the Health Sciences Schools of the University;

5. Provide a site for faculty members of the Health Sciences

[18] Section 23.1-2401(B).
6. Operate and manage general hospital and other health care facilities, engaging in specialized management and operational practices to remain economically viable, earning revenues necessary for operations, and participating in arrangements with public and private entities and other activities, taking into account changes that have occurred or may occur in the future in the provision of health care and related services.\[^{19}\]

The General Assembly also required that the “Authority shall operate, maintain, and expand, as appropriate, teaching hospitals and related facilities for the benefit of the Commonwealth and its citizens and such other individuals who might be served by the Authority.”\[^{20}\]

4. Powers

The Authority has been given “all the powers necessary or convenient to carry out the purposes and provisions of” its enabling chapter.\[^{21}\] The *Code of Virginia* also expressly grants VCUHSA more than two dozen specific powers, including the power to:

- “[s]ue and be sued in its own name”;\[^{22}\]
- “[m]ake and execute contracts, guarantees, or any other instruments and agreements necessary or convenient for the exercise of its powers and functions, including contracts with hospitals or health care businesses to

\[^{19}\] *Id.*

\[^{20}\] Section 23.1-2401(C).

\[^{21}\] Section 23.1-2404(A) (Supp. 2017).

\[^{22}\] Section 23.1-2404(A)(1).
operate and manage any or all of the hospital facilities or operations”.

• “[c]onduct or engage in any lawful business, activity, effort, or project consistent with the Authority’s purposes or necessary or convenient to exercise its powers”;  

• exercise all powers granted to corporations not inconsistent with the enabling chapter;  

• borrow money and issue bonds;  

• seek financing from and enter into contracts with the Commonwealth, the Virginia Public Building Authority, and the Virginia College Building Authority;  

• procure insurance or provide self-insurance;  

• accept loans, grants, contributions, or other assistance from all sources, including the federal government and the Commonwealth;  

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23 Section 23.1-2404(A)(5). The term “hospital facilities” is defined as “all property or rights in property, real and personal, tangible and intangible, including all facilities suitable for providing hospital and health care services . . . and other related and supporting facilities owned, leased, operated, or used, in whole or in part, by Virginia Commonwealth University as part of, or in connection with, MCV Hospitals in the normal course of its operations as a teaching, research, and medical treatment facility.” Section 23.1-2400 (2016).  

24 Section 23.1-2404(A)(6).  

25 Section 23.1-2404(A)(7).  

26 Section 23.1-2404(A)(9). See also § 23.1-2418 (2016) (setting forth in greater detail the Authority’s power to issue bonds).  

27 Section 23.1-2404(A)(10), (11).  

28 Section 23.1-2404(A)(12). The provision indicates that the “purchase of insurance, participation in an insurance plan, or creation of a self-insurance plan by the Authority is not a waiver or relinquishment of any sovereign immunity to which the Authority or its officers, directors, employees, or agents are otherwise entitled.” Id.  

29 Section 23.1-2404(A)(15).
The exercise of the powers permitted by this chapter shall be deemed the performance of essential governmental functions and matters of public necessity for the entire Commonwealth in the provision of health care, medical and health sciences education, and research for which public moneys may be borrowed, loaned, spent, or otherwise utilized and private property may be utilized or acquired.\[33\]

**APPLICABLE LAW AND DISCUSSION**

I respond to each of your questions in the corresponding sections below.

\[30\] Section 23.1-2404(A)(16).

\[31\] Section 23.1-2404(A)(23).

\[32\] Section 23.1-2404(A)(25).

\[33\] Section 23.1-2404(B).
1. Whether VCUHSA has absolute or qualified immunity from suit.

You ask for confirmation that, “as an agency of the Commonwealth of Virginia,” VCUHSA “itself has absolute or qualified immunity.” The Supreme Court of Virginia has not had occasion to address either whether VCUHSA is “an agency of the Commonwealth” or whether it is entitled to absolute or qualified immunity. While I note that the Secretary of the Commonwealth categorizes VCUHSA as an “independent agency” for the purposes of the organization of state government, it is not necessary to decide whether, in all circumstances, VCUHSA should be treated as an agency. The Attorney General has previously opined that an authority may be considered an agency for some purposes but not others.

Thus, in responding to your request, it is sufficient to conclude—which I do, for the reasons set forth below—that the Supreme Court of Virginia would likely hold that VCUHSA is an arm of the Commonwealth for purposes of sovereign immunity. Accordingly, it would have absolute immunity from suit. But even if the Supreme Court were to conclude that VCUHSA is not entitled to absolute immunity, it would be entitled to qualified immunity when performing governmental functions.

34 The Secretary’s state government organizational chart identifies VCUHSA as an “independent agency,” along with the Virginia Retirement System (the “VRS”), the State Corporation Commission (the “SCC”), and the Virginia Lottery, among others. See Secretary of the Commonwealth, Organization of Virginia State Government, VIRGINIA.GOV, available at http://commonwealth.virginia.gov/va-government/organization-of-virginia-state-government/ (last visited Dec. 5, 2017). Federal courts have agreed that the VRS and SCC are agencies of the State entitled to immunity. See Sculthorpe v. Va. Ret. Sys., 952 F. Supp. 307, 309-10 (E.D. Va. 1997) (VRS “is an independent agency of the state. . . . [I]t is an ‘arm of the state’ entitled to immunity . . . .”); Croatan Books, Inc. v. Commonwealth, 574 F. Supp. 880, 885 (E.D. Va. 1983) (“Clearly, the State Corporation Commission has no life other than that derived from the State; rather the agency is the Commonwealth itself in its role as business regulator, not an entity independent of it.”).

35 See, e.g., 1985-1986 Op. Va. Att’y Gen. 150, 151, 152 n.2 (soil and water conservation district defined in the Code as a “governmental subdivision” is a political subdivision but is an agency for purposes of sovereign immunity); 1976-1977 Op. Va. Att’y Gen. 319, 319 (Virginia Port Authority is a political subdivision but is an agency for purposes of statute governing appointment of its administrative head).
a. The Supreme Court of Virginia would likely find that VCUHSA is entitled to absolute immunity.

“[T]he doctrine of sovereign immunity is ‘alive and well’ in Virginia.” 36

“Sovereign immunity is ‘a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.’” 37

“Most importantly, the doctrine of sovereign immunity provides for ‘smooth operation of government’ and prevents ‘citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.’” 38

In determining whether a particular governmental entity is entitled to absolute immunity, the relevant question is whether the entity is properly considered an arm of the Commonwealth. 39 The Supreme Court has “consistently reaffirmed that whether an entity is an arm or agency of the State, and therefore entitled to absolute immunity, depends on the nature of the entity.” 40 As the Court explained in Prendergast v. Northern Virginia Regional Park Authority, 41 the “correct approach is the one we have long employed in the Commonwealth: the attributes of the particular entity which seeks immunity must be examined to determine whether it is an ‘arm’ of the Commonwealth.” 42

Consistent with that approach, when determining the legal status of entities, previous Attorneys General have looked to the particular context and


38 Id. (quoting Messina, 228 Va. at 308).


42 Id. at 194.
factual circumstances.43 They have not relied exclusively on whether an enabling statute identifies an entity as a “political subdivision.”44 Instead, they have “distinguished state agencies from independent political subdivisions by reviewing factors that assess the entity’s reliance on the state for control and funding.”45

[A] state agency is an entity that serves as a subordinate or auxiliary body to fulfill a state purpose, is dependent upon state appropriations, and is subject to state control to a great degree. For example, the exercise of powers of an agency is subject to prior approval or postexercise veto by a higher authority of state government.[46]

By contrast, a political subdivision:

is independent from other governmental bodies, in that it may act to exercise those powers conferred upon it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.[47]

There is no doubt that VCUHSA’s enabling statute confers on it a measure of independence as well as specific powers that are characteristic of political

43 See 2002 Op. Va. Att’y Gen. 281, 283 (“Depending on the context, . . . a political subdivision may be considered a state agency for limited purposes.”).

44 See, e.g., 1978-1979 Op. Va. Att’y Gen. 305, 308 (citation omitted) (“[T]he inquiry must go beyond the statutory provision under which the Authority was created and operated. The actual functioning of the Authority must be reviewed to determine factually whether the Authority is operated as an agency or a political subdivision of the State.”).


subdivisions.48 But based on the factors identified by previous Attorneys General—and in light of VCUHSA’s unique history, status, and interconnectedness with VCU—it is my opinion that the Supreme Court of Virginia would likely find that VCUHSA is, like VCU itself, an arm of the Commonwealth entitled to absolute immunity.

First, VCUHSA, which was created by the General Assembly, remains subject to a substantial degree of State control.49 Every member of VCUHSA’s governing board is either a State official or employee or has been appointed by one. The majority of the Board—12 of 21 members—serve because of their positions at VCU as faculty, officials, or members of the Board of Visitors:50

- five Board members must be physician-faculty members at VCU, chosen by the Governor and the General Assembly members after considering lists submitted by physician faculty of the VCU School of Medicine;

- five Board members are appointed by the rector of VCU from the VCU board of visitors (who themselves have been appointed by the Governor51); and

- two Board members, who are ex officio voting members, are senior officials at VCU: the President of VCU, and

48 Section 23.1-2404(A)(25) (VCUHSA may “[e]xercise independently the powers conferred . . . in furtherance of its corporate and public purposes”). See also infra Part 1.b.

49 The analysis herein regarding State control is offered in the limited context of assessing VCUHSA’s entitlement to sovereign immunity and should not be construed as opining on the relationship between any State entities and employees for purposes of determining respondeat superior liability. Cf. McDonald v. Hampton Training Sch. for Nurses, 254 Va. 79, 82 n.1 (1997) (distinguishing between “the status of an individual for purposes of respondeat superior” and “whether a governmental employee is entitled to sovereign immunity”). Nor should this analysis be construed as opining that a principal-agent relationship exists between VCU and VCU Health System or between VCU and any individual acting in his or her capacity as a VCU Health System employee.

50 See § 23.1-2402(A).

the chief academic and administrative officer for VCU’s Health Sciences School.52

VCU’s significant representation on the Board has been amplified in recent years by the General Assembly, which in 2014 inserted a statutory requirement that the VCU president serve as the Board’s chair;53 previously, the Board elected the chair.54

Elected State officials also dictate the Board’s composition. Fourteen members of the Board—including the five VCU physician faculty—are appointed by the Governor, the Speaker of the House of Delegates, or the Senate Committee on Rules. Although the eight Board members appointed by the Speaker of the House and the Senate Committee on Rules need not be members of the General Assembly themselves, currently three are.55

Not only does the Board’s composition ensure State control over VCUHSA, so does the management structure, which commits oversight of VCUHSA’s operations to a State employee. Under the Code of Virginia, the “Authority shall be under the immediate supervision and direction of a chief executive officer, [who] . . . shall be the individual who holds the title of Vice-President for Health Sciences” at VCU.56 Decisions about the CEO’s appointment or removal are made jointly by the VCU and VCUHSA boards, but if there is a disagreement between those boards that cannot be resolved, the President of VCU makes the final decision.57

Thus, both through operational oversight and Board appointments, the State maintains control over VCUHSA. This has led at least one court to

52 Section 23.1-2402(A). The latter individual holds the title of Vice-President for Health Sciences at VCU and serves as the CEO of VCUHSA. See § 23.1-2403.
53 Section 23.1-2402(G).
56 Section 23.1-2403(A).
57 Section 23.1-2403(A), (B).
conclude that VCUHSA is immune from suit. In *Stewart v. Virginia Commonwealth University*,\(^{58}\) an employment discrimination suit, the U.S. District Court for the Eastern District of Virginia concluded that VCU, as well as “its health system [and] medical center . . . are agencies of the Commonwealth of Virginia, arms of the State, and consequently entitled to sovereign immunity from suit . . . .”\(^{59}\) In arriving at that conclusion, the court reasoned that, under the *Code of Virginia*, VCU is “under the control of the General Assembly,” and that the General Assembly “specifically empower[ed] VCU to operate a medical center . . ., a school of medicine . . ., and [VCUHSA].”\(^{60}\)

The level of State control distinguishes VCUHSA from other entities that the Supreme Court of Virginia has found not to be immune from suit.\(^{61}\) For instance, in *Virginia Electric & Power Company v. Hampton Redevelopment & Housing Authority*,\(^{62}\) the Supreme Court of Virginia concluded that a municipal housing authority, despite being denominated a political subdivision of the Commonwealth, “is not entitled to the same immunity from tort liability that is enjoyed by the Commonwealth” because it “is an entity purely local in nature.”\(^{63}\) The authority “does not come into existence by state initiative; local activation, optional with each locality, is required.”\(^{64}\) Similarly, in *Prendergast*, the Supreme Court of Virginia held that the authority was not an “arm of the Commonwealth” because it “was not directly created by the Commonwealth”

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\(^{59}\) *Stewart*, 2010 WL 1170002, at *4. The U.S. Court of Appeals for the Fourth Circuit later vacated the district court’s dismissal of Stewart’s Title VII claim “against VCU and its allied medical facilities” in light of Supreme Court precedent that, “in enacting Title VII, Congress properly abrogated the states’ Eleventh Amendment immunity for such [employment discrimination] suits.” *Stewart*, 414 F. App’x at 556.

\(^{60}\) *Stewart*, 2010 WL 1170002, at *4.

\(^{61}\) See, *e.g.*, Baird v. Stokes, 82 Va. Cir. 56, 58 (Va. Cir. Ct. (Norfolk) Apr. 5, 2011) (noting that Eastern Virginia Medical School is a municipality rather than a State agency; EVMS “could not accurately be described as a state university medical school”; control was exerted by localities, who appointed most of the Board of Visitors), aff’d, Record No. 120743 (Va. Apr. 5, 2013) (unpublished).

\(^{62}\) 217 Va. 30 (1976).

\(^{63}\) *Id.* at 33.

\(^{64}\) *Id.* at 32.
and “is a creature of one or more localities and is essentially subject to their control.”65 And in Baird v. Stokes,66 a case involving the Eastern Virginia Medical School (“EVMS”), the Supreme Court found no error in a decision by the Circuit Court of the City of Norfolk that EVMS was not an agency of the Commonwealth in part because its governing board, at that time consisting mostly of appointees by local city councils, “maintained control over EVMS in the selection of leadership, as well as the adoption of rules and regulations.”67 “EVMS was thus subject to substantial local control and functioned independently of the Commonwealth.”68

Second, although I understand that VCUSH&A no longer has an “agency code” assigned by the Commonwealth’s Department of Planning and Budget, it is clear that VCUHSA remains dependent on significant financial support from the State.69 In the 2016-2018 biennial budget, for instance, the appropriations for the Department of Medical Assistance Services included approximately $150 million per year from general and non-general funds “to reimburse the Virginia Commonwealth University Health System for indigent health care costs.”70 As the Joint Legislative Audit & Review Commission has explained, the General Assembly’s annual appropriation is unique to VCU Health System and the University of Virginia (“UVA”) Medical Center, “the State’s two academic health centers”:

Virginia’s Medicaid program provides VCU Health System and UVA Medical Center with additional funding to recognize

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65 227 Va. at 194.


67 Id., slip op. at 7-8.

68 Id., slip op. at 8. The Supreme Court also found that, while not an agency, EVMS is a municipal corporation. See id., slip op. at 9.


the important role that these facilities play in providing a health care safety net for Medicaid and uninsured patients in the State, as well as the public interest in ensuring the financial viability of these centers. The State’s academic health centers have been reimbursed for well above their Medicaid costs almost every year over the past decade as a result of the additional funding received, which is designed not only to help offset their Medicaid losses but also to offset the uncompensated care they provide to uninsured patients.

VCU Health System and UVA Medical Center have received 84 percent of the $3 billion over the past 10 years for two primary reasons. As the State’s two academic health centers, they treat a higher percentage of Medicaid patients (26 percent and 20 percent, respectively) compared to other hospitals (14 percent). They also treat a high volume of indigent patients. In FY 2012, the General Assembly appropriated approximately $237 million in supplemental payments to these two hospitals as compensation for the provision of indigent care.

In addition, the 2016-2018 budget includes a roughly $26-million-per-year appropriation to VCU to fund positions at VCUHSA. An item denominated “State Health Services” (the same descriptive heading that covers appropriations to the UVA Medical Center in UVA’s portion of the budget) provides that the “appropriation includes funding to support 200 instructional and administrative faculty positions and for administrative and classified positions which provide services, through internal service agreements, to the Virginia Commonwealth University Health System Authority.”

The General Assembly also has appropriated money to fund VCUHSA building projects. In 2012, in the VCU portion of the budget (also under “State

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Health Services”), a $250,000 appropriation from the general fund was “designated for the Virginia Commonwealth University Health System to plan for a replacement facility for the Virginia Treatment Center for Children.” The funding for that facility came in 2013 when, as part of the Comprehensive Capital Outlay Program, the General Assembly authorized the issuance of over $1 billion in bonds as well as $56 million in higher-education-operating funds for a number of capital projects, including for a “Replacement Facility for the Virginia Treatment Center for Children” at VCU.

The General Assembly also controls VCUHSA’s ability to make large capital expenditures. Under § 23.1-2413 of the Code of Virginia, any capital project in excess of $5 million that is approved by the Board must be proposed to the House Appropriations and Senate Finance Committees with information about its “scope, cost, and construction schedule.” VCUHSA “may undertake the project unless either Committee raises objections within 30 days of the notification, in which case the Authority shall not undertake the project until such objections are resolved.”

Third, the unique history of VCUHSA and its ongoing symbiotic relationship with VCU, which itself enjoys absolute immunity, weigh significantly in favor of concluding that VCUHSA is also entitled to absolute immunity. To be sure, the General Assembly has defined VCUHSA separately in the Code—albeit under the same subtitle of Title 23.1 dealing with “[Public]...

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75 Section 23.1-2413(A) (Supp. 2017).

76 Id. See also § 23.1-2413(B) (requiring that projects in excess of $5 million “shall be . . . presented again” to the General Assembly’s finance committees “[b]efore the Authority materially increases the size or materially changes the scope of any capital project for which construction has commenced”).

Institutions of Higher Education"—and conferred on VCUHSA a greater measure of independence from VCU than it previously enjoyed. But the continuing interconnectedness of VCU and VCUHSA make it difficult to conclude that they should be treated differently for purposes of sovereign immunity. In addition to sharing leadership, VCU and VCUHSA jointly employ a number of employees, collaborate on initiatives and projects such as the Virginia Treatment Center for Children, and share a stake in the success of VCUHSA. In these respects, VCUHSA resembles the UVA Medical Center, which is operated by UVA under the supervision of a board of university officials. In Rector & Visitors of the University of Virginia v. Carter, the

78 See Virginia Code Title 23.1, Subtitle IV. VCUHSA also retains the power, like public universities, to seek financing from the Virginia College Building Authority. See § 23.1-2404(A)(10) (VCUHSA has power to “[s]eek financing from, incur or assume indebtedness to, and enter into contractual commitments with the Virginia Public Building Authority and the Virginia College Building Authority, which authorities may borrow money and make and issue negotiable notes, bonds, and other evidences of indebtedness to provide such financing relating to the hospital facilities or any project.”); § 23.1-1014(A)(2) (Supp. 2017) (“Each covered institution may . . . [s]eek financing from, incur, or assume indebtedness to, and enter into contractual commitments with, the Virginia Public Building Authority and the Virginia College Building Authority, which authorities may borrow money and make and issue negotiable notes, bonds, notes, or other obligations to provide such financing relating to facilities or any project.”).

79 See 2017 Budget Bill – HB 1500 (Chapter 836), Item 210, VIRGINIA’S LEGISLATIVE INFORMATION SYSTEM, available at https://budget.lis.virginia.gov/item/2017/1/HB1500/Chapter/1/210/ (last visited Dec. 6, 2017) (appropriating more than $26 million per year to VCU for “200 instructional and administrative faculty positions and for administrative and classified positions which provide services, through internal service agreements, to [VCUHSA]”).

80 See § 23.1-2428 (2016) (providing that, if VCUHSA is dissolved, “all assets of the Authority, after satisfaction of creditors, shall revert to the University”); § 23.1-2418(A) (providing that the “Authority may issue bonds for any of its purposes, including . . . to refund bonds or other obligations issued by or on behalf of the Authority, the University, or otherwise . . . . The Authority may guarantee, assume, or otherwise agree to pay, in whole or in part, indebtedness issued by the University . . . resulting in the acquisition or construction of facilities for the benefit of the Authority or the refinancing of such indebtedness.”).

81 UVA Medical Center’s Operating Board has a composition somewhat similar to VCUHSA’s. Its voting members consist of the Rector and five other members of UVA board of visitors (including the chair), all of whom have been appointed by the governor; its non-voting members include eight specific University officials, and up to six “public” members. See Health System Board, UVA BOARD OF VISITORS, available at http://www.virginia.edu/bov/mcob.html (last visited Dec. 6, 2017).
Supreme Court of Virginia concluded that, as part of UVA, the UVA Health System was entitled to sovereign immunity.\textsuperscript{83} Although, based on the Code, VCUHSA exercises its powers with greater independence than does UVA Medical Center, it would be incongruous for these two State teaching hospitals to be treated differently for purposes of sovereign immunity unless the General Assembly expressly intended that result.\textsuperscript{84}

VCUHSA’s unique history and status call for careful adherence to the well-established principle that “[t]o the extent an entity is entitled to sovereign immunity, there must be clear legislative intent before such immunity may be waived.”\textsuperscript{85} “A waiver of sovereign immunity will not be implied from general statutory language but must be explicitly and expressly stated in the statute.”\textsuperscript{86} Although this principle is more often invoked to prevent a general statutory waiver such as the Virginia Tort Claims Act\textsuperscript{87} from sweeping more broadly than the General Assembly intended—rather than in analyzing whether a particular entity’s governing statute entitles it to immunity—I believe it applies here. In light of VCUHSA’s features and functions, as well as its intertwined relationship with VCU, it would be appropriate to expect a clear and express

\textsuperscript{82} 267 Va. 242 (2004).

\textsuperscript{83} Id. at 246 (noting that even though “‘agencies’ are nothing more than administrative divisions of the Commonwealth . . . [t]he VTCA waives the sovereign immunity of the Commonwealth only. If the General Assembly desired in the Act to waive the sovereign immunity of the Commonwealth’s agencies in addition to the immunity of the Commonwealth, it could have easily done so. It did not.”).

\textsuperscript{84} See § 23.1-2401(B)(3)–(5) (VCUHSA shall support activities of VCU’s Health Sciences School, provide a site for faculty research, and “[s]erve as the principal teaching and training hospital for undergraduate and graduate students.”); Pike v. Hagaman, 292 Va. 209, 218 (2016) (referring to VCUHSA as a “ ‘state hospital’”). See also 2017 Budget Bill – HB 1500 (Reenrolled), Item 196.B.3, VIRGINIA’S LEGISLATIVE INFORMATION SYSTEM, available at https://budget.lis.virginia.gov/item/2017/1/HB1500/Chapter/1/196 (last visited Dec. 6, 2017) (ordering UVA and VCUHSA to “establish elective Family Practice Medicine experiences in Southwest Virginia for both students and residents”).


\textsuperscript{87} See generally VA. CODE. ANN. §§ 8.01-195.1 to 8.01-195.9 (2015 & Supp. 2017).
legislative statement before finding that its immunity has been waived, rather than construing that result by implication.

VCUHSA’s governing statute does provide that it may “[s]ue and be sued,”88 but the Supreme Court has held that such language does not abrogate sovereign immunity.89 Indeed, far from expressly waiving any immunity it has, VCUHSA’s enabling statute expressly preserves it: Code § 23.1-2404 permits VCUHSA to procure insurance, but specifies that this “is not a waiver or relinquishment of any sovereign immunity to which the Authority or its officers, directors, employees, or agents are otherwise entitled.”90

For these reasons, it is my opinion that the Supreme Court of Virginia would likely find that VCUHSA is entitled to absolute immunity. But that issue has not been conclusively settled. I am aware that the Circuit Court for the City of Richmond ruled last year that VCUHSA is not an arm of the Commonwealth for purposes of sovereign immunity.91 In my view, the court there did not sufficiently account for the factors discussed above. Recognizing that “[t]o determine if a political subdivision is an arm or extension of the state that enjoys absolute immunity, the court must consider factors that assess the entity’s reliance on the Commonwealth for substantial control,” the court found that

88 Section 23.1-2404(A)(1).
89 Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 457 (1961). See also 2006 Op. Va. Att’y Gen. 95, 97 (footnote omitted) (“[T]he Virginia Supreme Court and the Attorney General consistently have interpreted the power to ‘sue and be sued’ or to ‘contract and be contracted with’ insufficient to constitute a waiver of immunity or consent to suit.”).
90 Section 23.1-2404(A)(12). A handful of other statutes contain similar language. See VA. CODE ANN. § 33.2-2608(A)(3) (2014) (Hampton Roads Transportation Accountability Commission); § 23.1-1008(3) (2016) (institutions of higher education covered by the Restructured Higher Education Financial and Administration Operations Act); § 15.2-5340.2 (2012) (hospital authorities); § 62.1-132.1(A)(4) (Supp. 2017) (Virginia Port Authority); § 15.2-5205(19) (2012) (hospital or health center commission); § 15.2-5374(19) (Supp. 2017) (Southwest Virginia Health Authority). I do not suggest that the General Assembly intended any particular level of immunity by this language—only that, combined with the other factors discussed, this language makes an express waiver of sovereign immunity more critical.
91 See Lisa Stanley v. Virginia Commonwealth Univ. Health Sys. Auth. a/k/a Virginia Commonwealth Univ. Health Sys., No. CL16-3016 (Va. Cir. Ct. (City of Richmond) Oct. 11, 2016). It nonetheless found that it is entitled to sovereign immunity “because it is a municipal or quasi-municipal corporation that perform[s] a governmental function.” Id., slip op. at 4.
VCUHSA has at least “a few attributes of an ‘agency.’”92 But the court placed greater weight on the General Assembly’s authorization of VCUHSA to “‘exercise independently the powers conferred’” on it.93 And it distinguished Rector & Visitors of the University of Virginia v. Carter by reasoning that, “[u]nlike colleges and universities, VCUHSA is not subject to control by the Commonwealth. . . . The mere appointment of board members by the Governor or General Assembly does not constitute the control necessary to become an ‘agency’ or ‘arm’ of the Commonwealth.”94 In my opinion, that formulation discounts the level of State control over VCUHSA, both at the Board level and in its daily operations, which approaches that of the UVA Medical Center.

I also am aware of other support for the proposition that VCUHSA should not be considered a State agency or arm of the Commonwealth in limited contexts other than the one at issue here. The text of VCUHSA’s enabling chapter itself, for example, indicates that it should not be treated as an agency for all purposes: Code § 23.1-2410 authorizes the Auditor of Public Accounts to examine the accounts of VCUHSA, but it stipulates that “the Authority is not a state or governmental agency, advisory agency, public body or agency, or instrumentality for purposes of Chapter 14 (§ 30-130 et seq.) of Title 30.”95 And in 2004, the Attorney General opined that VCUHSA was required to compensate the State Fire Marshal for inspecting its buildings because they are not state-owned.96 The Attorney General reasoned that, because it is a “‘public body corporate’ and a ‘political subdivision of the Commonwealth,’ [VCUHSA] is neither a state agency nor a state institution for the purpose of answering the question you pose.”97

Those points do not undermine my ultimate opinion that the Supreme Court likely would find VCUHSA to be an arm of the Commonwealth and therefore entitled to absolute immunity. At most, they confirm that, as stated above, an authority may be considered an agency or arm of the Commonwealth

92 Id., slip op. at 2.
93 Id. (quoting former version of statute).
94 Id., slip op. at 3.
95 Section 23.1-2410(C) (2016) (emphasis added).
97 Id. (emphasis added) (footnote omitted).
in some contexts but not in others. 98 More informative on the question of VCUHSA’s immunity is the control that the Commonwealth retains over VCUHSA and its leadership, operations, and funding.

b. VCUHSA is entitled to immunity for performing governmental functions.

If VCUHSA is not an agency or arm of the Commonwealth entitled to absolute immunity, it is at least a quasi-municipal corporation, and therefore entitled to immunity for its governmental, as opposed to proprietary, functions.

“The shield of sovereign immunity does not just apply to the State . . . .” 99 Other entities enjoy immunity in certain circumstances. Among these are municipalities, municipal corporations, and the ill-defined category of “quasi-municipal corporations,” which the Supreme Court of Virginia has recognized as entities that are “not municipal corporations in the strict sense of the term” but that have been “created to perform an essentially public service.” 100 As the Supreme Court has summarized the rule, “municipal corporations perform two types of functions—governmental and proprietary. Municipal corporations are immune from liability ‘when performing governmental functions, but are not when exercising proprietary functions.’” 101

The Supreme Court’s analysis for determining whether an entity is a municipal corporation depends on six essential attributes of a municipal corporation:

(1) Creation as a body corporate and politic and as a political subdivision of the Commonwealth; (2) Creation to serve a public purpose; (3) Power to have a common seal, to sue and be sued, to enter into contracts, to acquire, hold and dispose of

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99 Jean Moreau & Assocs., 283 Va. at 137.

100 Hampton Rds. Sanitation Dist. Comm’n v. Smith, 193 Va. 371, 374-75 (1952). See also Baird, slip op. at 8 (“Political subdivisions, commissions, authorities and other entities established by the General Assembly have been labeled . . . as ‘quasi-municipal corporations.’”).

its revenue, personal and real property; (4) Possession of the power of eminent domain; (5) Power to borrow money and issue bonds which are tax exempt, with interest on such bonds enjoying the same status under tax laws as the interest on bonds of other political subdivisions of the state; (6) Management of the corporation vested in a board of directors or a commission.\footnote{City of Richmond v. Richmond Metro. Auth., 210 Va. 645, 647 (1970).}

Virginia courts and Attorneys General have found a number of entities to be municipal and quasi-municipal corporations based on these factors and the circumstances of each case.\footnote{See, e.g., Baird, slip op. at 8-9 (Eastern Virginia Medical School is a municipal corporation entitled to sovereign immunity); 2012 Op. Va. Att’y Gen. 96, 98 (Warm Springs Sanitation Commission a municipal corporation entitled to sovereign immunity). See also Hampton Rds. Sanitation Dist. Comm’n, 193 Va. at 377 (“While it is true that the more attributes of a municipal corporation an agency has the more likely it is to be treated as a municipal corporation, the final decision rests on the specific issue of each case.”).}

Applying the six factors here points to the conclusion that VCUHSA is a quasi-municipal corporation, even assuming for argument’s sake that it is not a State agency or arm of the Commonwealth.\footnote{Cf. County of York v. Peninsula Airport Comm’n, 235 Va. 477, 481 n.1 (1988) (“It is true that when participating localities retain substantial local control over an entity they have created, local activation negates its status as a state agency or an ‘arm’ of the Commonwealth. However, such an entity, although not an arm of the Commonwealth, still may be a municipal corporation (and, thus, a political subdivision) if it possesses enough of the essential attributes.”) (internal citations and certain punctuation marks omitted).} First, VCUHSA was “established as a public body corporate, public instrumentality, and political subdivision of the Commonwealth.”\footnote{Section 23.1-2401(A).} Second, as its governing statute repeatedly describes, VCUHSA was created to serve a public purpose, including “to provide for the health, welfare, convenience, knowledge, benefit, and prosperity of the residents of the Commonwealth.”\footnote{Section 23.1-2401(B). See also § 23.1-2404(A)(25) (authorizing VCUHSA to exercise its powers “in furtherance of its corporate and public purposes”).} Third, VCUHSA has the power to have a seal, to sue
and be sued, to enter into contracts, and to control its revenues and property. 107 Fourth, it has the power of eminent domain (although its exercise of that power is subject to gubernatorial approval). 108 Fifth, it has the power to borrow money and issue tax-exempt bonds. 109 Finally, as discussed at length above, VCUHSA’s management is vested in a board, albeit one controlled by State officials. 110

Thus, VCUHSA satisfies all six factors and therefore could qualify as a quasi-municipal corporation entitled to immunity in fulfilling governmental functions, even if it were not considered to be a State agency or arm of the Commonwealth. 111 I do not offer any opinion on the specific functions that would qualify for VCUHSA or its employees to be immune from suit. “Because no bright line rule exists to distinguish between governmental and proprietary functions, whether the exercise of any particular power . . . would be governmental or proprietary would turn on facts not presented.” 112

But I note that the General Assembly has broadly defined the “governmental” nature of VCUHSA’s activities. In § 23.1-2401(B) of the Code of Virginia, it stated that the purpose of VCUHSA is:

to exercise public and essential governmental functions to provide for the health, welfare, convenience, knowledge, benefit, and prosperity of the residents of the Commonwealth . . . by delivering and supporting the delivery of medical care and related services to such residents and

107 Section 23.1-2404(A)(2) (power to “[h]ave and alter an official seal”); § 23.1-2404(A)(1) (power to “[s]ue and be sued in its own name”); § 23.1-2404(A)(5) (power to “[m]ake and execute contracts”); § 23.1-2408(A) (Supp. 2017) (providing that “[a]ll moneys of the Authority derived from any source shall be paid to the treasurer of the Authority”); § 23.1-2404(A)(14)(a), (b) (power to own and sell land).

108 Section 23.1-2404(A)(16).

109 Section 23.1-2404(A)(9); § 23.1-2418 (setting forth in greater detail the Authority’s power to issue bonds); § 23.1-2411(B) (2016) (providing that “[a]ny bonds issued by the Authority . . . are exempt from taxation”).

110 Section 23.1-2402.

111 See Stanley, slip op. at 4 (finding that “VCUHSA is entitled to sovereign immunity because it is a municipal or quasi-municipal corporation that performed a governmental function”).

individuals, providing educational opportunities in the medical field and related disciplines, conducting and facilitating research in the medical field and related disciplines, and enhancing the delivery of health care and related services to the Commonwealth’s indigent population.\footnote{113}{Section 23.1-2401(B).}

Moreover, in § 23.1-2404(B), the General Assembly provided that the exercise of VCUHSA’s statutory powers “shall be deemed the performance of essential governmental functions and matters of public necessity for the entire Commonwealth in the provision of health care, medical and health sciences education, and research . . . .”\footnote{114}{Section 23.1-2404(B).} The General Assembly also required that the “Authority shall operate, maintain, and expand, as appropriate, teaching hospitals and related facilities for the benefit of the Commonwealth and its citizens and such other individuals who might be served by the Authority.”\footnote{115}{Section 23.1-2401(C).}

Whether or not a particular VCUHSA employee shares in VCUHSA’s immunity remains, as the Supreme Court made clear last year in \textit{Pike v. Hagaman},\footnote{116}{292 Va. 209, 215 (2016).} a separate question determined by application of the test in \textit{James v. Jane}.\footnote{117}{221 Va. 43, 53 (1980) (establishing a four-factor test to determine whether a State employee is entitled to immunity, based on the employee’s function; the extent of the State’s interest and involvement in that function; whether the employee’s act involved the use of judgment and discretion; and the degree of control and direction exercised by the State over the employee).} In \textit{Pike} the Supreme Court applied \textit{James} to conclude that a nurse employed by a VCUHSA hospital was entitled to sovereign immunity.\footnote{118}{292 Va. at 212, 219.} Although VCUHSA’s immunity as a State entity was not an issue before the Supreme Court, because the plaintiff had conceded in the court below that VCUHSA itself “was indeed entitled to sovereign immunity,”\footnote{119}{Pike v. Hagaman, 90 Va. Cir. 138, 139 (City of Richmond 2015), aff’d, 292 Va. 209 (2016).} the Court’s decision that the nurse was immune from suit underscores VCUHSA’s own immunity. Analyzing the second \textit{James} factor—the State’s interest in the nurse’s function—the Court examined VCUHSA’s governing statute and held that, in providing the specialized health services offered by VCUHSA, the nurse
was “serving an essential governmental function” and “carrying out the express interest of the Commonwealth.” Analyzing the fourth James factor—the level of control by the State over an employee—the Court found that the nurse was subject to a high degree of State control because, among other things, the “state hospital pays her wages and determines her schedule and whether she can take leave. This fourth factor also points in the direction of sovereign immunity.”

2. Whether recovery against VCUHSA for negligent acts of employees is limited to $100,000.

You also have asked for confirmation that “the amount of any recovery against the VCU Health System Authority for damages, loss of property or personal injury or death caused by the negligent or wrongful act or omission of employees of VCU Health System Authority is limited to $100,000 in accordance with V[irginia] Code § 8.01-195.3.” The Code section you cite is part of the Virginia Tort Claims Act (the “VTCA”), which is a limited waiver of the Commonwealth’s immunity and provides that:

the Commonwealth shall be liable for claims for money . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury or death. . . . The amount recoverable by any claimant shall not exceed . . . $100,000 for causes of action accruing on or after July 1, 1993 or . . . the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs.[122]

120 Pike, 292 Va. at 217 (punctuation and citations omitted).
121 Id. at 218.
122 Section 8.01-195.3 (2015).
An “employee” is defined as “any officer, employee or agent of any agency, or any person acting on behalf of an agency in an official capacity,” while “agency” is broadly defined to include “any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth . . . .”

While the VTCA exposes the Commonwealth to limited liability for the negligent acts of employees of State entities—including authorities—the VTCA does not expose entities such as VCUHSA to liability themselves. Thus, in Rector & Visitors of the University of Virginia v. Carter, the Supreme Court rejected an effort to hold UVA liable for the negligent acts of a resident physician in the UVA Health System. The Court explained:

Absent an express statutory or constitutional provision waiving sovereign immunity, the Commonwealth and its agencies are immune from liability for the tortious acts or omissions of their agents and employees. . . . The limited waiver provided for in the Act will be strictly construed because the Act is a statute in derogation of the common law. Under the plain language of the Act, the Commonwealth (and certain “transportation districts” not here relevant) are the only entities for which sovereign immunity is waived. The Act contains no express provision waiving sovereign immunity for agencies of the Commonwealth, which we have stated repeatedly is a mandatory requirement before waiver occurs. As an agency of the Commonwealth, UVA is entitled to sovereign immunity under the common law absent an express constitutional or statutory provision to the contrary. There is no such waiver in the Act or elsewhere.[124]

For the same reasons, VCUHSA may not be held liable under the VTCA for the negligent acts of its employees, whether it is considered an agency or an authority. And because the VTCA does not waive VCUHSA’s immunity, it is not liable for any amount of damages, let alone up to the statutory cap of $100,000 that would otherwise apply.

123 Section 8.01-195.2 (2015).
124 See Carter, 267 Va. at 244-45 (citations omitted).
CONCLUSION

In response to your first question, it is my opinion that the Supreme Court of Virginia likely would find, in light of VCUHSA’s functions and history, that it is a State agency or arm of the Commonwealth for the purposes of sovereign immunity, and therefore is entitled to absolute immunity from suit. Even if the Court were not to agree, however, VCUHSA also satisfies the criteria of a quasi-municipal corporation and therefore would be entitled to immunity for governmental functions. In answer to your second question, the VTCA exposes the Commonwealth, but not VCUHSA, to limited liability for the negligent acts of its employees.

OP. NO. 17-034

TAXATION: LOCAL TAXES – MISCELLANEOUS TAXES – FOOD AND BEVERAGE TAX

Section 58.1-3833 of the Code of Virginia exempts from local meals tax all meals that are purchased at an age-restricted independent living facility which includes some or all meals in a monthly rental fee.

THE HONORABLE ELLEN E. MURPHY
COMMISSIONER OF THE REVENUE, FREDERICK COUNTY

DECEMBER 7, 2017

ISSUE PRESENTED

Whether meals sold in an independent living facility that are in excess of the monthly food allowance and that are separately billed are exempt from local meals tax.

BACKGROUND

You state that Frederick County has a food and beverage tax (a “meals tax”). You refer to a continuing care retirement facility which provides residential living at three levels of care:
• Age-restricted active adult living, otherwise known as “independent living,” for which no state license is required. At this level of care, each resident receives one meal per day, the cost of which is included in the fixed monthly fee. The cost of other meals consumed by a resident is charged in addition to the fixed monthly fee.

• Assisted living, licensed by the Virginia Department of Social Services, where three meals per day are provided to each resident for a fixed monthly fee.

• Health care, where the Virginia Department of Health has issued a license for skilled nursing care. At this level of care, all meals for a resident are included in a fixed monthly fee.

All meals covered by fixed monthly fees are treated as tax exempt, and you do not question that practice. Your inquiry concerns only the tax status of those meals served at the independent living facility which are not included in the monthly fee, and for which residents pay separately.

**APPLICABLE LAW AND DISCUSSION**

Pursuant to § 58.1-3833 of the *Code of Virginia*, counties are authorized to impose a meals tax, subject to certain mandatory exemptions. The exemptions relevant to your inquiry are, first, for “age-restricted apartment complexes or residences with restaurants . . . where meals are served and fees are charged for such food and beverages and are included in rental fees”\(^1\) and, second, for “nursing homes, or other extended care facilities.”\(^2\)

Because the independent living facility has a restaurant that provides some meals included in the monthly rental fee, it falls within the statutory tax-exempt category of an age-restricted apartment complex or residence “where meals are served and fees [that] are charged . . . are included in rental fees.” The statute does not provide that only meals included in rental fees are exempt from taxation, while other meals are taxable. Instead, if the facility meets the

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\(^1\) VA. CODE ANN. § 58.1-3833(A) (2017) (exemption (x)).

\(^2\) VA. CODE ANN. § 58.1-3833(A) (exemption (vii)).
requirement of having rental fees cover meals, regardless of how many or few, then the exemption applies to all meals.

If the General Assembly had intended to limit the exemption only to those meals included in the rental fee, with other meals being taxable, it could have done so by appropriate language of limitation. It did not choose to do so. We must assume that the General Assembly “chose, with care, the words it used when it enacted the relevant statute.”\(^3\) “Rules of statutory construction prohibit adding language to . . . a statute.”\(^4\)

**CONCLUSION**

Accordingly, it is my opinion that § 58.1-3833 of the *Code of Virginia* exempts from local meals tax all meals that are purchased at an age-restricted independent living facility which includes some or all meals in a monthly rental fee.\(^5\)

**OP. NO. 17-037**

**CONSERVATION: SCENIC RIVERS ACT**

Absent unusual circumstances, the provisions of the Virginia Scenic Rivers Act do not apply to riparian landowners constructing dams, docks, or other structures that could impede water flow along tributaries of designated waterways unless those tributaries are included within the scope of the designation. Further, the Scenic Rivers Act does not impose any restrictions on a riparian landowner’s management of surface water on his land abutting a designated waterway, and accordingly that a riparian landowner may engage in grading, plowing,

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timbering, or otherwise develop his property in a manner that might impede the flow of surface water across his property into a designated scenic river.

C. Eric Young, Esquire
Tazewell County Attorney

December 7, 2017

Issues Presented

You have asked about the impact of the Virginia Scenic Rivers Act upon certain possible activities of landowners within Tazewell County. Specifically, you have asked (i) whether riparian landowners may construct dams, docks, or other structures which might impede the natural flow of a tributary to a designated scenic river; and (ii) whether a riparian landowner may engage in grading, plowing, timbering, or otherwise develop his property in such a manner that might impede the flow of surface water across his property into a designated scenic river.

Applicable Law and Discussion

1. Statutory Background

The General Assembly passed the Virginia Scenic Rivers Act in 1970. As enacted, the statute created a framework to study waterways within the Commonwealth by the Commission of Outdoor Recreation (now the Department of Conservation and Recreation) for “designation as wild, scenic, or recreational rivers.” After such study, consultation with other enumerated state agencies and, if requested, a public hearing, the Commission could recommend to the General Assembly that a “river or section of river” be designated as a scenic river. Once so designated by action of the legislature, the statute provided that “no dam or other structure impeding the natural flow thereof shall

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8 Id. (former § 10-170, currently codified at § 10.1-401).
9 Id. (former §§ 10-171, -172, currently codified at §§ 10.1-403, -404).
be constructed, operated, or maintained in such river or section of river unless specifically authorized by an act of the General Assembly.”

Since the passage of the Scenic Rivers Act in 1970, the General Assembly has recognized a number of rivers, or sections of rivers, as part of the Virginia Scenic Rivers System. The first such recognition occurred in 1975 for the Staunton River and the Rivanna River. While the terms of the designations varied slightly, neither of these Acts spoke to the rights of riparian landowners. Beginning in 1976, however, with the recognition of Goose Creek in Loudoun County, the General Assembly began noting that designation as part of the Scenic Rivers System did not impact the rights of riparian landowners beyond the restrictions otherwise imposed by the designation. During a recodification of the Scenic Rivers Act in 1988, the General Assembly made this protection of riparian uses applicable to all designated waterways with the enactment of § 10.1-408 of the *Code of Virginia*. Certain enumerated riparian uses now appear in the *Code* as specifically not subject to restriction by the Scenic Rivers Act, as well as a prohibition against using the Scenic Rivers Act to establish water quality standards under federal law.

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10 *Id.* (former § 10-174, currently codified at § 10.1-407).


13 This Office has previously noted that “each legislative designation of a scenic river varies slightly from the others,” 1984-1985 Op. Va. Att’y Gen. 442, 442, a fact confirmed by review of §§ 10.1-409 through 418.9 of the *Code*, the current codifications of the various designations made by the General Assembly.

14 1976 Va. Acts ch. 195, § 6 (“All existing riparian land and water uses which are currently permitted along or in the designated section of Goose Creek and expansion of such uses as authorized by law shall be permitted and shall not be restricted by this act.”).

15 1988 Va. Acts ch. 891 (“Except as provided in § 10.1-407, all riparian land and water uses along or in the designated section of a river which are permitted by law shall not be restricted by this chapter.”).

16 See § 10.1-408(B)(1) (Supp. 2017) (barring a Scenic Rivers System designation from serving as the basis for prohibiting surface mining of coal or minerals on adjacent riparian properties).

17 Section 10.1-408(B)(2).
2. Tributaries

You first ask whether the restriction contained in § 10.1-407 of the Code on constructing dams or other structures that would impede the “natural flow”\(^{18}\) of a designated waterway extends to tributaries of designated rivers. The plain language of the Code, together with the designations made by the General Assembly, answer this question generally in the negative. First, the restrictive language contained in the Code states that following designation of a “river or section of river,” dams or other structures impeding the natural flow may not be “constructed, operated, or maintained in such river or section of river.”\(^{19}\) The plain meaning\(^{20}\) of this language directs that the restriction only apply to “such river or section of river” rather than any tributary of the same. Where the General Assembly sought to extend the prohibition to tributaries of a certain river, it made the same clear in the scope of the designation.\(^{21}\) The fact that it does not mention tributaries in other enactments must be presumed intentional.\(^{22}\)

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\(^{18}\) A prior opinion from this Office noted that an underground pipeline would not violate § 10.1-407 as it would not result in an obstruction “impeding the natural flow” of a river within the “plain meaning of the phrase ‘impeding the natural flow,’” as the pipeline would not be located within the watercourse channel itself. 1991 Op. Va. Att’y Gen. 39, 41. “Natural flow” appears in numerous cases evaluating claims based on artificial constriction of such flow, with a general reference to the amount of water within a watercourse absent man-made influences, including during “seasons of either low or usual high water,” but excluding “times of unprecedented and extraordinary freshets.” American Locomotive Co. v. Hoffman, 105 Va. 343, 350 (1906) (quoting 30 AM. & ENG. ENCY. L. 374-76 (2d ed.)). This comports with definitions appearing in various publications on water rights, which generally refer to “natural flow” as the stream flow “in its natural condition, not perceptibly retarded, diminished or polluted by others.” Richard Ausness, Water Rights Legislation in the East: A Program for Reform, 24 WM. & MARY L. REV. 547, 549 (1983).

\(^{19}\) Section 10.1-407 (2012).


\(^{21}\) See, e.g., 1992 Va. Acts ch. 308 (designating segments of the Clinch River “including its tributary, Big Cedar Creek from the confluence to mile 5.8 near Lebanon”); 1988 Va. Acts ch. 490 (designating the North Landing river and “Tributaries” as part of the Virginia Scenic Rivers System).

\(^{22}\) See Halifax Corp. v. Wachovia Bank, 268 Va. 641, 654 (2004) (“[W]hen the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional.”) (quoting Halifax Corp. v. First Union Nat’l Bank, 262 Va. 91, 100 (2001)).
and it must be assumed that the legislature does not intend the Scenic Rivers Act to extend to tributaries of a designated waterway unless those tributaries are specifically identified in the designation. While this general rule may be subject to limitations in certain circumstances, absent the General Assembly specifically identifying a tributary within the scope of the designation, the restrictions imposed by § 10.1-407 do not extend beyond the bounds of the river or section of river so designated.

3. Surface Water

You next ask whether riparian landowners along a designated river may engage in grading, plowing, timbering, or other development work that would impede or alter the flow of surface water into the river. In Virginia, at the common law, “surface water is considered a common enemy” and a landowner is entitled to “fight it off as best he may.” Because any change in this rule would be a derogation of the common law, the legislature must “plainly manifest an intent to do so”; otherwise, the common law “will be read into the statute.”

Here, nothing in the Scenic Rivers Act suggests the General Assembly intended to abrogate the common law rules on management of surface water. The only restrictions on riparian use are those found in § 10.1-407, which relate to obstructions of the “natural flow” of the waterway itself. If anything, the

23 This Office previously noted that actions taken “outside the designated section could have an impact so substantial as to frustrate the legislative purpose of scenic designation and effectively destroy the river as a scenic resource,” but that the “outcome of such a case would necessarily depend on its particular facts.” 1984-1985 Op. Va. Att’y Gen. 442, 443. This would likely find analogy in the common law rule of reasonable use, which affords an upstream riparian landowner the “reasonable and necessary use” of waters, including the right of “developing power from the flow,” without depriving downstream owners of the same. See Hite v. Luray, 175 Va. 218, 225-26 (1940).

24 Hodges Manor Corp. v. Mayflower Park Corp., 197 Va. 344, 347 (1955) (citation omitted). Like most general rules at common law, this one is subject to some limitations. See Third Buckingham Cmty., Inc. v. Anderson, 178 Va. 478, 486 (1941) (noting a riparian landowner cannot use his property “to injure the right of another” such as by “collect[ing] the [surface] water into an artificial channel or volume and pour it upon the land of another, to his injury”).

The legislature indicated its intent to preserve the common law rights of riparian landowners to manage surface water through the language in § 10.1-408, protecting all “riparian . . . water uses along or in the designated section of a river which are permitted by law.” Therefore, I conclude that the Scenic Rivers Act 26 does not impose restrictions on a riparian landowner’s management of surface water on his land.

CONCLUSION

For the foregoing reasons, it is my opinion that, absent unusual circumstances, the provisions of the Virginia Scenic Rivers Act do not apply to riparian landowners constructing dams, docks, or other structures that could impede water flow along tributaries of designated waterways unless those tributaries are included within the scope of the designation. It is my further opinion that the Scenic Rivers Act does not impose any restrictions on a riparian landowner’s management of surface water on his land abutting a designated waterway, and accordingly that a riparian landowner may engage in grading, plowing, timbering, or otherwise develop his property in a manner that might impede the flow of surface water across his property into a designated scenic river.

26 A riparian landowner would still need to comply with other legal restrictions, including the common law rule noted above, as well as provisions of the State Water Control Law (§§ 62.1-44.2 through -44.34:28), which includes the Stormwater Management Act (§§ 62.1-44.15:24 through -44.15:50)), local ordinances, and other statutory or regulatory programs which might apply given the location of a particular waterway.
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An exception to the Credit Clause provides that it “shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority”.

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For fines and costs imposed by a circuit court in traffic or criminal proceedings, the General Assembly has imposed a twenty-year limitations period on civil enforcement, beginning on the date of offense or delinquency. There is no statutory provision that tolls the running of this limitation period when the debtor is incarcerated.

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