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

From July 1, 1964 to June 30, 1965

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1965
Letter of Transmittal

HONORABLE A. S. HARRISON, JR.
Governor of Virginia
State Capitol
Richmond, Virginia

My dear Governor Harrison:

In accordance with § 2-93 of the Code of Virginia, I transmit to you the Annual Report of the Attorney General. This report covers the period beginning July 1, 1964 through June 30, 1965.

Pursuant to the statutes, I have included in the report such official opinions rendered by this office during the above-stated period as would seem to be of general interest or helpful in promoting uniformity in the construction of the laws of the State, together with the required statement of cases now pending or disposed of since the last report issued by this office. Due to the increasing volume of tax collection cases on behalf of the Virginia Employment Commission, and habeas corpus proceedings, such cases have not been stated individually. A complete record of these cases is available in this office.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General
## PERSONNEL OF THE OFFICE
*(Post Office Address, Richmond)*

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>Robert Y. Button</td>
<td>Culpeper County</td>
<td>Attorney General</td>
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<tr>
<td>Kenneth C. Patty</td>
<td>Tazewell County</td>
<td>First Assistant</td>
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<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
<td>Assistant</td>
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<td>Robert D. McIlwaine, III</td>
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<td>Reno S. Harp, III</td>
<td>Richmond City</td>
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<td>M. Harris Parker</td>
<td>Greensville County</td>
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<td>Harold V. Kelly</td>
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<td>A. R. Woodroof</td>
<td>Amherst County</td>
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<td>Paul D. Stotts</td>
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<td>Curtis R. Mann</td>
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<td>Eleanor W. Tilley</td>
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<td>Margaret E. Bennett</td>
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<td>Diane H. Rudd</td>
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# ATTORNEYS GENERAL OF VIRGINIA
## From 1776 to 1963

<table>
<thead>
<tr>
<th>Name</th>
<th>Years</th>
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<tr>
<td>Edmund Randolph</td>
<td>1776-1786</td>
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<td>James Innes</td>
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<td>Robert Brooke</td>
<td>1786-1799</td>
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<td>Philip Norborne Nicholas</td>
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<tr>
<td>James Robeson</td>
<td>1819-1834</td>
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<tr>
<td>Sidney S. Baxter</td>
<td>1834-1852</td>
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<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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<tr>
<td>James C. Taylor</td>
<td>1870-1874</td>
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<td>Raleigh T. Daniel</td>
<td>1874-1877</td>
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<td>James G. Field</td>
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<td>Frank S. Blair</td>
<td>1882-1886</td>
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<td>Rufus A. Ayers</td>
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<td>R. Taylor Scott</td>
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<td>R. Carter Scott</td>
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<td>A. J. Montague</td>
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<tr>
<td>William A. Anderson</td>
<td>1902-1910</td>
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<tr>
<td>Samuel W. Williams</td>
<td>1910-1914</td>
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<tr>
<td>John Garland Pollard</td>
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<tr>
<td>J. D. Hank, Jr.</td>
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<td>John R. Saunders</td>
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<tr>
<td>Abram P. Staples</td>
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<td>Harvey B. Apperson</td>
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<td>J. Lindsay Almond, Jr.</td>
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<td>Kenneth C. Patty</td>
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<td>A. S. Harrison, Jr.</td>
<td>1958-1961</td>
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<tr>
<td>Frederick T. Gray</td>
<td>1961-1962</td>
</tr>
<tr>
<td>Robert Y. Button</td>
<td>1962-1963</td>
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</tbody>
</table>

*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.
†Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. Jno. R. Saunders and served until October 6, 1947.
‡Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of Hon. Abram P. Staples and served until his death on January 31, 1948.
§Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson. Resigned September 16, 1957.
**Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.
Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.
CASES DECIDED IN THE SUPREME COURT OF APPEALS

Barber, William Leon, Sr. v. Commonwealth of Virginia. From Circuit Court of the City of Chesapeake. Upon a conviction of murder. Affirmed.

Bateman, Richard v. Commonwealth of Virginia. From the Corporation Court of the City of Norfolk, Part II. Upon a conviction of forgery. Reversed.


Biddle, Shirley Mae v. Commonwealth of Virginia. From the Corporation Court of the City of Norfolk, Part II. Upon a conviction of murder. Reversed.

Bullock, James R. v. Commonwealth of Virginia. (Two cases). From the Corporation Court of the City of Norfolk, Part II. Upon a conviction of forgery. One case reversed; one case affirmed.


Button v. Day (Peninsula Ports Authority) Mandamus—Supreme Court of Appeals of Virginia testing constitutionality of agreement between the Authority, City of Newport News and C. & O. Railroad Company. Mandamus refused.

City Hall Tavern, Inc. v. A.B.C. Board. Bill for Injunction to enjoin Board from holding a hearing. Denied.

City Hall Tavern, Inc. v. A.B.C. Board. Bill for Injunction to enjoin Board from enforcing its order and to declare a statute unconstitutional. Denied.

City Hall Tavern, Inc. v. A.B.C. Board. Bill for Injunction to enjoin Board from enforcing its order and to declare a statute unconstitutional. Denied.

Cooper, Frank Timothy v. Commonwealth of Virginia. From Circuit Court of the City of Williamsburg and County of James City. Appeal from conviction of rape. Reversed.

Crews, Earl Davis v. Commonwealth. From the Circuit Court of Pulaski County. Driving under influence of intoxicants. Affirmed.


Fedele, Jacquelin v. Commonwealth of Virginia. From the Hustings Court of the City of Richmond. Upon a conviction of being a person not of good fame. Reversed and final judgment.


Gallagher, Roy Louis v. Commonwealth of Virginia. Appeal from the Circuit Court of Campbell County convicting appellant of operating vehicle while under the influence of intoxicants. Judgment affirmed.


Hoffler, Hubert Earl v. Commonwealth of Virginia. From the Corporation Court of the City of Suffolk. Upon a conviction of armed robbery. Affirmed.

Kene Corporation v. H. H. Harris, State Highway Commissioner. Appeal from the Corporation Court of the City of Norfolk which denied a writ of mandamus. Judgment affirmed.

Laing v. Commonwealth. Appeal of contempt conviction from the Circuit Court of Giles County. Affirmed.

Lovelace, Floyd Ural v. Commonwealth of Virginia. From Circuit Court of Pittsylvania County. Appeal from conviction of larceny. Affirmed.

Maddy, John W. v. First District Committee of Virginia State Bar. Appeal from order of Circuit Court of the City of Hampton convicting defendant of unprofessional conduct. Affirmed.


Pierce, Ruben v. Commonwealth of Virginia. From the Corporation Court of the City of Suffolk. Upon a conviction of armed robbery. Affirmed.


Virginia Retail A.B.C. Licensees v. Virginia A.B.C. Board. Appeal from order of Circuit Court of the City of Richmond upholding validity of certain regulations of the Board. Writ denied.

Wansley, Thomas Carlton v. Commonwealth of Virginia. From Corporation Court of the City of Lynchburg. Appeals from convictions of rape. (Two cases). Reversed.


Williams, E. E. Sr. v. Commonwealth. Appeal from order of Circuit Court of the City of Richmond, granting correction of erroneous assessment of taxes. Writ denied.

CASES PENDING IN THE SUPREME COURT OF APPEALS

Coleman, James R. v. Maher and May. Appeal from order of Circuit Court of the County of Henrico dismissing defendants as being immune from liability.


REPORT OF THE ATTORNEY GENERAL


Harris, Paul Roderick v. Commonwealth of Virginia. From Corporation Court of Danville. Appeal from conviction of statutory burglary. Pending.

Hawley, John Edward v. Commonwealth of Virginia. From the Corporation Court of the City of Chesapeake. Upon a conviction of grand larceny.

Holloman v. Commonwealth. From the Corporation Court of the City of Norfolk. Upon a conviction of murder in the second degree.


Parrish, William v. Commonwealth of Virginia. From the Corporation Court of the City of Charlottesville. Upon a conviction of grand larceny.

Pasquale Pasanello v. Commonwealth of Virginia. From the Corporation Court of the City of Charlottesville. Upon a conviction of grand larceny.


Robinson v. Commonwealth of Virginia. From the Circuit Court of Warren County. Appeal from conviction for allowing livestock to run at large. Pending.

Robinson, Gary Ray v. Commonwealth of Virginia. From Court of Hustings for the City of Portsmouth. Upon a conviction of maiming.

Russa, Albert J. v. Commonwealth of Virginia. From the Circuit Court of Roanoke County. Upon a conviction for abortion.


Thurman, Robert McCoy v. Commonwealth of Virginia. From the Circuit Court of Campbell County. Upon a conviction of statutory rape.

Westry, Sam v. Commonwealth of Virginia. From Circuit Court of the City of Virginia Beach. Upon a conviction of murder.

REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Butts, Evelyn v. Albertis Harrison, Governor, et al. Appeal from order of three-judge District Court holding Virginia's requirements of the payment of poll tax as a prerequisite to voting to be constitutional and valid.

Harper, Annie E. et al v. Virginia State Board of Elections, et al. Appeal from order of three-judge District Court holding Virginia's requirements of the payment of poll tax as a prerequisite to voting to be constitutional and valid. Probable jurisdiction noted.

CASES TRIED OR PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT


Pettaway, Avis M. v. County School Board of Surry County. Appeal from judgment of United States District Court for Eastern District of Virginia in school desegregation case. Judgment affirmed and case remanded.

Pettaway, Avis M. v. County School Board of Surry County. Appeal from judgment of United States District Court entering order on mandate. Pending.


CARES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


City Hall Tavern, Inc. v. A.B.C. Board. Complaint for Injunction to restrain Board from enforcing its order and to convene three-judge federal court to pass upon constitutionality of a Board of Regulation and make the restraining order permanent. Orally denied from the Bench and set off to the October, 1965, term for re-examination of its status, since a similar case is now pending in the Supreme Court of Appeals of Virginia.


Pettaway, Avis M. v. County School Board of Surry County, Virginia. On remand from Supreme Court of the United States. Order entered on remand.


Wilks, et al v. Woodruff, et al. Action to compel certain registrars to register certain voters. Relief denied as to all plaintiffs except one. Dismissed without prejudice as to that plaintiff.


CASES TRIED OR PENDING IN THE CIRCUIT, HUSTINGS, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE


City Hall Tavern, Inc. v. A.B.C. Board. Circuit Court, City of Richmond. Bill for injunction to enjoin Board from holding a hearing. Denied.

City Hall Tavern, Inc. v. A.B.C. Board. Circuit Court, City of Richmond. Bill for injunction to enjoin Board from enforcing its order to declare a statute unconstitutional. Denied.

City Hall Tavern, Inc. v. A.B.C. Board. Circuit Court, City of Richmond. Petition for review of Board's action in suspending plaintiff's license. Motion to dismiss filed.
City of Norfolk v. Frederick A. Carter. In the Corporation Court of the City of Norfolk. Upon a conviction of speeding. The defendant filed a motion to set aside the assessment of costs amounting to $5.00 imposed by § 14.1-200, Code of Virginia. Motion overruled and costs assessed against the defendant.


Court v. Commonwealth. Circuit Court for James City County and the City of Williamsburg. Petition for erroneous assessment of taxes. Petition denied.

Culbertson, W. W. v. County School Board of Loudoun County. Circuit Court of Loudoun County. Suit to remove cloud on title to real property. Pending.


Norfolk & Western Railway Company v. Commonwealth of Virginia. Circuit Court of the City of Richmond. Application for refund of franchise tax assessed under Article 2, Ch. 12, title 58, Code of Virginia. Pending.


Ord, Edward C. et al v. Douglas B. Fugate, State Highway Commissioner. Circuit Court of Loudoun County. Suit for declaratory judgment as to right to have highway maintained. Suit dismissed with prejudice.


Shell Oil Company v. Commonwealth of Virginia. Circuit Court of the City of Richmond. Application to secure reimbursement of taxes paid on aviation fuel. (Two cases). Pending.

Shockey, Harry A. v. Guy H. Lewis, Jr., et al. Circuit Court of Fairfax County. Suit for declaratory judgment as to right to certain land. Dismissed with prejudice.


State Board of Pharmacy v. Harrell. Circuit Court of the City of Virginia Beach. Appeal from license revocation. Decision of the Board modified and license revoked for 60 days. Execution suspended for 18 months.


Victoria Films, Inc. v. Division of Motion Picture Censorship. Circuit Court for the City of Richmond. Suit for declaratory judgment and injunction. Injunction awarded.


CASES TRIED BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA

Commonwealth of Virginia v. Lewis Trucking Corporation and Marvin Lewis. Motion under § 56-304.12 for judgment in the sum of $6,608.00 for unpaid registration and license fees. Judgment for Commonwealth in amount of $6,608.00, with interest at six per cent until paid. Pending appeal to Supreme Court of Appeals.

Commonwealth of Virginia v. Sewell's Motor Express, Incorporated and H. P. Sewell. Motion under § 56-304.12 for judgment in the sum of $12,834.00, plus interest at six per centum per annum from April 1, 1963 and $13,120.25, plus interest at six per centum per annum from April 1, 1964 for unpaid registration and license fees. Pending.

CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED

Alt, Albie v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license for a period of thirty days under § 46.1-430. Pending.

Billups, Lloyd Junous v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Law and Chancery Court of the City of Hampton. Appeal from an action of the Commissioner suspending operator's license and registration certificates and plates under § 46.1-449. Pending.

Bishop, Carl Edward v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Fredericksburg. Appeal from an action of the Commissioner suspending privilege to be issued an operator's or chauffeur's license for a period of one year under § 46.1-363. Commissioner's action affirmed.


Green Motor Lines, Incorporated v. The Commonwealth of Virginia. Hustings Court of the City of Richmond. Appeal alleging erroneous assessment of registration fees in the amount of $5,086.00, said tractor trucks being licensed for the same period in Florida. Pending.


McCullouch, Jeffrey Barton v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Commonwealth of Virginia. Circuit Court of the City of Virginia Beach. Appeal from an action of the Commissioner revoking operator's license and registration certificates and plates pursuant to §§ 46.1-417 and 46.1-418. Commissioner's action affirmed.

McCinnis, Cornelius Frederick, v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Fredericksburg. Appeal from an action of the Commissioner revoking operating privilege for a period of one year pursuant to § 46.1-430. Commissioner's order vacated by court and operating privilege restored.


Moore, Ballard v. Commissioner of the Division of Motor Vehicles. Circuit Court of Bath County. Appeal under § 46.1-437 from an action of the Commissioner revoking operator's license due to mental or physical infirmities or disabilities rendering it unsafe to drive a motor vehicle upon the highways. Operator's license surrendered. Pending.

Mundy, Joseph Patrick v. Commissioner, Division of Motor Vehicles. Circuit Court of Grayson County. Appeal from an action of the Commissioner revoking operator's license for a period of one year under § 46.1-430. License suspension period expired. Dismissed.


Robertson, Oscar Leonard v. C. H. Lamb, Commissioner of the Division of Motor Vehicles. Law and Equity Court of the City of Richmond. Injunction order entered temporarily enjoining Commissioner from suspending operator's license, registration certificates and plates under § 46.1-442 pending determination of declaratory judgment action. Pending.
Russell, Charles E. Company, Inc. v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Commonwealth of Virginia. Court of Hustings for the City of Portsmouth. Appeal from an action of the Commissioner applying mandatory penalty of ten per cent pursuant to § 58-721. Placing reports in mailbox held constructive compliance with statute and penalty denied.

Sheets, Hugh Samuel v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Tazewell County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under § 46.1-167.2. Pending.


Sherwood, Frank M. and Helen Langan v. Commissioner of Motor Vehicles. Circuit Court for Fairfax County. Appeal from an action of the Commissioner suspending the operator's licenses and privileges to operate motor vehicles and registration privileges in accordance with the provision of §§ 46.1-442 and 46.1-446 of the Code. Pending.


Wallingsford, Emery David v. Commissioner of the Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license and registration certificates and plates under § 46.1-449. Pending.


*Defendants include the Attorney General, the Commissioner, Department of Taxation, Commissioner, State Corporation Commission and Commissioner, Division of Motor Vehicles.

CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY, HUSTINGS AND CORPORATION COURTS OF THE STATE IN WHICH THE VIRGINIA EMPLOYMENT COMMISSION (UNEMPLOYMENT COMPENSATION COMMISSION) WAS INVOLVED


Funkhouser, Violet v. Unemployment Compensation Commission of Virginia and American Viscose Corporation, Circuit Court of Washington County. Pending.


In the Matter of Oceana Drugs Inc., and John S. McFall, individually and t/a
REPORT OF THE ATTORNEY GENERAL

Oceana Drug, Circuit Court of the City of Virginia Beach. Pending.

Jones, James F. v. Virginia Employment Commission and Pulaski Furniture Corporation, Circuit Court of Pulaski County. Decision: Dismissed (Non-suit)


HABEAS CORPUS CASES

A total of 850 habeas corpus cases were handled during the past fiscal year, 25 of which were appeals in the Supreme Court of Appeals of Virginia or the United States Court of Appeals for the Fourth Circuit, 425 of which were tried in the courts of record of the Commonwealth, 250 of which involved the filing of Answers or Briefs in the Supreme Court of Appeals of Virginia, and 150 of which involved the filing of pleadings in courts of record in cases not yet tried.

EXTRADITION HEARINGS CONDUCTED AND REPORTS SUBMITTED PURSUANT TO REQUEST OF THE GOVERNOR

<table>
<thead>
<tr>
<th>HEARING HELD</th>
<th>CASE OF</th>
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<tr>
<td>February 1, 1965</td>
<td>Theodore Shannon</td>
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<tr>
<td>March 19, 1965</td>
<td>Otis Lamb</td>
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<td>March 19, 1965</td>
<td>Ernest Franklin Maupin</td>
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<td>March 19, 1965</td>
<td>Stuart W. Reichstein</td>
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<td>April 27, 1965</td>
<td>Donna L. Biggerman (Torrence)</td>
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<td>May 5, 1965</td>
<td>James Clarence Huestis</td>
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<td>May 19, 1965</td>
<td>John William Ramey, Jr.</td>
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<tr>
<td>June 2, 1965</td>
<td>Eugene H. Myers</td>
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<tr>
<td>June 10, 1965</td>
<td>James Palmer</td>
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ADMINISTRATORS—Decedent’s Estate—Preference of funeral expenses under § 64-147 not affected by Social Security payment on funeral debt.

ESTATES—Preference—Funeral expenses under § 64-147 not affected by payment under Social Security Administration.

HONORABLE GUY WHITED
Sheriff of Russell County

July 2, 1964

This is to acknowledge receipt of your letter of June 24, 1964 in which you state in part:

“I am the duly appointed and qualified Administrator of an estate. The Funeral Home has been paid the sum of $183.00 on its bill by the Social Security Administration, and I would like to know whether or not the Funeral Home is entitled to the sum of $200.00 preferred claim on its bill in addition to the amount already paid of $183.00 by the Social Security Administration. I would appreciate your advising me in this connection.”

The money paid the funeral home in this instance by the Social Security Administration was the lump sum death benefit payment from the Federal Old Age and Survivors’ Insurance Trust Fund and was done so in accordance with the provisions of 42 U.S.C.A. Section 402(i). This Federal Act prescribes under what conditions and to whom this benefit is payable. If there is no surviving widow or widower, the lump sum payment under certain conditions may be paid directly to the undertaker. It does not appear from the provisions of this law that the administrator of an estate has the right to enforce payment thereof to the estate nor does it appear that the lump sum benefit is an asset of a decedent’s estate which would come into the hands of the administrator and be distributed by him. Section 64-147, Code of Virginia (1950) as amended sets forth the order in which the assets of a decedent in the hands of his personal representative are to be paid. As you point out, this section gives a preference for the funeral expenses not exceeding $200.00.

I am therefore of the opinion that you as administrator have authority to pay the $200.00 preferred claim to the funeral home out of the funds which you hold as administrator, notwithstanding the fact that an amount has already been paid by the Social Security Administration to the funeral home.

ADOPTION—Effect of § 20-54 on Decree.

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

September 23, 1964

This is in reply to your letter of September 17, 1964, requesting my opinion with respect to the following statement and question submitted to you by one of your constituents:

“Husband and wife desire to adopt a white child born to husband’s sister out of wedlock. Husband is a white male presently in the Armed Forces of the United States and stationed at Fort Eustis, Virginia. Wife is a Korean-Japanese. Husband and wife were not married in the State of Virginia, but were married in Hawaii.

“Does § 20-54 preclude the Courts from entering an order of adoption, assuming that all other requirements of the statutes affecting adoptions have been satisfied?”
Assuming that all other requirements of the statutes affecting adoptions have been satisfied, entry of an order of adoption is not expressly forbidden by § 20-54 of the Code. However, the circumstance that the marriage of the prospective adopting parents may be void without decree of divorce or other legal process under § 20-57 of the Code, as made applicable by the concluding sentence of § 20-54, may greatly affect the propriety of an entry of a decree of adoption in the situation you present.

ADOPTION—Married Couple May Adopt Child Who Is a Sister of Either of the Petitioners.

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

March 11, 1965

This is in reply to your letter of March 9, 1965, which reads a follows:

"Would you please let me have your opinion on the following inquiry: "
"Is the authority contained in Title 63, chapter 14 of the 1950 Code of Virginia, as amended, sufficient to permit a court of competent jurisdiction to enter an order of adoption when one of the adopted parents is the natural sister of the minor child who is the subject of the proceedings?"

"The specific facts prompting the inquiry are as follows:
"An American serviceman stationed in Korea, married a Korean national, who subsequently became a naturalized citizen of the United States. The parties now reside in the City of Newport News, and the sister of the naturalized American wife of the U. S. serviceman is living with the family and attending Hampton Institute. The student at Hampton Institute is a minor and a Korean national, and in order to qualify for certain benefits provided by the armed forces to dependents of the members thereof, the serviceman and his wife now propose to adopt the serviceman's wife's sister, the purpose being to qualify her as a dependent of an American serviceman thus entitling her to medical care, exchange and commissary privileges."

Section 63-348 of the Code provides that the petition may be filed by any natural person who is a resident of this State for "leave to adopt a minor child not legally his by birth." In my opinion, a married couple residing in this State may adopt a child who is the sister or brother of one of the petitioners.

ADOPTION—Records—Index required in adoption cases.

CLERKS—Records—Index required in adoption cases.

HONORABLE C. CHAMPION BOWLES
Judge, Ninth Judicial Circuit

July 8, 1964

This is in reply to your letter of July 3, 1964, in which you present the following question:
"Will you kindly give me your opinion as to whether the Clerk, in the change of name in adoption cases, is required to follow the provisions of Section 8-577.1 as to indexing when a separate index of adoption cases has not been established."

Section 8-577.1 relates to petitions for change of name only. This section constitutes a separate Chapter in Title 8 and in my opinion, is not applicable in adoption proceedings had under the provision of Chapter 14, Title 63 of the Code. Unless a court provides for the separate index allowed under § 63-359.1, it seems that the only index required in adoption cases is the usual index in connection with a chancery proceeding. Therefore, your question is answered in the negative.

ALCOHOLIC BEVERAGE CONTROL LAWS—City Ordinance Regulating Sale of Wine and Beer—Authority of City of Portsmouth to adopt.

CITIES—Ordinances—Permitting the sale of wine and beer—Authority of the City of Portsmouth to adopt.

HONORABLE WILLARD J. MOODY
Member, House of Delegates

June 16, 1965

This will acknowledge your letter of June 10, 1965 in which you request my opinion as to the propriety of the City Council for the City of Portsmouth considering a petition presented to it "calling for a referendum on or the passage of an ordinance for the sale of beer and wine on Sundays between the hours of six A.M. and midnight." In this connection you point out the following facts:

"In this instance, pursuant to a petition, an election was held on April 20, 1965, at which time an ordinance permitting the sale of beer and wine on Sundays between the hours of one o'clock and midnight was defeated. A new petition has now been presented containing a sufficient number of qualified voters requesting that an ordinance be adopted or a referendum be held for the sale of beer and wine on Sundays between the hours of six A.M. and midnight."

You also enclosed photostatic copy of sections 1, 2 and 3 of Chapter X of the Charter of the City of Portsmouth, which sections provide for the passage or repeal of ordinances by initiative and referendum. The following language appears in Section 1 of Chapter X:

"... and if it (the petition) be signed by electors equal in number to at least fifteen per centum of electors voting for governor in the last preceding gubernatorial election and contains a request that the said ordinance be submitted to a vote of the people, the council shall either (a) pass such proposed ordinance without alteration, or repeal such existing ordinance within ten days after determining the sufficiency of the petition, or (b) within said ten days call a special election (unless a general election is to be held at least thirty and within ninety days thereafter, and at such special or succeeding general election such proposed ordinance, or the repeal of such existing ordinance shall be submitted without alteration to the vote of the electors of the city. The council may, in its discretion, propose an ordinance for substitution, or may submit the same to the electors at the same election. If a majority of the qualified electors voting on a proposed ordinance shall vote in favor
thereof, it shall thereupon become a valid and binding ordinance of the city, and the same shall not be repealed or amended, except by a vote of the electors within two years thereafter. If the majority of the qualified electors voting on the repeal of an existing ordinance shall vote in favor of its repeal it shall thereupon become of no force and effect.

It is noted that had the proposed ordinance voted on at the election held on April 20, 1965, been adopted, the Council would have been prohibited from amending or repealing it within a two year period. The three sections of Chapter X do not appear to contain any prohibition, however, as to the capacity of the Council to enact an ordinance similar to the one rejected at such an election; nor does there appear to be any express prohibition or limitation upon the use of a petition for initiative or referendum—whether or not the petition deals with the subject matter of a similar petition upon which an election has been held. As I am not aware of any other provision of the law to the contrary, I am of the opinion that the Council may legally either adopt the proposed ordinance or call a special election according to law on the petition presented.

ALCOHOLIC BEVERAGE CONTROL LAWS—Forfeitures—Court may order abandonment where value negligible.

FORFEITURES—Abandonment of Confiscated Automobiles—Court may order where value negligible.

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

This is in reply to your letter of July 13, 1964, in which you advise that two automobiles were seized in your county pursuant to the provisions of § 4-56 of the Code and that in your opinion, neither of them would sell for an amount sufficient to satisfy the unpaid balance of the liens on each. You ask my advice as to "whether these automobiles should be returned to the owners," or whether my office desires to proceed with forfeiture.

To answer the second part of your inquiry first, the policy of this office has always been to leave further proceedings relating to forfeiture under § 4-56 of the Code to the discretion of the local Commonwealth's Attorney. We execute the necessary papers under the provisions of subsection (d) of § 4-56 only when requested to do so by the Commonwealth's Attorney.

In answer to your first inquiry, I call your attention to an opinion of the Honorable J. Lindsay Almond, Jr., Attorney General, to Honorable J. Alden Oast, dated February 25, 1950, which appears at page 3 of the Report of the Attorney General of 1949-50. A copy of this opinion, with which I concur, is enclosed.

I have assumed that each of the lienors of these two vehicles is an "innocent lienor" in terms of subsection (k) of § 4-56.

As pointed out in the referenced opinion of February 25, 1950, the alcoholic beverage control laws relating to the confiscation of vehicles contain no provisions for the abandonment of vehicles in the circumstances you suggest. However, I agree with the suggestion of my predecessor, Honorable J. Lindsay Almond, Jr., to the effect that you might bring these facts to the attention of the Court and that the Court would certainly have the authority, in the exercise of reasonable discretion, to order an abandonment of the vehicles on the ground that nothing could be realized by confiscation thereof.
ALCOHOLIC BEVERAGE CONTROL LAWS—What Constitutes Second Conviction.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

This is in reply to your letter of April 8, 1965, in which you request an opinion regarding Section 4-58 of the Code. You state that an A.B.C. investigator at various times procured several illegal sales of alcoholic beverages from one individual. Thereafter, the investigator obtained a separate warrant for each alleged sale, all warrants being returnable on the same day. You ask if, at the trial, this person is convicted on more than one warrant, is the second conviction considered "a second or subsequent conviction" under the second paragraph of Section 4-58 of the Code?

In answer to your question, I refer you to an opinion of the Honorable J. Lindsay Almond, Jr., Attorney General, rendered to the Honorable James W. Harman, Jr., Commonwealth's Attorney for Tazewell County, dated February 3, 1955 and set out in the Report of the Attorney General of Virginia, (1954-1955), at page 3, a copy of which opinion is attached hereto. I concur in this opinion.

ANNEXATION—Suits—Time during which reinstitution of suit prohibited—Runs from entry of order by Supreme Court of Appeals where appealed.

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney for Roanoke County

This will acknowledge receipt of your letter of February 22, 1965, which reads as follows:

"On the 16th day of May, 1961, a Three Judge Annexation Court in the case of City of Roanoke v. Roanoke County, handed down a decision denying all annexation. This case was appealed, and in January, 1963, the Supreme Court upheld the decision of the lower Court in toto. "Under the statute prohibiting the bringing of an annexation suit within five years after one has been brought and determined, the question I would like to ask is does the five years in this case begin with the 16th day of May, 1961 or does the five year period begin to run from January, 1963."

Section 15.1-1055 of the Code reads, in part, as follows:

"No city or town having instituted proceedings to annex territory of a county, shall again seek to annex territory of such county within the five years next succeeding the entry of the final order in any annexation proceedings under this article or previous acts except by mutual agreement of the governing bodies affected, . . ."

In my opinion the five year period runs from the time the Supreme Court of Appeals of Virginia entered its final order in the case. Had the case not been appealed by the city of Roanoke—in that event, the five year period would have run from the time the final order was entered by the annexation court.
ATTORNEYS—Annual Fees to Virginia State Bar—When penalty assessed for delinquency.

VIRGINIA STATE BAR—Annual Fees—When penalty assessed for delinquency.

HONORABLE R. E. BOOKER
Secretary-Treasurer, Virginia State Bar

The second paragraph of your letter of January 26, 1965, relative to the construction of Section 54-50.1 is as follows:

"There are at present two people who were licensed to practice law in the 20's, but who have not practiced in Virginia since the Virginia State Bar was organized and began functioning Jan. 1, 1939. They have never affiliated or paid dues to the Virginia State Bar and, of course, no registered notice was ever given them that their dues were delinquent. My question is—Would these persons be subject to the penalty should they now affiliate with the Virginia State Bar?"

The first portion of Section 54-50.1 reads as follows:

"Any attorney at law licensed to practice in this State who fails for two successive years to pay the annual fees provided for by 54-50, shall thereby forfeit his license to practice law in this State.

"The Secretary of the Virginia State Bar shall, on or before January thirty-one of each year, notify every attorney whose fees for the two preceding years have not been paid; such notice shall be deemed to have been given if such notice is deposited by registered mail addressed to such attorney at his address as shown on such Secretary's official records, * * * ."

Although you "gave all publicity possible" to the above section of the Code when adopted by the Legislature, for the reasons stated in your letter you did not give notice by registered or certified mail addressed to such attorney at his address as shown on such Secretary's official records. Under well recognized principles of law, provisions relative to the exaction of penalties are to be strictly construed against the Commonwealth. I do not believe that the notice required in order to exact the penalty has been given. Therefore, I am of the opinion that the answer to your question is in the negative and that these two individuals would not be subject to the penalty should they now affiliate with the Virginia State Bar.

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ATTORNEYS—Appointed as Public Defenders—Court may appoint one or more.

HONORABLE WILLIAM J. HASSAN
Commonwealth's Attorney for Arlington County

November 6, 1964

This will acknowledge receipt of your letter of November 4, 1964, in which you refer to Chapter 292 of the Acts of Assembly of 1958, which authorizes the judge of the circuit court of any county having a density of population in excess of four thousand per square mile to appoint a public defender. Arlington County comes within that classification.

You request my opinion as to:
"... whether it would be possible to appoint a competent and discreet attorney as a public defender and with him a younger and less experienced attorney to assist in the defense so that a man of experience could supervise and direct several defenses at one time with several different younger assistants associated with him in the various cases of the nature of a felony or a serious misdemeanor. It is our intention that the prescribed fee allowed by the Court would be shared by the public defender and his assistant. We do not contemplate two separate fees in any one case.

"We would also like your opinion of whether it would be possible to appoint more than one public defender at any one time so that a multiplicity of defendant felons might have adequate public defense. Your opinion on this matter will be greatly appreciated."

In my opinion, Chapter 292, Acts of Assembly (1958), should be construed to authorize the appointment of one or more attorneys if that is necessary to comply with the provisions of that Act and with the provisions of Article 6, Chapter 9, Title 19.1 of the Code.

ATTORNEYS—Employed to Defend School Boards—By whom paid.

BOARDS OF SUPERVISORS—Obligated to Pay Fees for Attorneys Employed to Defend School Boards.

HONORABLE JAMES B. FUGATE
Member, House of Delegates

May 19, 1965

This is in reply to your letter of May 17, 1965, which is, in part, as follows:

"In November, 1964 a suit was filed by the Commonwealth for a citizens school committee against all of the members of the Scott County School Board to remove the school board from office because of alleged misfeasance, malfeasance and nonfeasance in office. The School Board retained counsel pursuant to § 22-56.1 of the Code of Virginia of 1950. The attorneys retained by the Scott County School Board submitted their statement for legal services to the Board of Supervisors of Scott County for payment. The Board of Supervisors of Scott County in turn transmitted the statement for legal services to the Scott County School Board for payment. The Scott County School Board has no funds appropriated for such items.

"I would appreciate it if you would give me your opinion as to whether the Scott County School Board is responsible for the payment of the legal services of counsel employed by the Scott County School Board or whether the Board of Supervisors of Scott County is responsible for the payment of the statement for legal services under the provisions of § 22-56.1 or any other applicable statute."

The last paragraph of § 22-56.1 of the Code reads as follows:

"All costs, expenses and liabilities of proceedings so defended shall be a charge against the county, city or town treasury and paid out of funds provided by the governing body of the county, city or town in which such school board discharges its functions."

In my opinion the obligation is upon the board of supervisors to pay the at-
torneys' fees as well as all other costs and expenses incurred by the defendants by reason of such suit. This can be done either by direct payment by the board to the attorneys or by an appropriation being made by the board of supervisors to the school board for the specific purpose of paying the invoice.

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ATTORNEYS—Employment by Counties—May be employed to represent county in reapportionment matters.

COUNTIES—Employment of Attorneys—May employ counsel for representation in reapportionment matters.

HONORABLE H. RATCLIFFE TURNER
Commonwealth's Attorney or Henrico County

December 7, 1964

This is in reply to your letter of December 2, 1964, in which you present the following question:

"I have been asked by members of my Board of Supervisors for an opinion as to whether or not the Board of Supervisors of Henrico County has the authority to employ counsel for the purpose of filing suit in state or federal courts challenging the action of the Legislature of Virginia in reapportioning the House of Delegates in such manner as to give representation to Henrico County by allowing eight delegates as floater delegates to represent Henrico County and the City of Richmond, rather than giving separate representation to Henrico County."

Section 15.1-507 of the Code is applicable. This section reads as follows:

"The governing body of any county may represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases in which no other provisions shall be made and, when necessary may employ counsel to assist the attorney for the Commonwealth in any suit against the county or in any matter affecting county property when the board is of the opinion that such counsel is needed."

The question of representation in the General Assembly of Virginia is, of course, a matter of concern of the county. In my opinion, the board of supervisors may represent the county in proceedings involving this question which, of course, is of vital interest to the citizens of the county. In your letter you cited the case of Campbell v. Howard 133 Va. 19. In that case Howard and another attorney had been employed for the purpose of defending the county's interest in annexation proceedings and a part of their services was representing the county in the General Assembly of Virginia in connection with the passage of certain statutes affecting the annexation laws of the State. The board of supervisors refused to pay a fee for the services rendered before the General Assembly but the court held that the board had the power to employ counsel to represent the county in matters which might be affected by legislation hostile to the interest of the county. In my opinion, if the board of supervisors has the power to employ counsel to represent the interest of the county in matters pending before the General Assembly of Virginia, it has the power to employ counsel for the purpose of attacking legislation which the board considers hostile to the best interest of the people of the county.
ATTORNEYS—Fees for Defense of Indigents—Taxed as costs.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of July 24, 1964, in which you request my opinion as to whether the counsel fees paid on order of a court not of record for defending indigents pursuant to Article 6, Chapter 9, Title 19.1 (§§ 19.1-241.1 through 19.1-241.6) should be taxed as a part of the costs in the event the accused is convicted.

Chapter 657, Acts of Assembly (1964), by which §§ 19.1-241.1 through 19.1-241.6 were enacted, is silent with respect to taxing such expense as a part of the costs. However, as you indicated, §§ 19.1-319 and 19.1-320 of the Code provide that the expenses which are paid out of the State treasury incident to proceedings had in a court not of record, if the accused is convicted, shall be deemed as costs recoverable by the State. In my opinion, the amount paid for counsel fees under §19.1-241.5 is an expense incident to the proceeding and must be taxed as a part of the costs in the manner provided in § 19.1-320 of the Code.

ATTORNEYS—Payment of Dues in Virginia State Bar—Waived during period of absence on military service.

VIRGINIA STATE BAR—Payment of Dues—Waived during period of absence on military service.

HONORABLE R. E. BOOKER
Secretary-Treasurer, Virginia State Bar

This is in answer to your letter of March 29, 1965, which reads as follows:

"Code Sec. 54-50.1 provides that if a person's dues remain unpaid for two years, he should be given certified notice at his last known address, and if his dues are not paid within six months, the same shall be certified to the Clerk of the Supreme Court of Appeals of Virginia, and such person's license to practice law shall be cancelled, to be reinstated only upon payment of all back dues and a penalty of $100.00.

"A member of the Bar registered in 1961 as an active member of the Bar of the 16th Judicial Circuit. His 1962 dues were not paid and on Feb. 9, 1962, certified mail was sent to the only address this office ever had for the registrant. Certified mail was returned marked 'Moved—left no address'. His dues remained unpaid for more than two years, and in October, 1963, notice was given by certified mail of his delinquency. That letter was also returned. On July 10, 1964, the Clerk of the Supreme Court of Appeals of Virginia was notified that this person's dues had been unpaid for more than two years, and on that date, his license to practice law in Virginia was cancelled.

"Sec. IV, Rule 3(d) of the Virginia State Bar Rules states that any active member of the Bar who becomes a member of the Armed Forces of the United States shall be entitled to have his dues waived during the period of such absence in military service until the first day of January next succeeding the return of such member to active practice. The member whose license to practice was cancelled now advises that he spent three years in the Air Force 1962, 1963 and 1964, and was discharged from active duty in December, 1964."
"I would appreciate your advising whether or not this office has the authority to give this member the benefit of the waiving of his dues or if the notice as required by statute takes precedence over the rule and he is required to pay all back dues and penalty to be reinstated to practice law in Virginia."

In my opinion, the dues for the years in question should be waived pursuant to the provisions of the Rule of the Virginia State Bar and, since the party concerned should have been continued to have been carried as an active member of the Bar throughout his military service, your office should do whatever is necessary to restore his name to the list for the years 1962, 1963 and 1964, so that his membership will be reflected as continuous.

BAIL—Misdemeanants—May be released on bond by justice of peace.

JUSTICE OF PEACE—Bail—May admit to bail persons charged with misdemeanors.

HONORABLE E. R. HUBBARD
Justice of the Peace for Wise County

March 22, 1965

This is to acknowledge receipt of your letter of March 15, 1965, in which you request my advice on several questions relating to the granting of bail. I shall answer the same seriatim.

"(1) As a Justice of the Peace for Wise County, Virginia, [can I] release a person on bail on charge of drunk driving before I commit them to jail to a good reliable person instead of putting in jail?"

As a justice of the peace you have authority to admit a person to bail when that person is charged with a misdemeanor. See, § 19.1-110, Code of Virginia, (1950) as amended. Drunk driving is a misdemeanor. However, you should require the person to give recognizance with or without security for his appearance before the court. See, § 19.1-127 of the Code.

"(2) And would this hurt the officer's case or not?"

If a person is admitted to bail in accordance with law, this would not affect the outcome of the case.

"(3) Or should I see our Commonwealth's Attorney and Judge about this. I am sure that it would make the officers [mad] at me but I sure would like to know my rights on this. Please do check and advise. Thank you."

It is desirable for a justice of the peace to consult the Attorney for the Commonwealth concerning his duties and authority. Under said § 19.1-110, a county court judge or the circuit judge must first grant you authority to admit persons to bail in felony cases, else you do not have that power.
BAIL AND RECOGNIZANCE—Bail Commissioner—Authority to admit to bail.

BAIL AND RECOGNIZANCE—Justice of Peace for City—May admit to bail misdemeanant who is a prisoner in nearby county.

HONORABLE WILSON SULLIVAN  
Bail Commissioner

This is to acknowledge receipt of your letter of August 29, 1964, in which you request my opinion on the following questions which will be answered seriatim:

“1. If a Bail Commissioner has been appointed and qualified for a certain city and surrounding counties to receive cash bond, can he also receive such cash bonds for courts in this State not in the area for which he was duly appointed if the arrangement is agreeable with the recipient court in each case?”

Section 19.1-116, Code of Virginia (1950), as amended, prescribes the authority of a bail commissioner to grant bail. The last paragraph of that section is as follows:

“Any such bail commissioner or clerk may admit to bail any person charged with a criminal offense, for the appearance of such person in any court in which such person is required to appear to answer for such offense, whether any such court be a court of the county or city of such bail commissioner or clerk, or of some other county or city in this State.” (Italics supplied).

The question is answered in the affirmative.

“2. In case of consolidated jail, located in a city and serving that city and the surrounding counties, can a Justice of The Peace for that city receive cash bond for an accused who is a prisoner for the nearby county while he is in the city at the consolidated jail?”

Your attention is invited to § 19.1-118, which reads as follows:

“In any case in which a person charged with a misdemeanor felony is held in the jail or some county, city or town other than that in which he is to be tried upon such charge, he may be admitted to bail by any officer of the county, city or town in the jail of which he is so held in accordance with the provisions of law concerning the granting of bail in cases in which persons are so admitted to bail or recognizance, when held in the jail in the county, city or town in which they are to be tried. The provisions of this section shall apply to persons held in any such jail for any act committed prior to July first, nineteen hundred sixty, as well as to persons so held thereafter.”

The term “any officer” in the foregoing section includes a justice of the peace, as a justice of the peace is authorized under § 19.1-110 of the Code to grant bail. The question is therefore answered in the affirmative.
BAIL AND RECOGNIZANCE—Guaranteed Arrest Bond Certificates Issued by
Automobile Clubs—Not applicable to appeals. September 14, 1964

HONORABLE R. S. WRIGHT, JR.
Judge, Shenandoah County Court

This is in reply to your letter of September 3, 1964, which reads as follows:

"The question has been raised as to whether or not an Automobile Club
or Association which is included in those listed in your letter of February
3, 1964 to Clerks of Courts, Police Judges, Judges of County Courts,
Justices of Peace, Mayors of Towns and Cities, and the Superintendent
of State Police, in pursuance to the provisions of Sections 38.1-644.1
and 38.1-644.2 may become surety on an appeal bond involving a con-
viction under a Statute or Municipal Ordinance regulating motor vehicle
traffic to the circuit or other appropriate appellate court. The Automobile
Club involved is the Automobile Club of Virginia, Richmond, and
I understand, of course, that the Guaranteed Arrest Bond Certificate is not
exceed $200.00, the question being whether this is limited only to
making bail in the first instance or whether it also covers an appeal in a
motor vehicle case.

"I do not believe there has been a ruling made on this and if it is
proper, I shall greatly appreciate your opinion."

Section 38.1-644.1, Code of Virginia (1950), as amended, authorizes any do-
mestic or foreign surety company which has qualified to transact surety business in
this State to become surety in an amount not to exceed two hundred dollars with
respect to guaranteed arrest bond certificates issued by an automobile club or
association. Section 38.1-644.2, Code of Virginia (1950), as amended, provides
that any such guaranteed arrest bond certificate shall, when posted by the person
whose signature appears thereon, be accepted in lieu of cash bail in an amount not
to exceed two hundred dollars to guarantee the appearance of such person in any
court, as required, "when such person is arrested for violation of any motor
vehicle law of this State or ordinance of any municipality in this State," with
certain exceptions.

As I interpret these statutes, the intention is to authorize the issuance of such
guaranteed arrest bond certificate for use when the holder thereof is arrested for
certain traffic violations. In my opinion, they are limited to such use as do not
apply to an appeal bond in any case in which a person convicted of a traffic of-
fense desires to appeal his case to a higher court.

BOARDS OF SUPERVISORS—Appropriations—Authority to appropriate funds
to "day nursery" qualified under § 63-232. December 14, 1964

HONORABLE RICHARD E. DIXON
Assistant Commonwealth' Attorney for Fairfax County

This is in reply to your letter of December 4, 1964, relating to the Higher
Horizons Day Care Center, in which you request my advice as to whether or not
the board of supervisors has the power to grant the sum of $10,000 of public funds
to this Center.

This is a private corporation which has been licensed by the Department of
Welfare and Institutions under the provisions of Chapter 11 of Title 63 of the
Code. The Department of Welfare licensed this organization because in its judg-
ment it qualifies as a "day nursery" under § 63-232 of the Code. Therefore in my opinion, the board of supervisors may appropriate such funds as it deems advisable to this organization under the provisions of § 63-256 of the Code. I am advised by the Department of Welfare that other organizations of this nature have been licensed in other parts of the State and that the localities have been making contributions for the support of such organization.

BOARDS OF SUPERVISORS—Assessments for School Operation and Maintenance—Limitations.

TAXATION—Levies for School Operation and Maintenance—Limitation on counties.

HONORABLE RICHARD M. CHAPMAN
Commissioner of the Revenue for Scott County

April 8, 1965

This is in reply to your letter of April 6, 1965, which reads as follows:

"(1) Can a County Board of Supervisors set a levy in excess of $3.00 per $100.00 assessed value for operation and maintenance of schools? "(2) Can a County Board of Supervisors who has a levy of $3.00 per $100.00 assessed value for the operation and maintenance of schools assess an additional levy for operation and maintenance of schools, if they include the additional levy in with the General County Fund and instruct the Treasurer of the county to deposit the money collected from that levy into the school maintenance and operation fund at the time of collection?"

The answer to your first question is in the negative. Section 22-126 places a limitation of $3.00 on $100.00 of assessed value of property that may be levied for public school purposes within a county. There are certain exceptions in this section, but they do not apply to Scott County.

The answer to your second question is likewise in the negative. The board of supervisors may, of course, lay a general levy for county purposes at such rate as they deem necessary but it would be a violation of the above Code section for any portion of the levy to be for the specific purposes of operation or maintenance of a school.

The sums collected from a general levy for all county purposes are subject to appropriation by the board of supervisors and they may make such appropriations as they deem necessary out of the general fund for public school purposes which appropriations may be in addition and supplementary to the funds collected from the special levy for school purposes.

In connection with this matter, I enclose three previous opinions of this office which may be helpful to you. These opinions are as follows:

BOARD OF SUPERVISORS—Authority—Borrowing money—How amount determined.

SCHOOLS—School Boards—Borrowing money—How amount determined.

HONORABLE A. W. GARNETT
Commonwealth's Attorney for Spotsylvania County

September 4, 1964

When you visited this office on August 27 you requested my opinion on the following question, to-wit:

"Are the temporary loans obtained by a county school board under § 22-120 of the Code to be taken into consideration in determining the amount authorized to be borrowed by the board of supervisors to meet casual deficits under the authority of § 15.1-545 of the Code?"

The question is answered in the negative. The power of a board of supervisors to borrow funds on a temporary basis is restricted only by the terms of §§ 15.1-545 and 15.1-546 of the Code and § 115(a) of the Constitution.

The total amount a county may obligate itself under this section and § 22-120 does not create a debt in excess of the amount permitted under § 115(a) of the Constitution.

Although you did not raise the question, I call your attention to the opinions of the Attorney General published in our Reports for 1955-56, page 185, and 1957-58, page 242, holding that that portion of § 22-120 permitting the borrowing of funds for a period in excess of one year for the purchase of school busses is void as being in violation of § 115(a) of the Constitution.

BOARD OF SUPERVISORS—Authority—Conditions under which may contribute to development of airport.

HONORABLE A. A. RUCKER
Commonwealth's Attorney for Bedford County

April 16, 1965

This is in reply to your letter of April 13, 1965, which reads as follows:

"A private individual owns a small one strip airport in the Smith Mountain Lake area of Bedford County. I am advised that this landing strip is graded for a length of 2800 feet, in connection with which grading and preparation certain financial assistance has been received from the State. Further, that it is contemplated that this strip will be paved. It seems to me that in all likelihood the existence of this strip is and will be quite an asset to the people of that area and to the public at large.

"In the event that the owner of this airport by recorded deed conveys to the Board of Supervisors of Bedford County a right for the public to land and take off from this airport, then and in that event would it be legally permissible for the Board of Supervisors of Bedford County to contribute financial assistance from County funds for the paving and other development of this airport?"

The statutes with respect to powers of counties in connection with the establishment of an airport or landing field are contained in Chapter 3 of Title 5 of
the Code. The power of counties to make appropriations in connection with such project is contained in § 5-39 of this chapter. Under § 5-20 the county may acquire property for the use of a landing field either by purchase or lease or by other means stated therein. Section 5-38 authorizes a county to lease the facility to any individual or corporation for the purpose of operating an airport or landing field or for the purpose of landing or starting airplanes therefrom. In my opinion, before the county may make appropriations for the purpose of grading and paving the proposed landing strip it will be necessary that the county comply with the provisions of the statutes referred to.

BOARDS OF SUPERVISORS—Authority—May adopt ordinance regulating the parking of railroad cars.

ORDINANCES—Boards of Supervisors—Regulating parking of railroad cars on sidings.

HONORABLE E. CARTER NETTLES, JR.
Commonwealth’s Attorney for Sussex County

January 4, 1965

This is in reply to your letter of December 21, 1964, which reads as follows:

“My Board of Supervisors would like to pass an ordinance regulating the parking of railway cars within a certain distance of railway crossings, both public and private, for the safety of the public. Would you please advise if the Board possesses the power to enact such an ordinance.”

Under the provisions of § 15.1-510, any county may adopt ordinances to secure and promote the safety of the inhabitants of the county, not inconsistent with the general laws of the State. An ordinance of the nature suggested would not, in my judgment, be in conflict with § 56-412.1 of the Code, since the provisions of that section do not relate to the parking of railroad cars on railroad sidings. If such an ordinance is a reasonable requirement for the purpose of preventing the standing railroad cars from obstructing the view of persons crossing the railroad on a public highway. I am of the opinion it would be enforceable. Section 56-412.2 of the Code infers that the counties have authority to pass ordinances of this nature so long as they are not in conflict with § 56-412.1.

BOARDS OF SUPERVISORS—Authority—May assign office space in courthouse to officials listed in § 15.1-258.

PUBLIC OFFICERS—Commissioner of Accounts—Eligible for assignment of office space in courthouse by board of supervisors.

HONORABLE EDW. H. RICHARDSON
Commonwealth’s Attorney for Roanoke County

July 13, 1964

This is in reply to your letter of July 10, 1964, which reads as follows:

“Under the provisions of § 15.1-258 of the Code of Virginia, as
amended, the Board of Supervisors of Roanoke County provides offices for the Treasurer, Attorney for the Commonwealth, Sheriff, Commissioner of the Revenue, Commissioner of Accounts, and numerous offices for such Departments as the Home Demonstration Agency, etc., three or four offices for Federal Agencies, and temporary offices for the State Police. The office of Superintendent of Schools is provided in a School Administration Building not located in the Court House.

"I am enclosing herewith a resolution passed by the Board of Supervisors of Roanoke County June 29, 1964, concerning the use of space within the Court House building for the Commissioner of Accounts, and his right to practice law in said office.

"The Commissioner of Accounts for at least the past 44 years has been an Attorney at Law, and during those years has occupied space in the Court House, supplied by the County, and in addition to his duties as Commissioner of Accounts has used the office for the practice of law.

"The present Commissioner of Accounts was appointed as such in 1926, when Judge T. L. Keister resigned from said office to become Judge of the Circuit Court of Roanoke County. Since that time, the present Commissioner of Accounts has occupied a basement room, divided into two small offices, and, in addition to his duties as Commissioner of Accounts, he also conducts a private law office.

"The question the Board would like answered is, if under the provisions of § 15.1-258 of the Code of Virginia, it has the right to require the Commissioner of Accounts to vacate the office which he occupies in the Court House, and his right to practice law in said office while conducting his duties as Commissioner of Accounts."

Section 15.1-258 of the Code provides as follows:

"The governing body of each county and city shall, if there be offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, attorney for the Commonwealth, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city. Any such governing body may, if there be offices in their respective courthouses available for such purposes, provide offices for the judge of any court sitting in the county or city, and any judge of the Supreme Court of Appeals who may reside in the county or city, and if such offices are not available in the courthouse, they may be provided by the governing body, if they deem it proper elsewhere than in the courthouse of the county or city."

Under this section, determination of whether or not office space is available for the commissioner of accounts within the courthouse is within the sound discretion of the board of supervisors. This discretion may not be set aside and disregarded unless it is abused. Edgerton v. Hopewell, 193 Va. 493, at p. 501. In my opinion, it would be an abuse of that discretion if the commissioner of accounts should be denied an office in the courthouse for the purpose of making room for an agency that is not specifically named in § 15.1-258. Those officials named in § 15.1-258, in my opinion, are entitled to be assigned office space in the courthouse before any other official or agency is assigned space therein.

In my opinion if the board of supervisors, in its discretion, determines that it no longer has available space in the courthouse for the commissioner of accounts, it has the authority to require the commissioner of accounts to vacate the office he now occupies in the courthouse.

With respect to the question as to whether the commissioner of accounts has the right to conduct the private practice of law in the office assigned to him in the courthouse, I am of the opinion the board has no control. The commissioner
of accounts is appointed by the court and performs his official duties as an officer of the court, under its control. The only authority vested in the board with respect to the commissioner of accounts is to determine whether or not there is space in the courthouse for the operation of that office. There is no provision in the statutes under which the board may exercise any control over the commissioner of accounts while occupying the space assigned to him.

BOARD OF SUPERVISORS—Authority—May make allowance to game warden for enforcement of dog laws from surplus in dog fund.

HONORABLE E. CARTER NETTLES, JR.
Commonwealth's Attorney for Sussex County

This is in reply to your letter of July 3, 1964, in which you advise that the governing body of Sussex County desires to make an allowance to the Game Warden for services rendered in the enforcement of the dog laws as is authorized in § 29-209 of the Code. You further advise that the Executive Director of the Commission of Game and Inland Fisheries has informed you that it is the policy of the State to limit the amount of county contributions to one-third of the amount paid by the State to game wardens, and if a county does exceed the one-third limit, the State salary is reduced proportionately.

You have requested my opinion as to whether the Commission of Game and Inland Fisheries may legally reduce the salary of game wardens under such circumstances.

The allowances in question are made by the governing bodies of the counties from any surplus remaining in the dog fund over and above the amount necessary to comply with § 29-209 of the Code. There being no minimum or maximum fixed by this statute, the governing body would be at liberty to use the surplus, if any, to pay the game warden any amount it desires. Obviously, there is no means whereby such a surplus can be predicted with certainty.

The question which you have presented poses a problem which is not controlled by statute. Essentially this question involves the authority of the executive branch of government to control the salaries or perquisites of State employees. It is entirely conceivable that allowances or gratuities emanating from sources other than the State could result in such an imbalance in compensation that the administration would lose effective control. Since this is a problem which involves the functions of the Governor's Office, I will abstain from expressing a view on the policy which has been adopted by the State, and suggest that you discuss the matter with the appropriate representative of the Governor's Office.

BOARD OF SUPERVISORS—Authority—May make appropriation for paying expenses of school band to attend festival in Florida.

HONORABLE W. A. HOWLETT
Treasurer of Carroll County

This is in reply to your letter of March 8, 1965, which reads as follows:
"I respectfully request your opinion on the following:

"Is it lawful for the Supervisors of Carroll County to appropriate a sum of money for the purpose of allowing a County High School Band to attend a festival, as a representative of the State, in Florida?

"If a direct appropriation is impossible, can this money be appropriated to the Carroll County School Board and same be transferred by them for this project?"

In my opinion the board of supervisors may make an appropriation to the school board of the county for the purpose of paying expenses of a county high school band to attend the festival in Florida. The school board should pass an appropriate resolution to the effect that it considers this activity to be a proper part of the high school program in the county.

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BOARDS OF SUPERVISORS—Authority—May not use surplus from special stamps to hunt bear and deer to finance county fire department.

GAME AND INLAND FISHERIES—Authority—May not cooperate in financing fire department.

March 24, 1965

HONORABLE CECIL E. WRIGHT
Judge, Craig County Court

This will acknowledge receipt of your letter of March 19, 1965, in which you refer to Chapter 420, Acts of 1962, under which certain counties in the State, including the county of Craig, are authorized to implement the provisions of Section 2 of said Chapter. You point out that one provision of Section 2 is as follows:

"... Any surplus remaining in the fund, which surplus has been in the fund more than three years, shall be earmarked for conservation, restoration, protection of wildlife and preventing damage by wildlife to property in said county under the direction of the board of supervisors and in cooperation with the Commission of Game and Inland Fisheries. . . ."

You present the following question and make these observations:

"Does the Board of Supervisors, with the cooperation of the Commission of Game and Inland Fisheries, have the authority to expend any sum from said fund to the Craig County Fire Department for the maintenance of the Craig County Fire Department for the reasons set forth below?

"The Craig County Fire Department is the only fire fighting unit in Craig County or in close proximity to Craig County. The Craig County Fire Department suppresses and assists in suppressing grass, brush and mountain or woodland fires in Roanoke, Botetourt and Alleghany Counties when called on by the game wardens, State Foresters, U. S. National Forest Service and others.

"Craig County is mostly made up of farm lands and mountain lands. Much of the farm lands in Craig County are under the Federal Land Bank System and the accumulated growth of grass and weeds offer perfect coverage and food for small game, such as rabbits, quail and doves.
Much of this small game, as well as the big game, would be destroyed by grass, brush and mountain or woodland fires if it was not under the protection of the Craig County Fire Department.

"The Craig County Fire Department answers approximately thirty-five mountain land fires annually and many, many brush and grass fires throughout the county. The grass and brush fires appear more frequent in the spring when the small game, both animals and birds, are rearing their young.

"Since the Craig County Fire Department is the one greatest unit in Craig County in the conservation and protection of wildlife, would the Board of Supervisors, with the cooperation of the Commission of Game and Inland Fisheries, have the authority to expend any sum from said fund after the expiration of the three year period for the maintenance of the Craig County Fire Department in order to further conservation and protection of wildlife in said county?

"The Craig County Fire Department is strictly a volunteer fire department and is supported by contributions from the Board of Supervisors, business and private sources."

It will be noted that the surplus remaining in the fund for more than three years is a restricted fund and can only be expended for the purposes set forth therein "under the direction of the board of supervisors and in cooperation with the Commission of Game and Inland Fisheries."

I think this provision contemplates a program for conservation, restoration, etc., in which the Commission of Game and Inland Fisheries cooperates. I do not feel that it is the intent of this provision to authorize the county to finance a county fire department out of the fund, although the fire organization may at times be useful in the protection of wildlife. The fire department is essentially for the protection of property and its protection of wildlife is merely incidental. Monies appropriated out of this special fund for the support of the fire department are no longer "earmarked" and used exclusively for the specific purposes for which the fund is established. The services rendered by the Craig County Fire Department, as you point out, extend outside the county of Craig and, of course, the special dog fund may not be used for that purpose.

The statutes with respect to the establishment and operation of county fire departments are found in Chapter 2, Title 27 of the Code. Under the provisions of this Chapter, the board of supervisors may make appropriations from the general fund for the purpose of supporting such a fire department and may also levy a special tax for that purpose on all the property in such fire zones or fire districts as may be established.

In light of the above statements, I am of the opinion that your inquiry must be answered in the negative.

BOARDS OF SUPERVISORS—Authority—May require school board to channel purchases through county purchasing agent.

SCHOOLS—School Boards—Authority over purchases of supplies for school purposes.

April 16, 1965

HONORABLE RHEA F. MOORE, JR.
Clerk of Board of Supervisors of Tazewell County

This is in reply to your letter of April 13, 1965, in which you state that the board of supervisors of your county is considering the employment of a purchasing
agent to coordinate its buying needs. You request my advice as to whether or not the board of supervisors can direct or order the school board to channel its purchases through such a purchasing agent.

Article 7, Chapter 2, Title 15.1 of the Code authorizes the governing body of every county to employ a county purchasing agent and provides that the purchasing agent, with the approval of the county board, shall adopt rules and regulations in accordance with the provisions of § 15.1-107. Under the terms of this chapter it applies to all of the departments or agencies of the county government. Under this chapter I am of the opinion that the county school board could be required to purchase its supplies through the county purchasing agent.

In my opinion, however, the school board, subject to the powers of the State Board of Education, is the sole judge of its needs and the type and character of supplies it may desire to purchase for school purposes. The supervision and management of the public schools are vested in the school board by the provisions of Section 133 of the Constitution, and its decision as to what supplies, material and equipment it may need and the type and costs thereof, is vested solely in the school board, subject to the amount appropriated to the board by the board of supervisors for such purposes, and subject to the authority vested in the State Board of Education by Section 132 of the Constitution.

BOARDS OF SUPERVISORS—Authority—No authority to enact ordinance paralleling State law regulating hunting.

HONORABLE THOMAS STARK, III
Commonwealth's Attorney for Amelia County

This is in reply to your letter of November 10, 1964, which reads as follows:

"The Board of Supervisors of Amelia County, Virginia, under Section 29-144.5 of the Code of Virginia of 1950, as amended, proposes to pass an ordinance that would prohibit hunting on or from Highway Department rights of way of primary or secondary highways in Amelia County. The Board is not inclined to prohibit hunting within 100 yards of such primary and secondary highways.

"May the Board of Supervisors pass such an ordinance in light of Section 33-287 of the Code of Virginia, 1950, as amended? If permissible the proposed hunting ordinance would contain a section stating clearly that the ordinance does not supersede any State statute and in addition would make specific reference to Section 33-287 of the Code. The problem which the Board of Supervisors seeks to attack and correct by its proposed hunting ordinance is the road hunting of deer in Amelia County. The Board of Supervisors is unwilling to deny property owners the right to hunt on their land within 100 yards of a primary or secondary highway."

Section 29-144.5 of the Code, to which you have referred, does not, in my opinion, authorize a board of supervisors to pass an ordinance of the type suggested by you. This section authorizes the governing body to enact and enforce an ordinance prohibiting the hunting of deer within one hundred yards of a highway. You state that your board of supervisors does not wish to enact an ordinance such as is authorized by this section but desires to limit the ordinance to prohibit hunting of deer on a highway. The shooting of firearms on a highway is prohibited by statute—§ 33-287 of the Code—and I do not construe § 29-144.5 as
conferring upon the board of supervisors the power to parallel this section unless it is incidental to an ordinance which prohibits hunting of deer within one hundred yards of the road.

In this connection, I enclose copy of an opinion dated July 17, 1950, to Mr. E. E. Orange, published in Report of Attorney General (1950-51), at p. 31. This opinion, of course, was written prior to the enactment of § 29-144.5, but this latter statute, as I have indicated, does not justify a departure from the views expressed in that opinion.

Sections 15.1-518 and 15.1-518.1 of the Code would not authorize the enactment of an ordinance such as you have suggested.

BOARDS OF SUPERVISORS—Authority—Over the shooting of firearms.

HONORABLE DONALD G. PENDLETON
Assistant County Judge of Amherst County

October 28, 1964

This is in reply to your letter of October 7, 1964, supplemented by your letter of October 19, 1964, in which you present the following situation:

"I have been employed by some citizens of Amherst County in reference to the regulating of shooting matches. The facts are as follows: That on weekends, shooting matches are conducted in the Madison Heights Sanitary District of Amherst County which is the most populated section. Their matches often times will be conducted until past midnight. They affect the health of the inhabitants through their inability to obtain proper rest. My clients feel that a 7 p.m. curfew would be reasonable and not create a hardship on those conducting the matches.

"The Board of Supervisors has agreed to regulate them if they have the authority. It is my opinion that the general grant of authority by the General Assembly to the counties to make regulations in reference to health, welfare, and safety gives them the power to regulate shooting matches as to a curfew.

"I would also like to have your opinion as to how the Va. Code, Sec. 15.1-518 affects this problem since this was passed by the General Assembly during their last session."

Section 15.1-510 of the Code provides, in part, as follows:

"Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this state . . . ."

In my opinion, it is doubtful whether the provisions of this statute would be sufficient to authorize the board of supervisors to prevent shooting matches on the ground that they would affect the health and welfare of the inhabitants merely because their sleep is interrupted. The statute, in my opinion, as it relates to health, authorizes the passage of ordinances for the purpose of preventing the spread of disease, such as small pox, diptheria, typhoid, etc., but not, in my opinion, to prevent the possible effects from loss of sleep.

I see no reason why the board may not exercise this authority under § 15.1-518;
however, I do not feel that an ordinance which would only prevent the shooting of firearms in the area prescribed in the ordinance after 7:00 p.m. would be in the scope of the statute. I feel that it would be necessary that the ordinance entirely prohibit the shooting of firearms in the area.

I call your attention to the provisions of § 33-287 of the Code, which provides as follows:

“If any person shoot in or along any road, or within one hundred yards thereof, or in a street of any city or town, whether the town be incorporated or not, he shall, for each offense, be fined not less than five dollars."

BOARDS OF SUPERVISORS—Authority—Roanoke County Board may make appropriation from general fund for equipment of building operated jointly by County and Town of Salem under § 15.1-172(h) of the Code.

MAY 25, 1965

HONORABLE CHARLES B. PHILLIPS
Assistant Commonwealth’s Attorney for Roanoke County

This is in reply to your letter of May 20, 1965, which reads as follows:

“During the year 1964, a bond issue was held in Roanoke county and the voters voted in favor of issuing $500,000.00 in bonds, payable over a period of twenty (20) years for the purpose of joining in with the Town of Salem for the erection of an auditorium and coliseum upon land owned by the Town of Salem. In a contract between the Town of Salem and County, it was agreed that while fee simple title to this land remained in the name of the Town of Salem, the coliseum and auditorium, together with the parking area surrounding same could not be sold without the consent of the County of Roanoke. The Town of Salem now wishes the County to spend an additional sum of between $60,000.00 and $70,000.00 for equipping said building with proper facilities for the enjoyment thereof, said money to be used from General County Funds, and not from the $500,000.00 for the sale of the bonds.

“The Board of Supervisors of Roanoke County have asked me to inquire from you whether they have the right to spend this money from the General County Funds for the purpose set forth above.”

In my opinion, the board of supervisors may make an appropriation out of the general fund for the purposes set forth in your letter. This is a project under § 15.1-172(h) of the Code being financed and operated jointly by the county of Roanoke and the town of Salem, which may be financed either out of appropriations from the general levy or by the issuance of bonds, or both. The fact that the county may issue bonds under the General Finance Act for construction of the project does not impose a restriction upon the power of the board to make appropriations for any lawful undertaking out of the general fund resulting from the general levy fixed pursuant to § 15.1-344 of the Code. The project is a lawful undertaking permitted under § 15.1-185 of the Code.

I assume that the county and the town have entered into an agreement for this joint venture pursuant to the provisions of § 15.1-21 of the Code (formerly § 15-13.2) and which was the subject of discussion by Mr. Kenneth C. Patty,
Assistant Attorney General, in his letter of May 26, 1964, to Mr. Richardson and Mr. Kime.

BOARD OF SUPERVISORS—Authority—Sanitary District—May advance funds for study of installing central sewerage system.

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

December 18, 1964

This is in reply to your letter of December 14, 1964, which reads as follows:

"An area of this county has indicated that they may petition the court for creation of a Sanitary District, pursuant to the statutes made and provided. Before taking steps in that direction, they have requested the Board of Supervisors to finance an engineering study to determine the feasibility of installing a central sewerage system therein.

"Please advise whether the Board of Supervisors has authority to assume the financial obligation in conducting such feasibility study?"

Section 21-134.1 of the Code provides as follows:

"Notwithstanding the provisions of § 21-132, the governing body shall direct the treasurer to reimburse the general fund of the county from the proceeds of the bond issue or from any funds to the credit of the sanitary district, not otherwise specifically allocated or obligated to the extent that the county has made advances to the sanitary district from such general fund to assist the district to initiate or effectuate the project for which it was created."

In my opinion, the board of supervisors may advance funds for the purpose stated. If the sanitary district is organized, it is mandatory that the general fund of the county be reimbursed in compliance with this section of the Code.

BOARD OF SUPERVISORS—Authority—Wise County not authorized to appropriate money for flood control.

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

March 22, 1965

This is in reply to your letter of March 17, 1965, in which you request my opinion with respect to the following:

"The Tennessee Valley Authority proposes certain flood control projects in the Lipps Magisterial District of Wise County, Virginia. They propose to purchase certain water rights for dredging and cleaning the creeks and rivers in the Lipps Magisterial District, and they have requested the County of Wise, through the Board of Supervisors, to put up matching money for this Tennessee Valley Authority project.

"My first question is, does the Board of Supervisors of Wise County, Virginia, under Section 15.1-510 of the Code of Virginia have authority
to appropriate matching money for a flood control project under the supervision of the Tennessee Valley Authority?

"If your answer to the above question is in the affirmative, my next question is, would the Board of Supervisors have the authority to put a general county levy on all four magisterial districts of Wise County, Virginia for the above flood control project, solely in the Lipps Magisterial District of Wise County?"

In my opinion, § 15.1-510 of the Code does not authorize the board of supervisors of a county to appropriate money for the purpose of flood control. This section of the Code authorizes the board of supervisors to adopt and enforce ordinances for the purposes set forth therein.

Section 15.1-31 of the Code authorizes counties to make appropriation for projects for the purpose of preventing the flooding or inundation of the county, but this authority is limited by the language of the Act to flooding "by surrounding or nearby sea or tidal waters." It would seem that on account of this language the General Assembly has restricted this power to counties in the eastern part of the State.

BOARDS OF SUPERVISORS—Authority to Move Courthouse.

BOARDS OF SUPERVISORS—Authority to Convey Courthouse Property under § 15.1-262.

HONORABLE WILLIAM L. PERSON, JR.
Acting Commonwealth’s Attorney for James City County

This will acknowledge receipt of your letter of February 10, 1965, in which you state that the courthouse of James City County is located in the City of Williamsburg and is owned jointly by the county and the city. Colonial Williamsburg has offered the county and the city a cash consideration and another site located in the City of Williamsburg for the present courthouse site. You have been requested by the Board of Supervisors of James City County to determine whether this exchange with Colonial Williamsburg may be accepted under the provisions of § 15.1-262, and whether § 15.1-559 is applicable since the courthouse property is owned jointly with the City of Williamsburg.

I do not believe the fact that the courthouse is jointly owned by the county and city would have any effect upon the provisions of § 15.1-559. The question is whether or not it is proposed to remove the courthouse to another place. Ordinarily, the meaning of the word "place" depends upon the connection and circumstances of its use. In this instance, I feel that it should be construed to mean that if a courthouse is sought to be removed to another vicinity or locality, an election is required. In a telephone conversation with this office you have stated that it is proposed to construct the new courthouse on a lot approximately two blocks distant from the present location on St. Francis Street—the building to be on the opposite side of the street from the location of the present building. In my judgment, the new courthouse in its new location will be in the same vicinity, locality and place as it is presently located and, for that reason, § 15.1-559 of the Code does not apply.

In my opinion, the board of supervisors may convey the present courthouse
property to Colonial Williamsburg by following the procedure set forth in § 15.1-262 of the Code.

You also present the following question:

"If § 15.1-559 is applicable to a jointly owned courthouse, may the county residents vote to move the city offices out of the city?"

In my opinion, this question must be answered in the affirmative. This is in conformity with a prior opinion of this office, published in the Report of Attorney General (1954-55), at p. 22.

BOARDS OF SUPERVISORS—Authority to Purchase Land for Recreation Areas.

April 29, 1965

HONORABLE J. PATRICK GRAYBEAL
Commonwealth’s Attorney for Montgomery County

This is in reply to your letter of April 26, 1965, in which you state that the county of Montgomery, through its Planning Commission, proposes to purchase or otherwise acquire certain real estate within the county for use as public recreation or playground areas. You refer to §§ 15.1-271 through 15.1-274 of the Code and request my advice as to whether or not a referendum is necessary before the system can be established.

In my opinion, the referendum is not required under §§ 15.1-15 and 15.1-271. The county is authorized to establish such a system under these sections without submitting the question to the voters.

In that connection I enclose copies of four previous opinions of this office, as follows:

Opinion to Hon. M. D. Rosenberg dated September 2, 1941 and reported in Opinions of Attorney General (1941-42), at p. 25
Opinion to Hon. James P. Reardon dated October 18, 1943 and reported in Opinions of Attorney General (1943-44), at p. 19
Opinion to Hon. S. J. Thompson dated August 23, 1949 and reported in Opinions of Attorney General (1949-50), at p. 20

You will note that in these opinions it has been held that the provisions of § 15.1-274 apply in those cases where the board of supervisors does not take the initiative in the establishment of such system of recreation and playgrounds.

You present a second question as follows:

"The second point presented, relates to the fact that one specific piece of property is of particular interest to the Planning Commission at this time and it was my feeling that a plan for the entire county should be formulated prior to the acquisition of any land. My question on this point then is whether a plan for the entire county must or should precede the acquisition of any real estate."
In my opinion the answer to this question is in the negative. I am unable to find anything in these statutes which would indicate that a plan for the entire county must or should precede the acquisition of any real estate contemplated for the use of such a system of recreation.

BOARDS OF SUPERVISORS—Budget—May transfer unencumbered funds from one item in budget to another.

HONORABLE GEORGE A. PRUNER
Commonwealth's Attorney for Russell County

July 21, 1964

This is in reply to your letter of July 16, 1964, which reads, in part, as follows:

"The synopsis of the proposed budget of the General County Fund of Russell County for the year 1964-65 was published in the newspaper as provided by statute. The synopsis included two items toward which my inquiry is now directed, one—County Administration, $10,995.00, and the other—Miscellaneous, $28,150.00.

"On April 6, 1964, the Board of Supervisors of Russell County adopted the General County Fund Budget for 1964-65, leaving the County Administration item at $10,995.00, as published in the synopsis. * * *

"The Miscellaneous item in the synopsis was reduced from $28,150.00, as published, to $20,711.48, the latter figure being adopted by the Board. * * *

"At a meeting of the Board of Supervisors of Russell County, held on the 1st day of June, 1964, with six of the seven members being present, the annual salaries of the Board Members were increased from $900.00 to $1800.00, and the salary of the Chairman was increased from $1200.00 to $3,000.00, and the salary of the Clerk increased from $900.00 to $1200.00, pursuant to Code Section 14.1-45 and Code Section 14.1-46, as provided by the Acts of the General Assembly of 1964, Chapter 386.

"I quote the minutes from the Board of Supervisors Order Book, omitting names, as follows:

"'Upon motion, it is ordered that the salary of ................., Chairman of the Board of Supervisors of Russell County, be increased to $250.00 per month, and the salary of ................., ................., ................., ................., Members of the Board of Supervisors of Russell County be increased to $150.00 per month, and the salary of ................., Clerk of the Board, be increased to $150.00 per month, effective July 1, 1964, and to be paid each month. Members of the Board are to spend at least 3 days each month for the interest of the County and the Chairman of the Board spend at least 10 days each month for the interest of the County.'

"The Board retired to the Jury Room into a caucus or executive session and discussed the matter of the salary change and subsequently returned to the Court Room and voted upon and adopted the above resolution.

"At a meeting of the Board of Supervisors held on July 6, 1964, a move was made to rescind the salary increase, but the move was defeated by a vote of three to two, with the Chairman and one member abstaining. I quote the minutes, omitting names, as follows:
Upon motion of .........., a request was made to rescind the salary raise, passed by the Board at the meeting of June 1, 1964, which said motion was seconded by .........., and the members voted upon said motion as follows: * * *.

You present the following questions:

"(1) Did the procedure by the Board in retiring into a caucus or executive session invalidate the proposed salary increase? I have read your opinion of August 22, 1962, to the Honorable Harold H. Purcell, Member of the Virginia State Senate, relative to this point.

"(2) Assuming that the matter of procedure was not involved, and regardless of what your answer to my first question may be, my next inquiry is whether the proposed salary increase is invalid because it was not included in the item, County Administration, as advertised in the synopsis and as the budget was adopted, thus necessitating the payment thereof out of the Miscellaneous item in the budget? Couched in other language, was it mandatory that the salary increase be included in the item, County Administration, not under the item, Miscellaneous, in the adopted budget?"

In the opinion to Senator Purcell, to which you refer, the statement was made that—

"... I am of the opinion that the statute (now § 15.1-539 of the Code) prevents a board of supervisors from going into executive session for the purpose of discussing a matter and subsequently opening the doors to the public when voting upon a question. ..."

This, of course, would not prevent the Board members prior to an official meeting from informally discussing a question that they contemplate considering at the meeting. In the instant case, the Board was sitting in formal meeting and moved into another room, thus excluding the citizens from that portion of their meeting. This, in my opinion, was contrary to the provisions of the statute. However, I feel that this does not have the effect of making void the subsequent action of the Board in open meeting.

The item for miscellaneous expenditures as contained in the budget is, of course, subject to specific appropriation. In my opinion, the Board may, in its discretion, appropriate out of this fund the additional money that will be required to pay the increases, which would be a transfer from that item to the fund set apart for administrative expenses. Your letter does not disclose whether or not the Board, subsequent to the public hearing on the proposed budget, made an annual or other appropriation and furnished a copy of the same to the county treasurer as required by § 58-921 of the Code. If this has not been done, then under the provisions of §§ 15.1-162 and 58-839 of the Code the budget is tentative only. However, a board of supervisors is not prevented from transferring unencumbered funds from one item in a budget to another item.

In my opinion, it was not mandatory that the proposed salary increase be included in the Item "County Administration" at the time the budget was advertised and adopted. As I have pointed out, this item can be increased by transferring funds from the miscellaneous item to the "County Administration Item."
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Clerk—Compensation under § 15.1-534.

Honorable J. E. Crockett
Clerk of Circuit Court of Wythe County

This is in reply to your letter of December 15, 1964, which reads as follows:

"Pursuant to § 15.1-534 of the Code of Virginia as amended, Wythe County and the counties of Fauquier and Surry were permitted, along with several other counties, to increase the compensation of the Clerk of the Board of Supervisors to $1,000.00.

"The Board of Supervisors of Wythe County passed such a resolution and have ordered $850.00 paid to me as Clerk at the December meeting, making my annual compensation $1,000.00 for the year 1964, as now allowed.

"My question is—is it proper for this to be done for the entire year by action of the Board of Supervisors, or would the Board only be allowed to give the increase on a monthly basis since the law went into effect.

"I see no restrictions as to how the salary of the Clerk shall be paid, whether annually, quarterly or monthly.

"I have been paid $12.50 per month for the past twelve months, making a total of $150.00 for the year 1964, also a lump sum payment in December for the additional $850.00 to make the $1,000.00 per year allowed by the Code."

The amendment to the above Code section permitting the county of Wythe to pay the clerk at the rate of $1,000 a year did not go into effect until the first moment of June 26, 1964. Therefore, the increase could not relate to any period prior to July, 1964. It would have been proper, in my opinion, for the board of supervisors at the July meeting, to have fixed the compensation of the clerk at a salary not exceeding $1,000 a year and to have made it effective July 1. The board did not take any action until the December meeting in 1964. There is grave doubt as to whether the board at that time could have made the increase effective for any month prior to December. Payments had already been made for the months preceding December in accordance with the statute and with the previous resolution of the board and, in my opinion, the board of supervisors does not have the power to provide for increases for the months in which the payments have already been made for services rendered during such months.

The resolution of the Board of Supervisors may be amended at the regular meeting in January so as to provide for the payment of $1,000 per year, effective from January 1, 1965, payable in such installments as the board may deem advisable.

BOARDS OF SUPERVISORS—Compensation of Members of Board of Assessors—Required to pay.

Assessors—Members of Board of Assessors—How paid.

Honorable William C. Carter
Commonwealth’s Attorney for Cumberland County

This is in reply to your letter of March 22, 1965, in which you state that
Cumberland County provided for a general re-assessment in the year 1964; that the Board of Assessors, after due advertisement, held meetings in each magisterial district on November 20, 21 and 22 for the purpose of hearing complaints of taxpayers regarding the proposed re-assessments; that pursuant to the provisions of § 58-792.1 the Judge of the Circuit Court extended the time for completion of the assessments to February 28, 1965.

You further state:

"At a regular meeting of the Board of Supervisors on February 5, 1965, one of the members, Mr. Thomas P. Scott, member from the Randolph District, who believed his property to have been improperly re-assessed, requested a Board of Equalization be appointed to hear his grievances. He was informed that the time had been extended to February 28, 1965 and Mr. Scott then requested that the Board of Assessors be re-convened to hear his grievances. The Board was re-convened on February 12, 1965 and again during the week of February 15, 1965.

"At the regular meeting of the Board of Supervisors on March 5, 1965 a bill was presented to the Board in amount of $100.29 to pay the per diem costs and expenses of re-calling the Board of Assessors to hear only Mr. Scott's grievances.

"Prior to the payment of this bill the other two members of the Board of Supervisors, Marvin Jones from Madison District, Chairman, and Garland L. Blanton, member from Hamilton District, requested this office to ask for an opinion from the Attorney General as to the propriety of paying same in that Mr. Scott failed to appear at any of the three regularly scheduled meetings in November of 1964, but waited until February 5, 1965 to request that the Board be reconvened for his sole convenience."

The compensation of such assessors is provided for in § 58-788 of the Code. The members of the Board of Assessors are entitled to be paid in accordance with the schedule of compensation fixed by the Board of Supervisors under this section. The Board of Assessors is the judge of when and how frequently meetings will be held for the purpose of considering the matter delegated to them by statute. I do not feel that the failure of any person to appear at a hearing scheduled in November and then make complaint regarding the assessment of his property prevents such person from appearing and making his complaint at a later session or sessions of the Board of Assessors.

In my opinion, if the bill presented to the Board of Assessors is for services performed by them in the regular conduct of their official duties, the Board of Supervisors is required to honor the same provided it complies with the compensation schedule fixed by the Board of Supervisors under § 58-788 of the Code.

BOARDS OF SUPERVISORS—Contracts—Prohibited where members directly or indirectly interested.

BOARDS OF SUPERVISORS — Lease of Land — Controlled by provisions of §15.1-656.

December 14, 1964

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

This is in reply to your letter of December 11, 1964, which reads as follows:

"I am writing to inquire whether a lease of a small parcel of land
owned by a member of the Essex County Board of Supervisors to Essex County, to be used as a public dump, requires the approval of the Circuit Judge in view of § 15.1-656 of the Code of Virginia.

"This section refers to a sale of land. The Supervisor has offered to lease the property for $1.00 per year."

In my opinion, the transaction between the member of the board of supervisors and the county should be treated as a sale and approved in the manner set forth in the last paragraph of the above Code section. If it is not treated as a sale, then it would be a contract prohibited under the first paragraph of the above Code section.

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**BOARDS OF SUPERVISORS—Counties of Bedford, Campbell, Franklin and Pittsylvania May Place Directional Buoy Markers on Smith Mountain Lake-Conditions under which authority obtained.**

March 16, 1965

R. BOLLING LAMBETH, Esquire
Chairman, Reservoirs Regional Planning and Economic Development Commission

This will acknowledge receipt of your letter of March 11, 1965, requesting my advice as to whether the governing bodies of the counties of Bedford, Campbell, Franklin and Pittsylvania may expend public funds for the purpose of placing "Directional Buoy Markers" on Smith Mountain Lake, located in these counties. You state that these markers are necessary for the safety of persons using the lake for boating and other recreational purposes.

I suggest that you examine §§ 15.1-271 through 15.1-273 of the Code and determine whether or not the counties may obtain from the Appalachian Power Company, or whoever has the ownership of the water, a lease or other sufficient interest in the water to establish the lake as a recreational facility for the use of the public—such facility to be jointly owned and conducted under § 15.1-273.

If such an arrangement can be worked out by the passage of uniform ordinance by each county, I am of the opinion such expenditure as you have referred to can be legally authorized, as well as other necessary operational expenditures.

If you wish to do so, you may furnish the governing bodies of each of the four counties involved with a copy of this opinion.

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**BOARDS OF SUPERVISORS—Deputy Clerk or Deputy Treasurer May Not Contract With.**

**SCHOOLS—Principals—May Receive compensation from general county fund for preparing annual budget.**

**SCHOOLS—Funds—Excess—How handled.**

May 3, 1965

HONORABLE E. FORD HUBBLE
Clerk of Circuit Court of Scott County

This is in reply to your letter of April 22, 1965, which reads as follows:

"Would you please give me the following opinions:
"Is it permissible for a Deputy Treasurer or Deputy Clerk to receive compensation paid out of the General County Fund for services as OASI Administrator?

"Is it permissible for the Principal of a School employed in the county system to receive compensation from the General County Fund for preparing the annual Budget?

"If a tax levy has been specifically set out for retiring School Debt Bonds or a County School Debt Literary Loan and an excess exists in this fund, can any part of the fund be transferred either temporarily or permanently to any other County Operating Fund?"

With respect to the first question, I enclose copy of an opinion dated August 10, 1949, which is applicable. This opinion is published in the Report of Attorney General (1949-50) at p. 29. Section 2707 referred to therein is now § 15.1-67.

The answer to your second question is in the affirmative. Section 15.1-67 does not apply since the school principal is not an officer. Section 22-213 would not prohibit this employment since it is not a contract of the nature covered by that section.

It is well settled that where a levy is made for a specific purpose the funds collected as a result of such levy cannot be diverted to another purpose so long as any part of the debt is unpaid. If a levy to raise funds for payment of a specific school bond issue produces an excess of the amount required to pay off the debt, the excess, in my opinion, may be applied to the payment of other indebtedness of a related nature. If there are no other school obligations outstanding such as bonds of a separate issue, Literary Fund loan, or Supplemental Retirement System loan, then it may be applied on other bond indebtedness, if any. If there is no indebtedness of any kind, then it should, in my opinion, go into the general fund subject to appropriation by the Board.

You did not state whether the surplus is from a district levy for district indebtedness or a county-wide levy for a debt of the county as a whole. If it was a district levy, then the surplus should be applied to other obligations of that district, if any, rather than to county-wide obligations. The taxpayers of a district should reap the benefit of any debt fund raised by special levy in their district. Any such disposition as I have suggested would require an appropriate resolution by the board of supervisors.

This question was touched upon in the case of Godwin v. Board of Supervisors, 161 Va. 494, at p. 505, in a statement that, it seems, was not essential to a resolution of the question before the court. The statement is as follows:

"... Here we have an unexpended balance from a lawful levy made for a proper purpose, and used until that purpose was accomplished. What must the county do with the residue of the levy? It goes into the general county fund. Parker v. Board of Commissioners, 178 N. C. 92, 100 S. E. 244.

"This is not the ordinary case of taking money raised for one purpose and using it for another. We are merely dealing with an unexpended and unexpected balance remaining after the purposes for which it had been collected are fulfilled..."

This statement by the Supreme Court would indicate that it would be proper to transfer the surplus to the general fund, but, in the absence of any statutory directive, I am constrained to adopt the view that it should be allocated by the board of supervisors to other indebtedness, if any, rather than to general purposes.
I also enclose copy of an opinion issued on February 21, 1939 (Report of Attorney General, 1938-39, at p. 59), which relates to a question of the application of a surplus in a fund raised by district levy to retire a district indebtedness.

BOARDS OF SUPERVISORS—Member—Payment of expenses in connection with official duties.

December 18, 1964

HONORABLE ROBERT D. HUFFMAN
Clerk of Circuit Court of Page County

This is in reply to your letter of December 15, 1964, in which you state as follows:

“We shall greatly appreciate your opinion on the following question: For a number of years a member of the Board of Supervisors of Page County has been acting as the officially designated State-Local Hospitalization Authorization Agent, whose duty it has been to investigate all indigent applicants who apply for assistance under the State-Local Hospitalization Program. In view of the fact these duties are quite removed from his official duties as a member of the County Board of Supervisors, and since some expenses are incurred in processing these applications for assistance, it has been the practice of the Board of Supervisors over the years to allow him a mediocre sum for his expenses only, currently $300.00 per year.”

There is no prohibition against the county paying a member of the board of supervisors his out-of-pocket expenses in connection with his official duties. Expenses for travel would be determined under § 14.1-7 of the Code, which refers to § 14.1-5. Any payments for services, in my opinion, would be in violation of § 15.1-67 of the Code.

BOARDS OF SUPERVISORS—Ordinances—Collection of county taxes on real estate.

ORDINANCES—Collection of County Taxes on Real Estate—Authority of board of supervisors to adopt.

TAXATION—Real Estate Taxes—Collection by boards of supervisors.

June 22, 1965

HONORABLE H. RATCLIFFE TURNER
Commonwealth’s Attorney for Henrico County

This is in reply to your letter of June 21, 1965, in which you state that the Board of Supervisors of Henrico County is desirous of adopting an ordinance under the provisions of § 58-847 of the Code of Virginia providing for the collection of county taxes on real estate in June and December of 1966. You present the following questions:

“1. as to whether or not the authority conferred on cities and towns by § 58-847 is general law so that the County of Henrico would have this authority by virtue of the provisions of § 15.1-522 of the Code?
"2. Whether or not the Legislature by addition of the amendments of 1954 would exclude this section from the application of § 15.1-522?"

In our opinion, § 58-847 of the Code is general law authorizing any city or town in this State to provide by ordinance for the collection of city or town taxes or levies on property in installments at such time and with such penalties for nonpayment in time as may be fixed by ordinance. The amendment added by Chapter 253 of the Acts of Assembly (1954) does not, in my opinion, affect the general powers granted to cities and towns. Section 15.1-522 of the Code vests in the board of supervisors of any county adjoining and abutting any city, within or without this State, having a population of one hundred and twenty-five thousand or more, with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the Acts of the General Assembly passed in pursuance thereof.

In the recent case of Board of Supervisors of Henrico County v. A. Q. Corbett, Director, etc., the Supreme Court of Appeals of Virginia held that § 15.1-522 of the Code is a valid exercise of the power of the General Assembly to classify counties and to confer upon them the same power as it has conferred generally upon cities and towns and that the phrase "as the councils of cities and towns" means such powers as are granted by general law to all the councils of all the cities and town.

The population of the City of Richmond, according to the 1960 Federal census, is in excess of one hundred twenty-five thousand.

In light of the foregoing opinion of the Supreme Court of Appeals of Virginia, I am of the opinion that the Board of Supervisors of Henrico County has the power to provide for the collection of county taxes on real estate in installments coming due at such time as the board of supervisors may determine.

Therefore, your question No. 1 is answered in the affirmative, and your question No. 2 is answered in the negative.

BOARDS OF SUPERVISORS—Ordinances—Establishing license fees for coin-operated washing machines, etc.—Requisites for adoption.

ORDINANCES—License Fees for Coin-operated Washing Machines—How adopted.

June 21, 1965

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

This is in reply to your letter of June 16, 1965, in which you state that the board of supervisors of your county adopted the following order on the 7th day of January, 1935:

"It is ordered that the License for operating a Slot Machine in Smyth County, as provided Section 198 of the Tax Code of Virginia, as amended by the Act of the General Assembly of Virginia, approved March 30, 1934, the amount of said license to be the same as fixed by said section for State License upon said Slot Machine."

You state that the commissioner of the revenue is attempting to collect license fees for the operation of coin-operated washing machines, etc., upon the basis of this order. You have requested my opinion as to the validity of the order as a basis for imposition of such a license tax.
In my opinion, the order is not sufficient. Any ordinance imposing such a tax should prescribe a specific tax for each type of machine as set forth in § 58-355 of the Code and any such ordinance would have to be adopted in the manner provided in § 15.1-504 (a), (b), (c), of the Code.

BOARDS OF SUPERVISORS—Ordinances—Well registration—No authority in board to adopt.

ORDINANCES—Well Registration—No authority in board of supervisors to adopt.

February 17, 1965

HONORABLE CHARLES G. STONE
Commonwealth’s Attorney for Fauquier County

This is in reply to your letter of February 15, 1965, with which you enclosed a copy of a “Well Registration Ordinance” which the Board of Supervisors of Fauquier County contemplates adopting.

You have requested my advice as to whether or not the Board has the authority to adopt and enforce such an ordinance.

It is stated that your county has created a Water and Sanitation Authority, which I presume was organized under Chapter 28 of Title 15.1, which is known as the “Virginia Water and Sewer Authority Act.” I am unable to find any provision in this Act that would authorize the adoption of an ordinance of this nature. You referred to § 10-98 of the Code, which reads as follows:

“If any person, company or corporation for any governmental, municipal, commercial, industrial, or institutional use or purposes shall himself or by agent excavate by the process of drilling any well for water, oil or gas, or make any exploratory excavation for or deepen or redrill such a well he shall within thirty days after beginning operation give written notice thereof to the Division of Geology and shall thereafter supply it with such information as it may from time to time require with respect to depths attained, shows, yield, pressure, water levels, drawdown and other technical or geological data. Such information shall be given on blank forms furnished by the Division and shall be returned to it within thirty days after receipt of the forms.

“All wells drilled for water for domestic or farm use, all driven wells and all shallow wells not more than fifty feet in depth are exempted from the operation of this section.

“Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction punished accordingly.”

By § 10-92 of the Code, the administration and enforcement of this provision is lodged in the State Geologist. Inasmuch as the General Assembly has enacted a law relating to the subject matter of the proposed ordinance and has imposed the duty of its enforcement upon the State Geologist in the Department of Conservation and Economic Development, in my opinion, the counties are not authorized to adopt and enforce an ordinance of the nature under consideration here.
HONORABLE W. D. REAMS, JR.
Commonwealth's Attorney for Culpeper County

This is in reply to your letter of December 2, 1964, in which you state, in part, as follows:

"... A local corporation engaging in obtaining new industries in the county of Culpeper has received a commitment from a furniture plant to locate in the county. As an inducement the Board of Supervisors and the Town Council have been asked to appropriate funds to extend an existing water main to the property which the manufacturing plant wishes to purchase. The Town Council and the Chairman of the Board believes this industry to be a beneficial one to this county.

"... With reference to the above fact situation and the above cited code sections your opinion is respectfully requested whether the county may appropriate funds for this purpose and whether the first cited section places any restriction on the second cited section . . . ."

The Code sections to which you refer are 15.1-10.1 and 15.1-37. These sections read as follows:

"§ 15.1-10.1.—The board of supervisors of any county may appropriate out of the general levy, except the school fund, in their discretion, a sum not exceeding one per centum of their annual revenues, from all sources, in advertising and giving publicity to the resources and advantages of their county, and in securing and promoting industrial development of such county. For the purposes set out in this section the county governing body may make such appropriation, not exceeding ten thousand dollars per year and notwithstanding the one per centum limitation hereinafore imposed, to chambers of commerce or similar organizations within such county, or to employ a suitable person to secure and promote industrial development of the county."

"§ 15.1-37.—The governing body of every county and town is authorized to make expenditures from the county or town general fund in order to acquire land, participate in the construction of dams and perform all other necessary acts for the purpose of providing sources of public water supply for agricultural, residential, governmental and industrial development of the county or town."

In my opinion, the provisions of § 15.1-37 are sufficiently broad to authorize the board of supervisors of your county to make appropriations out of general funds for the purposes set forth in paragraph one of your letter. This section specifically authorizes the expenditure of public funds for whatever may be necessary in order to provide a source of a public water supply for industrial development in the county.

I am of the further opinion that § 15.1-10.1 does not impose any restrictions upon the authority contained in § 15.1-37.
BOARDS OF SUPERVISORS—Reassessment of Real Estate—When not subject to repeal.

June 1, 1965

HONORABLE JOSEPH A. MASSIE, JR.
Commonwealth's Attorney for Frederick County

I have your letter of May 28, 1965, in which you advise that the Board of Supervisors of Frederick County adopted a resolution on January 20, 1964, for the reassessment of the real estate in the County for 1964; that the reassessment was had and an equalization board was appointed; and other steps were taken as outlined in your letter, to which I do not think it necessary to refer specifically. You request the opinion of this office as to whether the Board of Supervisors now has the power to take action to repeal, negate and set aside the resolution of the Board of Supervisors passed in 1964 providing for the reassessment in Frederick County.

I find no statutory authority for the Board of Supervisors to take such action. In my opinion, the reassessment had in the year 1964 and the action taken by the board of equalization appointed by the court as a result of this reassessment are valid and cannot now be upset by action of the Board of Supervisors.

BOARDS OF SUPERVISORS—Recordation Tax—Doubtful if authorized to impose on deeds conveying property located within city of second class.

TAXATION—Local Recordation Tax—Doubtful if county may impose on deeds conveying property located within city.

June 24, 1965

HONORABLE J. EDWARD MOYLER, JR.
City Attorney for the City of Franklin

This will acknowledge receipt of your letter of June 16, 1965, in which you state as follows:

"The Board of Supervisors of Southampton County has just recently advertised in the local newspaper that it will act upon a proposed ordinance which provides a local recordation tax of $.05 per $100.00 of consideration on deeds, etc., all in conformity with § 58-65.1 of the Code of Virginia of 1950, as amended.

"The City of Franklin, a second class city, uses the same Courthouse and Clerk's Office as Southampton County. The City, pursuant to an agreement with the County, annually pays a proportionate part of the expense of the Clerk's Office, Sheriff's Department, and Commonwealth Attorney's Office.

"The City Council does not feel that an additional tax, such as this, is necessary at this time and would like your opinion as to whether § 58-65.1 permits the Board of Supervisors to levy such a tax on property transfers within the City when the instruments evidencing such are recorded. Our Council feels that if such is permitted, it is tantamount to taxation without representation and unconstitutional . . . ."

The question as to whether or not under this section a board of supervisors of a county in which is located a city of the second class has the authority to impose the recordation tax upon deeds conveying property located within the city has been carefully considered and we feel that the question is not free from doubt.
The third paragraph of § 58-65.1 of the Code indicates that the board of supervisors may impose such tax.

Inasmuch as we feel that the question is doubtful, we suggest that the board of supervisors limit the effect of its ordinance to deeds conveying property located within the county and outside the corporate limits of the city of Franklin.

BOARDS OF SUPERVISORS—Tie Breaker—May vote on any question upon which Board empowered to act.

HONORABLE DOWNING L. SMITH
Commonwealth’s Attorney for Albemarle County

This will acknowledge receipt of your letter of August 26, 1964, which reads as follows:

"The Board of Albemarle County Supervisors has requested an opinion as to whether a tie breaker, under § 15.1-540 of the Code of Virginia, is limited in the matters on which he may vote to break a tie.

"Can a tie breaker vote on the matter of laying County and District levies in view of Section 111 of the Constitution?

"Can the tie breaker vote on the matter to adopt or amend an ordinance to provide for a $10.00 automobile license tax?

"Can the tie breaker vote on the matter of selecting a Chairman of the Board of Supervisors in view of the holding in Hudgins v. Hall, 183 Va. 577?

"Are there any other matters in which a tie breaker may be forbidden to vote on in case of a tie vote of the Board of Supervisors? Albemarle County operates under the County Executive form of Government provided for in the amendment of Section 110 of the Constitution."

In my opinion the answers to your questions set forth in paragraphs 2, 3 and 4 of your letter must be answered in the affirmative. Under § 15.1-535 of the Code the tie breaker is appointed for a term of four years and he must be qualified to hold the office of supervisor. The tie breaker is considered to be a member of the board whenever there is a tie and he is called upon to exercise his duties as a tie breaker. Section 15.1-540 of the Code provides that all questions submitted to a board of supervisors for a decision shall be determined by a viva voce vote of a majority of the supervisors voting on any such question and in any case in which there shall be a tie vote of the board upon any question when all the members are present, etc., the person appointed as tie breaker, after being advised regarding the question, shall vote. The power of the tie breaker to cast his vote and determine a question is not dependent upon the nature of the question except that it must be a question upon which the board of supervisors has the power to act.

With specific reference to your third question, I do not find anything in the case of Hudgins v. Hall, 183 Va. 577, that would raise a question as to the right of the tie breaker to cast his vote to break a tie on the question as to who should be chairman of the board. Under the law at the time of Hudgins v. Hall, supra, the statute provides that a decision on any question would require a majority vote of all the supervisors present. There were six members of the board present at the meeting, five of whom voted. Mr. Hall, who claimed to have been elected, received three votes, which was not a majority of all the members present. Under the present law all questions submitted to the board for a decision can only be determined by a majority of the supervisors voting on the question. Had that been the law at the time of the Hudgins v. Hall case, Mr. Hall would have been elected as chairman.

These tie breaker provisions have been in existence for more than sixty years,
and I cannot find any reference to any question having been raised as to the
constitutionality of the statutory power of the tie breaker to cast a vote on any
question pending before a board of supervisors. See, Acts of Assembly (1902-3-4,
Chapter 535; 1904, Chapter 140). These provisions must be presumed to be in all
respects valid under Article VII of the Constitution of 1869 and Section 111 of
the Constitution of 1902.

In view of the foregoing, the answer to the question presented in the fifth
paragraph of your letter is in the negative.

BOARDs OF SUPERVISORS-Zoning Ordinance—Referendum not authorized
under general law.

ZONING—Ordinance—No provision in general law authorizing referendum.

February 15, 1965

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

This is in reply to your letter of February 12, 1965, which reads as follows:

"A zoning ordinance will probably be presented to our Board of
Supervisors by the Planning Commission in the near future.
"The Chairman of our Board asked me to determine whether a referen-
dum can be held to determine the will of the majority of the people
as to zoning for this county. I find no law making such procedure avail-
able but would appreciate your opinion on the subject."

There is no provision in general law authorizing a referendum with respect
to zoning ordinances. Under § 15.1-591, provision is made for an election with
respect to this matter, but this statute is drawn so as to limit its applicability to
the county of Albermarle.

October 16, 1964

HONORABLE E. SUMMERS SHEFFEY
Commonwealth's Attorney for Washington County

This will acknowledge receipt of your letter of October 12, 1964, relating to a
company engaged in acting as surety on bail bonds which company you state
has defaulted in the County of Smyth to the extent of $10,000.00. This company
is surety on similar bonds in your county and you have advised the clerks and
justices of the peace in your county to refuse bonds with this particular company
as surety.

You request my opinion as to whether your advice to these officers was
justified.

I think it was appropriate for you to notify these officers of your opinion
as to the sufficiency of bonds with the company in question acting as surety.
However, under § 19.1-127, it is the prerogative of the officer taking the bond
to pass upon its sufficiency.

Under §§ 19.1-120 and 19.1-121, the Commonwealth's Attorney may object
to the sufficiency and adequacy of a bail bond, and move to have the alleged inadequacy corrected, after reasonable notice.

BONDS—To Secure Possession of Seized Motor Vehicles—Form to be used.

October 20, 1964

HONORABLE MARGARET B. BROWN
Clerk, Circuit Court of Culpeper County

This is in reply to your letter of September 30, 1964, in which you inquire whether this office has a form for bonds used under § 46.1-351.2 (b), Code of Virginia (1950), as amended, and if so, you ask to be furnished a copy of same.

The requirements for a bond to secure possession of a seized motor vehicle under this section are quite similar to the requirements for a bond for the same purpose under § 4-56 (e) or § 19.1-364, Code of Virginia (1950), as amended, pertaining to motor vehicles seized under the ABC laws and those relative to the enforcement of forfeitures in general, respectively. While I do not have any official forms for such purposes, there is enclosed an outline of a form which you may use for guidance in preparing the bond referred to in § 46.1-351.2.

CEMETERIES—Endowment Care Fund—Minimum trust fund required before establishment of cemetery.

December 18, 1964

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This is in reply to your letter of December 17, 1964, which reads as follows:

"Reference is made to Chapter 534, Section 57-35.1 and following of the Acts of 1964, upon which I would like your opinion:

"Meadowbrook Memorial Gardens, Incorporated, is at present operating a memorial park in Nansemond County. The corporation has been in existence since 1960 and The Virginia National Bank, Norfolk, Virginia, is administering the trust fund in accordance with this chapter.

"The corporation is contemplating opening a branch of the memorial park in another location in Nansemond County.

"First: Would the trust fund that has already been established, in which The Virginia National Bank, Norfolk, Virginia is trustee, be sufficient to cover both operations?

"Second: Where another corporation received its charter prior to the effective date of the present Act of the General Assembly, and contemplates creating a memorial park in Nansemond County, but has not at the present date actually started operating for business, would this corporation be required to deposit in a bank in this state in an irrevocable endowment trust a minimum of twenty-five thousand dollars, as required by Section 57-35.2 of the Act?"

In my opinion, your first question must be answered in the negative. Section 57-35.1 provides as follows:

"The following terms used in this article shall, for its purposes, have the following meanings:

"(a) 'Cemetery' means any land or structure used or intended to be used for the interment of human remains.

* * * *
“(c) ‘Endowment Care Fund’ means a fund created to provide a sufficient income to a cemetery which will enable such cemetery to provide care, maintenance, administration and embellishment of such cemetery adequate to the circumstances. It includes the term ‘Perpetual Care Fund’ and the two terms are used interchangeably.”

Section 57-35.2 requires that the minimum trust fund shall be required of any person as defined therein “owning, operating or developing any cemetery.” The language of the statute does not seem to be susceptible to any other interpretation than that if an owner establishes two or more cemeteries, the minimum trust fund must be provided for each of such cemeteries.

With respect to your second question, the answer is in the affirmative. The statute does not except from its requirements a corporation that was organized prior to the effective date of the statute.

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CEMETERIES—Establishment—What constitutes.

COUNTIES, CITIES AND TOWNS—Establishment of Cemeteries—What constitutes.

September 4, 1964

HONORABLE A. A. RUCKER
Commonwealth's Attorney for Bedford County

This is in reply to your letter of August 28, 1964, which reads as follows:

"Section 57-26 of the Code of Virginia of 1950 as amended pertains to cemeteries, and sets forth certain restrictions as to location of the same.

"In the Town of Bedford, a Municipal Corporation located within Bedford County, Virginia, there are located several duly and long established cemeteries. Recently an individual had the body of one deceased relative buried in the back yard of their residence property which is located right in a residential area of the Town of Bedford, not within an established cemetery and not within an area in which a cemetery was authorized to be established by any ordinance of the Town's governing body. It appears to me that the burying of one body as set forth above constitutes the establishment of a cemetery and that under the conditions above outlined such is a violation of the provisions of Section 57-26 of the Code of Virginia.

"The contention is being made, however, that the burying of one body as above set forth is not the 'establishing' of a cemetery and that in order to 'establish' a cemetery in the sense contemplated by Section 57-26 it is necessary that there be a 'setting apart' of the burial ground, presumably by some act or acts other than the burying of one body therein.

"I shall appreciate your giving me your opinion as to whether or not the burying of one human body in an area not established as a cemetery by appropriate ordinance and in an area not theretofore used for the burial of a human body or bodies as above set forth in this letter constitutes the establishment of a 'cemetery' as the term 'cemetery' is used in Section 57-26 of the Code of Virginia."

Section 15.1-860 of the Code of Virginia (1950), as amended, reads as follows:

"A municipal corporation may regulate and inspect cemeteries and
burials therein, prescribe records to be kept by the owners thereof, and prohibit burials except in public cemeteries."

You have not mentioned any provisions of the Town Charter or ordinances that may be applicable to this situation, and I assume there are none. Section 57-26 of the Code reads, in part, as follows:

"(1) Restrictions as to location.—No cemetery shall be hereafter established within a county or the corporate limits of any city or town, unless authorized by appropriate ordinance subject to any zoning ordinance duly adopted by the governing body of such county, city or town; . . . ."

In 14 Am. Jur., 2d. Cemeteries, § 1, it is said:

"A 'cemetery' is a place or area set apart, either by governmental authority or private enterprise, for the interment of the dead."

In 14 C.J.S., Cemeteries, § 1, we find this definition:

"A cemetery is a place where the dead bodies of human beings are buried; it is a place or area of ground set apart for the burial of the dead, either by public authority or private enterprise."

In my view, the mere act of an owner in burying or permitting the burial of one person upon premises owned by him is insufficient to show that he has "established" either a private or public cemetery within the meaning of § 57-26 of the Code. See, Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 147 N. E. 104; 14 C. J. S. Cemeteries, § 2.

CITIES—Consolidation—Agreement between City of Virginia Beach and Princess Anne County.

HONORABLE WILLIAM P. KELLAM
Member, House of Delegates

October 13, 1964

This is in reply to your letter of October 9, 1964, in which you refer to my opinion of April 8, 1963, to Honorable Gordon F. Marsh (Opinions of Attorney General, 1962-63, p. 10), relating to the consolidation of the City of South Norfolk and Norfolk County and its effect upon the security behind certain sanitary district bonds that were issued prior to the consolidation.

You state that —

"On January 1, 1963, the City of Virginia Beach and Princess Anne County consolidated into a new City of Virginia Beach under a substantially identical consolidation agreement and charter. There were outstanding on the effective date of consolidation bonds issued by the old City of Virginia Beach, by Princess Anne County and by various sanitary and magisterial districts of the county. Although it seems apparent that your opinion to Senator Marsh is equally applicable to bonds of the former city and county and districts of the county, I have been requested on behalf of the City of Virginia Beach to obtain your opinion on the matter."

I do not have access to the Consolidation Agreement mentioned in Section 1
of the Charter of the City of Virginia Beach (Chapter 147, Acts of Assembly, 1962), but I understand that it contains provisions similar to Sections VII and XVII of the Agreement between the City of South Norfolk and Norfolk County, as quoted in the opinion to Senator Marsh. The provisions of the City of Chesapeake Charter, which are cited in that opinion, are of the same effect as those contained in the Charter of Virginia Beach. Assuming the Consolidation Agreement of Virginia Beach contains provisions similar to Sections VII and XVII of the Charter of the City of Chesapeake, the conclusions reached in my opinion to Senator Marsh apply to the City of Virginia Beach.

CITIES—School Funds—City Treasurer's responsibility.

SCHOOLS—School Funds—Responsibility of city treasurer.

TREASURERS—Responsibility for School Funds.

HONORABLE J. H. JOHNSON
Treasurer for the City of Roanoke

December 15, 1964

This is in reply to your letter of December 9, 1964, which reads as follows:

“In view of a recent change in the method of transferring Roanoke City School monies collected in the various city schools to the office of the City Treasurer, after which time they are deposited into the City General Fund Account; will you please give me an official ruling as to when, and at what point I become personally liable under state law, as City Treasurer, for such funds if and when they are administered as follows: An employee in each city school, along with the principal of that school has been designated to receive cafeteria collections, tuition fees, book rentals, as well as student funds, and they deposit all such collections in one of the local banks, using the school name as the account name. Later checks are drawn payable to the City School Board on the city portion only, not including student funds, and signed by both parties so designated. The checks are then endorsed by the Clerk of the School Board and transmitted by him to the City Treasurer on an itemized report at which time the funds are received into the City General Fund account by the City Treasurer.

"Section 37 of the Roanoke City Charter imposes upon me as City Treasurer the duty to . . . 'Collect and receive all city taxes, levies, assessments, license taxes, rents, school funds, fees and all other revenues or monies accruing to the city, except such as Council shall by ordinance make it the duty of some other officer or person to collect . . . ,’ and there is no ordinance relieving me of the duty of collecting and acting as custodian of any part of the city funds nor one permitting other persons to sign checks for the purpose of transferring city funds.

“Volume 5, § 22-97(13) of the Code of Virginia, in my opinion, also makes me liable for Roanoke City School Funds. Unless you know of some other section in the state law giving school boards internal controls, thereby relieving me of any responsibilities until the time such funds reach my hands as City Treasurer, and this is what I must know.”

I conclude that you are concerned chiefly about your responsibility for city school funds which for practical reasons have to be collected from the pupils at the several schools of the city.

Customarily, cafeteria, tuition and book rental funds are collected from the students at each school. These funds are deposited usually in the bank account
established for local student and other activity funds pending their remittance to the school board for recordation and transmission to the treasurer. The issuance of a check against the student activity funds bank account to the school board does not constitute an expenditure of public funds; consequently, § 22-97(13) does not apply. The procedure described provides a proof of payment of school funds collected at each school and remitted by the school principal to the school board. When these checks are received and separately recorded, the school board then forwards them to the treasurer for deposit by him as required by law.

You quote a portion of Section 37 of the Roanoke City Charter to indicate your responsibility for all city funds. You will observe that this section provides that the treasurer shall "collect and receive." This, in my opinion, must be construed to mean that the treasurer shall collect those funds where that duty is directly placed on him, and receive the other funds from city agencies which, by the very nature of their operations, make it essential for them to collect certain monies to be remitted to the treasurer.

Section 22-136 of the Code of Virginia, relating to the settlement of school accounts, shows that persons other than the treasurer would have to handle school funds. This section, even though referring to counties, is applicable to cities. See, § 22-3 of the Code. See, also § 22-199 of the Code, which specifically deals with two of the types of funds referred to in your letter.

In conclusion, I advise that in my opinion your responsibility for funds covering cafeteria collections, tuition fees and book rentals begins when these funds are received by you from the school board.

CLERKS—Appointment of Appraisers—When required—Value of estate determines.

ESTATES—Appointment of Appraisers—When required—Value of estate determines.

Miss Edith H. Paxton
Clerk of Circuit Court for the City of Staunton

May 11, 1965

This is in reply to your letter of May 6, 1965, in which you present the following questions:

"May we have the benefit of your opinion in deciding whether or not it is the duty of the clerk to appoint appraisers in the following instance?

[1] A decedent left goods and chattels in the amount of $1150.00 and a house and lot valued at $15,000.00. In his will he provided that the house and lot, and all other real property, pass to his widow in fee simple. A local bank qualified as the executor under the will but was not given the power to sell or dispose of any real estate.

[2] We also have instances where a decedent dies intestate and leaves personal estate under the value of $2500.00 and real estate in a greater sum.

[3] Should appraisers be appointed only in estates where the personal representative will handle more than $2500.00 or should they be appointed in every estate when the value—total value exceeds $2500.00?"

Section 64-126 of the Code is applicable. Under this section no appraisement is required since the value of the estate to be administered by the personal representative does not exceed twenty-five hundred dollars. Real estate is subject to appraisal under this section when the personal representative is authorized to sell or rent the same.
With respect to question (3) appraisals are required to be made only when the value of the estate to be handled by the personal representative exceeds twenty-five hundred dollars. As pointed out herein, real estate is not subject to appraisal unless the personal representative is authorized to sell or rent the same.

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CLERKS—Courts of Record—Fees—Upon conviction in felony cases.

FEES—Clerks of Court—Upon conviction in felony cases.

HONORABLE JOHN H. POWELL  
Clerk of Circuit Court of Nansemond County

July 30, 1964

This will acknowledge receipt of your letter of July 23, 1964, in which you raise three questions.

First: You refer to our opinion dated June 25, 1964 to J. Gordon Bennett, Auditor of Public Accounts, in which we stated that under §§ 14.1-112(15) and 14.1-115 of the Code the clerk in a felony case—where there is a conviction—would be entitled to the $20.00 clerk's fee provided in § 14.1-112(15) and also the $2.50 fee which is allowed under § 14.1-115. The latter fee, of course, is not contingent upon a conviction.

The $20.00 clerk's fee in case of conviction was formerly $10.00 and you state that you have always assumed that in the event you collected the $10.00 fee you should not bill the State for $2.50. You refer to a ruling of former Attorney General Almond, dated January 4, 1949 and published in Report of Attorney General (1948-49), at p. 36, as authority for your position in the matter. By reference to this opinion, I find that Attorney General Almond stated that the allowance of the $10.00 fee in case of conviction does not have the effect of changing the law as to the fee to which the clerk was entitled to be paid from the State treasury (under § 3506, Code of 1919) when the defendant failed to pay the costs. Section 14.1-115 (formerly § 3506 and § 14-125) reads as follows:

"For each case of felony tried in his court, to be charged only once, the clerk of such court shall be entitled to the sum of two dollars and fifty cents. But this section shall not apply to the clerk of the Hustings Court of the city of Richmond."

I have consulted with the State Comptroller and he advises me that his office has never construed this section to be conditioned upon the failure of the clerk to collect the fee allowed under § 14.1-112(15) (formerly § 14-123). The costs against the defendant in case of conviction insofar as the clerk's services are concerned will, of course, be the $20.00 provided for in § 14.1-112(15) and the $2.50 which is to be paid out of the State treasury under § 14.1-115. See, Code § 19.1-320. It will be observed that under § 14.1-112(15) the $20.00 allowed to the clerk thereunder is in lieu of all other fees allowed under § 14.1-112 and not in lieu of the fee allowed under § 14.1-115. Of course, if the defendant pays the costs, including the $2.50, then the clerk is not entitled to collect this amount from the Commonwealth because the section specifically provides that the fee is to be charged only once.

Second: You refer to § 14.1-122, which provides as follows:

"In every scire facias or other proceeding upon a forfeited recognizance where a judgment is awarded in behalf of the Commonwealth
there shall be taxed in the costs an attorney’s fee of ten dollars which when recovered shall be paid into the State treasury."

You point out that the fees collected by the Commonwealth’s Attorney must be paid into the State treasury under § 14.1-54 and that that section contains the following language:

"... One-half of all fees to which attorneys for the Commonwealth are entitled for the performance of official duties or functions, shall be paid by them or such official as may collect the same, not later than the tenth day of the month following their receipt, into the treasuries of their respective counties and cities, and the remaining one-half of all such fees shall be paid by such official as may collect the same into the State treasury, not later than the tenth day of the month following their receipt."

As pointed out by you, § 14.1-122 (formerly § 14-131) was amended by Chapter 386, Acts of Assembly (1964) so as to read as set forth above.

Before the amendment, the section provided:

"In every scire facias or other proceeding upon a forfeited recognizance where a judgment is awarded in behalf of the Commonwealth there shall be taxed in the costs an attorney’s fee of ten dollars and five per centum of the amount of the judgment, which when recovered shall be paid to the attorney for the Commonwealth." (Emphasis supplied).

It will be noted that the recent amendment eliminated the five per centum and directed that the attorney’s fee of $10.00 be paid into the State treasury rather than to the Commonwealth’s Attorney. This amendment is not in conflict with § 14.1-54 because that section relates only to fees collected by the Commonwealth’s Attorney and provides that one-half thereof shall be paid into the local treasury and one-half into the State treasury. However, if the two sections should be considered as conflicting, the amendment made by Chapter 386, Acts of Assembly (1964) is the latest expression of the General Assembly with respect to the disposition of such fee and must take precedence over any apparent conflict found in § 14.1-54. In connection with this matter, you state the following:

"... I am wondering if the General Assembly had a right to specify that all of the Commonwealth Attorney’s fee in every scire facias upon a forfeited recognizance should be paid into the State, in view of the fact that the County pays one-half of his salary . . . ."

The General Assembly unquestionably had the power to enact this legislation and it is my opinion that it is valid in every respect.

Your Third question reads as follows:

"In your opinion to me of June 19, 1964, to which you attached a copy of an opinion to Hon. L. J. Hammack, Jr., Commonwealth’s Attorney of Brunswick County, you stated that it was the unanimous opinion of the Compensation Board that the person operating the electronic equipment under § 17-30.1 preferably be a member of the staff of the clerk of the court of record.

"I am aware of past opinions in which it has been stated that a deputy has to be a resident of the county or city in which the clerk’s office is located.

"In view of the fact that Southampton County, the City of Suffolk and Nansemond County are in the same judicial circuit and that it will
be almost impossible to employ a different deputy in each of the courts
to operate the electronic device for each of the courts for approximately
four days each term in each court, which dates will be indefinite, in
your opinion would it be possible for the three clerks, or perhaps two,
if the other court does not use the electronic device, to employ one
person to operate the device and make that person a deputy in each
court?"

It is true that this office has ruled that a deputy clerk is required to be a
resident of the county or city in which he exercises the powers of a clerk.
I do not feel it was the intention of the State Board of Compensation to
imply that the member of the staff of the clerk's office should be a deputy clerk.
The person who is employed for the purpose of recording the evidence and other
proceedings in connection with felony cases does not necessarily have to be a
deputy clerk. Where one person is employed by two or more counties located
within a judicial circuit, it occurs to me that they should avoid appointing such
person as a deputy clerk.

CLERKS—Deputy—May be employed on part-time basis.

January 5, 1965

HONORABLE GEORGE W. KEMPER
Clerk of Circuit Court of Rockingham County

This is in reply to your letter of January 4, 1965, which reads as follows:

"I have had a deputy clerk working for me in the office for a number
of years. She submitted her resignation effective December 15, 1964.
However, she plans to continue working on a part-time basis, perhaps
as long as several weeks at a time. It would be very helpful to me
if she can continue to be a deputy clerk. Is this permissible?"

In my opinion, there is no reason why a deputy clerk may not be employed
on a part-time basis.

CLERKS—Fees—For docketing mandamus proceedings against an election of-

October 22, 1964

HONORABLE THOMAS R. MILLER
Clerk, Hustings Court of the City of Richmond

This will acknowledge receipt of your letter of October 21, 1964, which reads
as follows:

"I am hereby requesting a ruling on whether, upon an application
for a writ of mandamus to require the General Registrar to admit a
person to be registered to vote, the Clerk is required to charge the $3.00
writ tax provided for in § 58-73 of the Code, along with a $5.00 filing
fee for such action at law?

"I am familiar with § 24-112 where a petition may be filed alleging
refusal of registration, without security for either of the above fees,
but where the action is for mandamus, it seems to me that I am re-
quired, as Clerk, to charge both of the above fees before I can file or
docket the action."
Section 24-112 of the Code of Virginia does not apply to mandamus proceedings. The usual fees and costs provided by statute in such proceedings will be applicable in any suit against an election official for a writ of mandamus.

CLERKS—Fees—Municipal courts—Disposition.

January 15, 1965

HONORABLE T. C. ELDER
Commonwealth's Attorney for City of Staunton

This is in reply to your letter of January 14, 1965, which reads as follows:

"The City Manager of Staunton has asked me to investigate the handling of clerk's fees under § 46.1-413 of the Code.

"My question is whether or not under the provisions of the second paragraph of § 46.1-413 as set forth at page 86 of the 1964 Cumulative Supplement, Volume 7 of the Code of Virginia the Clerk of the Municipal Court of the City of Staunton is entitled to keep as his personal fee the fifty cents reporting fee. The clerk is paid an annual salary by the City of Staunton.

"In the event he is not entitled to retain said fee personally should it go to the Commonwealth or to the City of Staunton? A good many of our traffic offenses are handled on city warrants as violations of the City Code."

Section 46.1-413 of the Code, to which you refer, provides that every county or municipal court or clerk of a court of record shall forward an abstract of the record to the Commissioner of Motor Vehicles. The last paragraph of this section reads as follows:

"There shall be allowed to the clerk of any court a fee of fifty cents for each report hereunder to be taxed and payable as a part of the court costs."

In my opinion, the judge of the municipal court could confer upon the clerk the duty of forwarding to the Commissioner of Motor Vehicles an abstract of the record required by § 46.1-413. See, § 16.1-58 of the Code. If the clerk of the municipal court is authorized to forward such abstracts to the Commissioner, in my opinion, he would be entitled to collect the fee of fifty cents provided for in the last paragraph of § 46.1-413. Under § 16.1-62 of the Code, the salaries of the clerks shall be fixed and paid by the governing body of the county in which the municipal court is located.

Section 16.1-63 of the Code reads as follows:

"The council of any city may provide by ordinance that the salaries paid the judge, clerk and other officers and employees of its municipal court or courts shall be in full compensation for all services rendered by them. Unless otherwise provided all fees charged and collected by them shall be accounted for and paid into the city treasury."

Under this section, in the event the council of the city provides by ordinance that the salary being allowed to the clerk shall be in full compensation for all services rendered by such clerk, then in that event the fees collected by the clerk shall be accounted for and paid into the city treasury.
CLERKS—Fees—Recordation of printed and typewritten material—How determined.

HONORABLE L. A. KELLER, JR.
Clerk of Circuit Court of Louisa County

August 11, 1964

This is in reply to your letter of August 8, 1964, in which you refer to § 14.1-112(2) of the Code of Virginia, relating to clerks' fees and present the following questions:

"1. Does the language 'typewritten single space' refer to the entire instrument to be recorded or copied, or would the double fee be applicable if only a portion of the instrument is 'typewritten single space'?"

"2. Are the words 'printed' and 'typewritten,' as used in the above section of the Code, synonymous?"

Section 14.1-112(2) is a new provision and provides—

"A clerk of a circuit or other court of record shall, for services performed by virtue of his office, charge the following fees, to wit:

* * * * *

"(2) For recording and indexing in the proper book any writing and all matters therewith, except plats, or for recording and indexing anything not otherwise provided for, provided that no additional charge shall be made for recording less than one-half of a page, a minimum of four dollars for up to three pages and one dollar for each page over three; and for admitting to record, or making a copy of any paper or record to go out of the office, which has been typewritten single space, or is printed in smaller than pica type, the fee for admitting to record or making such copy shall be double the amount of the fees allowed about... . . ."

On July 10, 1964, I rendered an opinion relating to this provision to the clerk of Botetourt County, copy of which I enclose herewith.

With respect to question 1, in my opinion, a paper that is only partially typewritten single space or is printed only partially in smaller than pica type, would fail to be the type of instrument contemplated by the Act. In my opinion, since the provision is in the nature of an exception to the regular fee, it must be strictly construed.

In regard to question 2, in my opinion, the words "printed" and "typewritten" are not synonymous.

CLERKS—Fees—Where causes removed from one circuit to another.

HONORABLE RHEA F. MOORE, JR.
Clerk of Circuit Court of Tazewell County

April 21, 1965

This is in reply to your letter of April 19, 1965, which reads as follows:

"We have received a chancery cause removed from the Circuit Court of Fairfax County, by order of that court dated April 9, 1965. The
Clerk of that Court has transferred the complete file pursuant to the aforesaid decree. Included with the papers is his Clerk's receipt showing that the proper writ tax and Clerk's fee have been paid.

"We pose the question as to which Clerk's Office is entitled to the fee in this cause? In the case at hand, it appears all the necessary processes to date have been issued by the Fairfax Office, however, this office will have work to do in this cause, including the entry of all subsequent decrees."

Sections 8-157 through 8-159 of the Code relate to the removal of causes from one circuit to another circuit. These provisions fail to make provision for the clerk's fee to be prorated. You, of course, understand that § 14.1-113 protects the plaintiff in a chancery suit from being subject to any additional clerk's fee if he is paid the $20.00 fee provided for therein.

I made inquiry of one of the clerks here in Richmond and I find that suits are frequently transferred from one jurisdiction to another and that no adjustment or division is ever made of the clerk's fee.

In the absence of any specific statute with respect to this matter, I am of the opinion that the clerk of the office in which the suit is first brought is entitled to the fee paid under § 14.1-113 of the Code.

CLERKS—Offices—When may be closed.

COURTS—Closing of Clerks' Offices.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

December 10, 1964

I have read the copy of your letter of December 9, 1964, to the Hon. Rhea F. Moore, Jr., Clerk of the Circuit Court of Tazewell County, relating to the closing of the clerk's office on December 26 and January 2. It is noted that Mr. Moore stated that the Judge of the Circuit Court of Tazewell County is of the opinion that he is without power to authorize the clerk's office to be closed on those days.

Under the provisions of § 17-41 of the Code, the judge of that court would have the power to authorize the clerk to close the office on the above dates, provided the Governor should proclaim these dates to be a legal holiday under the provisions of § 2-19 of the Code and provided also that the board of supervisors of the county would approve such action by resolution.

CLERKS—Recordation—Indexing of Wills—Instruments admitted to record.

WILLS—Recordation—Instruments admitted to record.

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

September 9, 1964

This is in reply to your letter of September 4, 1964, which reads as follows:

"I would appreciate it very much if you would give me your interpretation of
§ 64-90 of the Code as amended in 1964, especially the section as amended in the second paragraph with this addition:

"'On and after July 1, 1964, such wills shall be indexed in the General Indices of Deeds in such clerk's office in the name of the testator as grantor.'

"In view of the fact that the amendment was made in the second paragraph which deals with duly certified copies and authenticated copies of wills, in your opinion, according to the wording of the amendment should all wills be indexed in the General Indices of Deeds, or only the copies from other counties and cities."

Section 17-79 of the Code provides, in part, as follows:

"(1) There shall be kept in every clerk's office modern, family name or ledgerized alphabetical key-table general indexes to all deed books, miscellaneous liens, will books, judgment dockets and court order books. The clerk shall enter therein daily with pen and ink or typewriter all instruments admitted to record, indexing each instrument in the names of all parties appearing therein who are thereby shown to be affected by the instrument.

* * * * *

"(6) All deed books, miscellaneous liens, will books, judgment dockets and court order books shall be numbered or otherwise adequately designated and the clerk upon the delivery of any writing to him for record required by law to be recorded shall duly index it upon the general index in the manner hereinbefore required and when the writing has been actually transcribed on the book shall add to the general index the number of the book in which, and the page on which, the writing is recorded."

This section makes provision with respect to indexing a will when probated.

I enclose copy of an opinion furnished to the Clerk at Charlottesville, which relates to the amendment to § 64-90 of the Code—Acts of Assembly (1964), Chapter 169.

Miss Maupin, the Clerk at Charlottesville, asked whether or not in light of this amendment she would be required to continue indexing wills when probated in the manner required by § 17-79 of the Code. We were of the opinion that in addition to indexing wills under § 17-79 they must be indexed in accordance with the amendment. While the second paragraph of § 64-90, prior to this amendment, related to certified and authenticated copies of wills, the amendment refers to "such will" which, it seems, must relate to all wills whether probated in a clerk's office or submitted as either a certified or authenticated copy. Had it been the intention to limit the amendment to certified and authenticated copies, the amendment, I believe, would have so stated.
COMMONWEALTH ATTORNEYS—Compensation for Rendering Special Services.

Otcober 19, 1964

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for City of Hampton

This is in reply to your letter of October 16, 1964, in which you state as follows:

"I was requested by the Electoral Board of the City of Hampton to represent them in a petition filed by the Republican Party in the Supreme Court of Appeals under its original jurisdiction asking the court to issue a writ of mandamus to compel the Electoral Board to appoint two Republican nominees as election judges in two precincts in the City of Hampton, although none of the nominees were registered to vote in the precinct to which nominated to serve. I filed a demurrer, answer and motion to abate, together with a brief. The Court on October 14, 1964, refused to issue the writ and dismissed the petition.

"I propose to submit a statement for services performed; however, I first desire your opinion as to whether or not in my official capacity as Attorney for the Commonwealth this representation is a part of my duties.

"Upon examining the Code of Virginia, I find that I am required impliedly to enforce the election laws (Title 24-27) and appear on behalf of the Commonwealth when a person is denied registration (Title 24-112). The first is in the nature of criminal enforcement and the latter the nature of a civil action.

"I do not feel my duties require me to represent the local electoral board in a mandamus action; however, I would appreciate your opinion on this question."

Code § 15.1-822 relates to the duties of the Commonwealth's Attorney for cities. I have not examined the Charter of the City of Hampton to determine whether it prescribes the duties of the Commonwealth's Attorney. If there is no such provision in the Charter, the general law with respect to counties applies.

This office has held that when a Commonwealth's Attorney is employed to represent a county in matters of a civil nature not specifically imposed upon him by statute, he may be paid compensation for such special service. For example, this office has ruled that services for local county school boards, such as bringing a suit to condemn land for a school site, or examining titles for such purpose, are special services for which extra compensation may be paid.

It is now expressly provided in the sixth paragraph of § 15.1-67 of the Code that extra compensation may be paid to the Commonwealth's Attorney of a county for services rendered in connection with a suit brought against a county or an agency of the county which would no doubt include a county electoral board. However, the exception with respect to a Commonwealth's Attorney of a city (last paragraph of § 15.1-73) only applies to the collection of taxes which are a lien on real estate.

The question you have presented is not free from doubt. I can find no statute imposing on the Commonwealth's Attorney the duty of representing an electoral board in a mandamus proceeding. The Board, with the consent of the governing body of the city, could have employed another attorney to represent it in this matter. Since I cannot find that there was a statutory duty upon you to represent
the Electoral Board in this matter, I feel there is no legal prohibition preventing the payment of extra compensation to you for such service.

COMMONWEALTH ATTORNEYS—Duties—Not required by law to represent local board of health.

April 28, 1965

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of April 16, 1965, in which you state that a chancery suit has been instituted in the Circuit Court of Loudoun County against the Board of Supervisors and the Loudoun County Health Department. You request my advice as to whether or not you as Commonwealth's attorney are required by law to represent the Health Department in this matter. You state that you recognize your obligation to represent the Board of Supervisors.

I am unable to find any statute which, in my judgment, would make it mandatory upon the Commonwealth's attorney to represent the local Board of Health. This Board is established under the provisions of Chapter 3 of Title 32 of the Code, and its members are appointed by the State Board of Health and, as you pointed out, its policies are generally governed by regulations of the State Board of Health.

COMMONWEALTH ATTORNEYS—Fees—Scire facias cases.

FEES—Scire Facias Cases.

November 2, 1964

HONORABLE W. L. PRIEUR, JR.
Clerk of Courts of City of Norfolk

This is in reply to your letter of October 30, 1964, which reads as follows:

"Section 14.1-122 provides that $10.00 shall be assessed as costs in Scire Facias cases to the Commonwealth Attorney on forfeited recognizance. Now that the City has paralleled so many of the statutes and is authorized to have bonds issued running to the City, I am desirous of knowing as to whether or not, in your opinion, we should tax a $10.00 fee for the City Attorney's Office in these cases. I can find no authority to do so."

Section 14.1-122 provides that where a judgment is awarded in behalf of the Commonwealth in every scire facias or other proceeding upon a forfeited recognizance there shall be taxed in the costs an attorney's fee of ten dollars which when recovered shall be paid into the State treasury. In those instances where the recognizance is payable to the locality—the condition being to appear in court in response to a charge of violating a local ordinance—there can be no judgment in case of forfeiture, except in favor of the locality. I am unable to find any statute authorizing the taxing of any attorney's fee in such instances.

I have not examined the charter of the City of Norfolk. If it should contain a provision authorizing the taxing of such costs in such cases and providing that the same when collected shall be paid into the city treasury, such a provision would, in my opinion, be valid.
COMMONWEALTH ATTORNEYS—Proceedings under § 46.1-351.2—Not bound by action of trial court in criminal proceedings.

August 24, 1964

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the City of Hampton

This is in reply to your letter of August 5, 1964, in which you request my opinion on certain questions relative to the seizure of motor vehicles under Title 46.1, Code of Virginia (1950), as amended, Sections 46.1-351.1 and 46.1-351.2, respectively. I shall consider these questions separately and in order.

In reference to seizure of a motor vehicle pursuant to Section 46.1-351.1, you inquire "whether the officer has the right to subsequently seize and take possession of such motor vehicle after the same has been released to the owner at which time the officer had no reason to believe the driver was operating under a revoked or suspended license." The pertinent portion of Section 46.1-351.1, Code of Virginia (1950), as amended, provides as follows:

"Where any officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested any person who will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351, he shall seize and take possession of such motor vehicle, and deliver the same to the sheriff of the county or the sergeant of the city in which such arrest was made, taking his receipt therefor in duplicate."

This statute provides for the seizure of the motor vehicle involved where the arresting officer reasonably believes he has arrested a person who will be subject to the penalties for operating a motor vehicle while his license is revoked or suspended or while restoration of such license is contingent upon furnishing proof of financial responsibility. The only crime which will suffice to meet the statute is that of operating in violation of Section 46.1-350 or Section 46.1-351. Specifically, the arresting officer must believe that one of these statutes was being violated by the person arrested. If he does not have reason to believe that he has arrested a person who will be subject to the penalties of either of such statutes, then the statutory provision for seizure of the motor vehicle is not applicable.

In my interpretation, a basic purpose underlying this statute is to prevent a prolongation of the statutory crime believed by the arresting officer to have been committed. Furthermore, examination of Section 46.1-351.2, Code of Virginia (1950), as amended, which provides for the proceedings concerning vehicles seized under Section 46.1-351.1 discloses an apparent legislative intent that forfeitures thereunder be accomplished where the vehicle at the time of the seizure was being operated in violation of §§ 46.1-350 or 46.1-351. There is no indication that the vehicle, after being released to the owner, continues to be subject to such seizure at some later time. Accordingly, it is my opinion that, while action under the criminal statutes, namely, Sections 46.1-350 and 46.1-351, may survive the commission of the crime, the right of seizure under Section 46.1-351.1 does not, and I shall answer your question in the negative.

Referring to Section 46.1-351.2, paragraph (d), you inquire whether or not you are bound "by the determination of a lower court" as to the guilt of the defendant with regard to "operating a motor vehicle under a revoked or suspended license." This paragraph is as follows:

"If such claimant shall deny that he was, or should be, convicted as provided in §§ 46.1-350 or 46.1-351, and shall demand a trial by jury
of the issue thus made, the court shall, under proper instructions, submit the same to a jury of five, to be selected and empanelled as prescribed by law, and if such jury shall find on the issue in favor of such claimant, or if the court, trying such issue without a jury, shall so find, the judgment of the court shall be to entirely relieve the property from forfeiture, and no costs shall be taxed against such claimant."

Here, the purpose is to provide for trial of the issue made by a person claiming to be the owner of the seized property, or the holder of a lien thereon, in any case in which such claimant shall deny that he was or should be convicted as provided in §§ 46.1-350 or 46.1-351. It is an opportunity afforded all persons interested in the seized property, whether owner or liens, to contest the right of forfeiture. The trial is directed to this issue to determine whether such claimant is the actual bonafide owner or liens and whether the vehicle shall be relieved from forfeiture, rather than to a determination of the criminal action against the person who operated the vehicle at the time it was seized. There is nothing in the quoted paragraph or elsewhere in this section to indicate that a forfeiture must be supported by a conviction nor that a conviction necessitates a forfeiture. On the contrary, it is indicated that the proceedings under this section will be independent of the criminal proceedings. It is my opinion, therefore, that you are not bound by the action of the lower court in this regard.

CONSERVATION AND ECONOMIC DEVELOPMENT—Authority—May receive grants under Public Law 88-578 for its own use and for payment to other state agencies.

HONORABLE MARVIN M. SUTHERLAND
Director, Department of Conservation and Economic Development

January 7, 1965

This is in answer to your letter of December 4, 1964. Enclosed with your letter was a copy of Public Law 88-578, otherwise known as the "Land and Water Conservation Fund Act of 1965," recently passed by the Congress of the United States. The purpose of this Act is to provide greater outdoor recreation facilities in the United States. To accomplish this purpose, the Act establishes a land and water conservation fund in order to provide Federal financial assistance to the states for planning, acquisition and development of outdoor recreation areas and facilities. The Act provides that this program of assistance to the states will be administered by the Secretary of the Interior of the United States.

You advise that, in accordance with the provisions of this Act, the Governor has designated you, as Director, and the Department of Conservation and Economic Development as the individual and the State agency which shall have authority to represent and act for the State in dealing with the Secretary of the Interior in order to accomplish the purposes of the Act. You further advise that the Governor has also designated you and your Department as the individual and the agency having authority and responsibility to accept and to administer funds paid under the Act for approved projects. You indicate that the Federal funds to be made available will not only be used by your agency but will also be used by other agencies of the Commonwealth and by "practically all types of political subdivisions of the Commonwealth." It is my understanding that the Federal funds granted for specific projects would be paid to you or your Department and that in turn you or your Department would dispense the funds to the specific State agency or political subdivision responsible for a given project or various aspects of a given project.
You then ask my opinion as to the following:

"1. Can the Department of Conservation and Economic Development receive Federal grants under this act for its own use in acquiring and developing parks?

"2. Can the Department of Conservation and Economic Development receive Federal grants under this act for payment to other State agencies?

"3. Can the Department of Conservation and Economic Development or some other existing State agency receive Federal grants under this act for payment to political subdivisions of the Commonwealth?

"4. Can the Virginia Department of Conservation and Economic Development receive Federal grants under this act to be used for planning purposes by the Virginia Outdoor Recreation Study Commission (authorized by Chapter 277, Acts of 1964)?

"5. In event question 4 above is answered negatively, can the Virginia Outdoor Recreation Study Commission receive Federal grants under this act for planning purposes?"

With reference to your questions 4 and 5, I understand from you that it is not necessary that grants to be used for planning go through you or your Department. In other words, it is my understanding that as far as the Department of the Interior is concerned, and as a practical matter, the planning funds granted under Public Law 88-578 may be paid directly to the Virginia Outdoor Recreation Study Commission. As you point out, this Commission was created by the Acts of Assembly of 1964, Chapter 277. Paragraph 1, § 4, thereof reads as follows:

"The Commission may accept and expend gifts, grants and donations from any and all sources and persons."

Therefore, it is my opinion that Federal funds granted for planning purposes under the Act may be paid directly to the Virginia Outdoor Recreation Study Commission, without the necessity of these funds going through you or your Department, provided this procedure is acceptable to the Secretary of the Interior. Of course, it may be necessary for the Governor to designate the Commission as the agency to receive the planning funds, in order to specifically conform to the provisions of the Act. I am sure the Secretary of the Interior can advise you about this aspect of the matter.

In answer to your questions 1, 2 and 3, it is my opinion that the Department of Conservation and Economic Development may receive grants under the Act for its own use in acquiring and developing parks, and for payment to other State agencies and political subdivisions of the Commonwealth.

Section 2-3 of the Code of Virginia (1950) reads as follows:

"Any department, agency, bureau or institution of this State may accept grants of funds made by the United States government, or any department or agency thereof, to be applied to purposes within the functions of such State department, agency, bureau or institution, and may administer and expend such funds for the purposes for which they are granted."

Further, and more specifically, in Title 10 of the Code, certain powers are granted to you and your Department which appear to be applicable. Section 10-2 of the Code provides that "the Director may sue and be sued and shall contract and be contracted with, purchase, lease, or otherwise acquire and hold property, and convey property, real and personal. . . ." Section 10-126 of the Code provides, in part, as follows:
"In addition to such money as may be appropriated to the Department by law, the Director is also authorized to accept any funds which may be given or granted to it, to be expended in such a manner and for such purposes not inconsistent with the general provisions of this chapter as may be specified in the terms of the gift or grant. . . ."

You will note that § 10-126 appears in Chapter 8 of Title 10. This is the chapter entitled "Division of Industrial Development and Planning." As you know, the primary responsibility for industrial development and planning is now under the office of the Governor, and § 10-126 is one of the few sections in Title 10 not repealed by the Acts of Assembly of 1962 when the responsibility was shifted to the Governor's office. It is my opinion that the purposes of Public Law 88-578 are not inconsistent with the general provisions of Chapter 8, Title 10. That is to say, it is my opinion that the purposes of Public Law 88-578 are not inconsistent with industrial development and planning in Virginia.

My opinion in answer to your questions 1, 2 and 3 is further supported by the language of §§ 10-101(4), 10-111 and 10-112 of the Code, particularly with reference to the use of Federal grants under the Act to finance "camping and recreation facilities," as defined in § 10-100(2) of the Code.

It should also be noted that § 10-1 of the Code provides that all references in the Code, or any other law, to your Department or Board and the Director of your Department shall be deemed to refer to the Department or Board and the Director. This means that references to the Director or Department of Conservation and Economic Development or to the Board of Conservation and Development are all references one to the other. Therefore, it is my opinion that powers possessed by the Department, the Director or the Board are powers possessed by one and all.

CONSERVATION AND ECONOMIC DEVELOPMENT—Bonds—Camping units—How bonds must be secured.

BONDS—Camping Units—How secured.

Honorable Marvin M. Sutherland
Director, Department of Conservation and Economic Development

October 2, 1964

This will acknowledge receipt of your letter of September 25, 1964, in which you state that your department contemplates the issuance of bonds in the amount of $200,000 under the provisions of Chapter 6, Title 10 of the Code of Virginia. The proceeds of the bonds will be used for the purpose of constructing 200 additional camping units and that there are presently 100 units. You have requested my advice as to whether or not under the provisions of this statute your department may pledge two-thirds of the revenues received from all the units as security. You do not contemplate segregating the revenues received from the new units and pledging only those revenues.

Upon examination of §§ 10-106 and 10-107 of the Code, I am of the opinion that under these sections any bond issued under Chapter 6 of Title 10 may be secured solely by a pledge of the revenues to be derived from the recreational facilities to be financed out of the proceeds of such bonds. The pledge of two-thirds of the revenues derived from the 200 new units and the 100 existing units would not be in conformity with the Code sections cited above.
REPORT OF THE ATTORNEY GENERAL

CONTRACTS—Repossession Provisions—Valid whether contract made within or without State.

April 28, 1965

HONORABLE WESCOTT B. NORTHAM
Commonwealth’s Attorney for Accomack County

This is in reply to your letter of April 21, 1965, which reads as follows:

“Please advise if an agent of a finance company has the right to repossess a motor vehicle in Virginia without legal process. I have received a complaint that this was done in Accomack County under a form of conditional sales contract used in Maryland.

“Enclosed is a copy of the contract, the pertinent part being paragraph numbered 3 on the back of the contract authorizing the seller to take possession of the property without legal process. In this particular case the motor vehicle was taken without permission of the owner by an agent of the finance company who found the vehicle parked on a public highway.

“If an agent does not have the right to so take a motor vehicle, would it be proper to charge him with grand larceny or unauthorized use of a motor vehicle?”

Paragraph 3 of the contract to which you referred in your letter contains several provisions, one of which is that in the event the buyer defaults in any payment due under the contract the seller shall have the right at his election to declare the unpaid balance, together with any other amount for which the buyer shall have become obligated under the contract, to immediately become due and payable. It further provides that the seller may take immediate possession of the property without demand. This right, of course, inures to the benefit of the holder in due course of the obligation executed by the purchaser for the deferred purchase price of the car.

Section 55-93 of the Code authorizes such repossession regardless of whether the contract was made within or without this State.

Based upon the facts presented by you and the terms of the contract, in my opinion, the seller or the finance company had the right to repossess the car without permission of the owner, provided there was default in the obligations made by the buyer.

In view of the above, I deem it unnecessary to answer the third paragraph of your letter.

COSTS—Assessment for Law Library—Clerk not required to docket case until deposit of costs made.

CLERKS—Liability—Not liable for failure to docket case where deposit of costs not made.

December 2, 1964

HONORABLE W. L. PRIEUR, JR.
Clerk of Courts of City of Norfolk

This is in reply to your letter of November 30, 1964, in which you enclosed an ordinance passed by the City Council of Norfolk, effective January 1, 1965. The authority under which such ordinance may be enacted and enforced is
§ 42-19.4 of the Code of Virginia. The purpose of this ordinance is to assess the sum of $1.00 as a part of the costs in each civil action filed in the courts of record of Norfolk. The ordinance provides that the clerk shall collect this sum and remit the same to the treasurer of the city. The amount collected shall be used for the acquisition of law books and law periodicals for the establishment, use and maintenance of a law library for the use of the judges of the courts of the city of Norfolk and the members of the bar and the public. The money so collected may also be used for payment of expenses, such as salaries and maintenance of the library.

Rules 2:2 and 3:3(a) of the Supreme Court of Appeals of Virginia provide as follows:

Rule 2:2: "A suit in equity shall be commenced by filing a bill of complaint in the clerk's office and by paying the required writ tax and deposit against costs. The suit is then instituted and pending as to all parties defendant thereto."

Rule 3:3(a): "An action shall be commenced by filing in the clerk's office a motion for judgment and by paying the required writ tax and deposit against costs. The action is then instituted and pending as to all parties defendant thereto."

In your letter you present the following question:

"If some attorney would refuse to pay this additional $1.00, would I incur any liability in refusing to docket his case?"

In my opinion, the statute authorizing the ordinance in question is valid, and the $1.00 assessment of costs provided for in the ordinance is a part of the costs contemplated by the above Rules of the Supreme Court. Therefore, the clerk is not required to docket an action until the writ tax has been paid and deposit of costs has been made. Your question is answered in the negative.

COSTS—Fee for Issuing Subpoena—How collected.


JUSTICE OF PEACE—Fees—For issuing subpoena—How collected.

Honorable David A. Lyon, III
Secretary-Treasurer, Association of Justices of the Peace

June 28, 1965

This is in reply to your letter of June 2, 1965, which reads as follows:

"Section 14.1-132.—'The fee of a justice of the peace for issuing a subpoena for a witness or witnesses in a case pending before a judge of a court not of record shall be twenty-five cents for each subpoena and there shall be no additional fee when there are more than one witness on one side of the case.'

"From whom does the justice of the peace secure payment of his fee? If it is a witness for the Commonwealth and the defendant is convicted is it attached as part of the costs? Does he bill the State Treasurer if it's for the Commonwealth? If it is for the defendant, does he collect at the time of issuing? Also should a fee for serving the subpoena be collected by the justices of the peace?"
If the defendant is convicted and the costs, including the fee for issuance of the subpoena, are not collected from the defendant, they become payable by the Commonwealth.

If the subpoenas are issued at the request of the Commonwealth's Attorney, or some other officer of the Commonwealth, the responsibility is upon the Commonwealth to pay for the issuing of the subpoena, unless the costs are collected from the defendant. This is provided for in § 14.1-85 of the Code. If the defendant is acquitted, of course, no costs can be assessed against him but if he is convicted it would be proper, in my opinion, for the county court judge to assess this item as a part of the costs.

The statute is not clear as to whether a justice of the peace can demand his issuance fee at the time he issues a subpoena at the request of a defendant. If the defendant advances this fee he should be given a receipt and the subpoena should show that the twenty-five cent fee was paid by the defendant.

The justice of the peace does not send a bill to the State Treasurer for the collection of the fee due by the Commonwealth but he must follow the procedure set out in § 14.1-85 of the Code, which refers to § 19.1-317 of the Code.

In my opinion, the justice of the peace is not required to collect the fee that the sheriff may be entitled to for the service of the subpoena.

COSTS—Recording Testimony—How charged and collected.

CRIMINAL PROCEDURE—Recording of Testimony—How charged and collected.

October 7, 1964

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This will acknowledge receipt of your letter of September 24, 1964, with which you enclosed a letter to you from Honorable Robert D. Huffman, Clerk of the Circuit Court of Page County, dated September 23, 1964, in which Mr. Huffman refers to §§ 14.1-116 and 17-30.1 of the Code, and makes the following observations:

"... It is our view that pursuant to Code § 14.1-116 the Clerk is required to tax as a part of the costs of prosecution, if the accused is convicted, the sum of $10.00 per day or part of day in felony cases and $1.00 per day or part of day in misdemeanor cases for repairing, replacing or supplementing such electronic devices, which sum if and when collected from the accused to be placed in a special fund and carried on the Clerk's books to be expended by him from time to time for the above mentioned purpose. No part of this expense to be paid by the Commonwealth.

"In addition, pursuant to Code § 17-30.1, as amended, it is required that all felony cases be recorded and the accused, if convicted, assessed with a reasonable charge for the operation of the electronic equipment, which shall be included as a part of the costs of the case, such sum to be fixed by the Court. If, however, the accused is acquitted or the costs not paid the Clerk to bill the Commonwealth on criminal form 4, in either event the sum so collected credited to Clerk's fees.

"Also, in all criminal cases where an appeal to the Supreme Court of Appeals of Virginia is sought and the accused is financially able to
pay for a transcript of the record the fee therefor, when collected to be credited to Clerk's fees and if the Court orders a transcript made for an indigent convict, the Clerk to bill the State on criminal form 4, and when received credited to Clerk's fees and if conviction not reversed the costs as fixed by the Court to be assessed against the defendant.

"We are not advised as to how to handle this last mentioned item as all the costs are made up and judgment docketed at the conclusion of the case and an appeal would in all probability be noted subsequent thereto. It is our thinking at the moment that a second judgment will have to be docketed . . ."

The first paragraph quoted herein from Mr. Huffman's letter appears to be a correct interpretation of § 14.1-116.

With respect to the second paragraph relating to § 17-30.1, Mr. Huffman's statement that "in either event the sum so collected [shall be] credited to the Clerk's fees," is not in accord with the statute. The sum collected from the defendant must be paid into the State treasury as reimbursement for the amount paid by the State for the expense of reporting or recording the trial of the case. See, your letter of June 17, 1964, to Hon. Langhorne Jones and our letter of June 18, 1964, to Hon. L. J. Hammack, Jr. This section provides that this expense shall be paid by the Commonwealth out of the appropriation for criminal charges, subject to being taxed as a part of the costs and collected from the defendant in case he is convicted.

With respect to the third paragraph quoted above, the statement that such costs, when collected, would be credited to the clerk's fee, is likewise not correct. All such costs, if collected, must be paid into the State treasury. This is also in accord with the opinions cited above.

As to the point raised in the last paragraph quoted from Mr. Huffman's letter, if a conviction is not reversed in the Supreme Court of Appeals, I assume that when the lower court receives the mandate from the Supreme Court, it would be in order for the lower court to enter an order in favor of the Commonwealth against the defendant for the payment of such costs and that the clerk should docket such judgment.

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COUNTIES—Automobile Graveyards—Regulation of—State preempted field except for licensing and regulation of maintenance and operation.

ORDINANCES—Automobile Graveyards—Counties may act in fields of licensing and regulation of maintenance and operation.

HONORABLE WILLIAM M. MCCLENNY
Commonwealth's Attorney for Amherst County

September 8, 1964

This is in reply to your letter of August 14, 1964. You furnished this office with a copy of the so-called "automobile graveyard" ordinance dated August 1, 1938, which was ordained by the Board of Supervisors of Amherst County.

This office has held that by amending § 15-18 of the Code of Virginia (1950), (designated as § 15.1-28), and adding § 33-279.3 to the Code (Chapter 552, Acts of 1958), the State has preempted the field relative to fencing and the location of "automobile graveyards." See, letter to the Honorable Julius Goodman, dated April 14, 1959, Opinions of the Attorney General (1958-1959) p. 44. A
copy of this opinion is enclosed. The same view was expressed in a letter to the Honorable Robert C. Fitzgerald, dated September 30, 1960, Opinions of the Attorney General (1960-1961) p. 19. Hence, the Board of Supervisors no longer has control over the location of these “automobile graveyards” except where land within 1,000 feet of a primary State highway has been designated or zoned for such purpose by the Board of Supervisors pursuant to Paragraph (c) of § 33-297.3.

I am of the opinion that said § 33-279.3 has the effect of amending Paragraph 1 of said ordinance, and in my judgment the Board of Supervisors under said ordinance cannot require a certificate of approval. It can only impose a license tax and enact an ordinance governing maintenance and operation of such “automobile graveyards.” I do not believe the ordinance does this.

It is believed that both of your questions are answered in the foregoing and that the ordinance should be amended to conform to the present form of the statutes.

COUNTIES—Land Subdivision Ordinance—Jurisdiction over area adjacent to town.

SUBDIVISIONS—Ordinances—In areas adjacent to towns—Procedure to follow in adopting.

HONORABLE E. G. SHAFFER
Commonwealth’s Attorney for Wythe County

May 4, 1965

This will acknowledge receipt of your letter of April 20, 1965, which reads as follows:

“The County of Wythe is contemplating adopting a subdivision ordinance under the provisions of Article 7 of Title 15.1 of the Code.

“The Town of Wytheville favors the ordinance provided the town could in the future assume jurisdiction in the two-mile area outside of the town and extend its own subdivision ordinance into such area at that time.

“The question that we have, therefore, is whether or not the adoption of the subdivision ordinance at this time by the county of Wythe would forever preclude the town of Wytheville from extending its own subdivision ordinance into the two-mile area outside of its corporate limits.

“I find nothing in the Code that sheds any light on this question; but from an opinion of the Attorney General, dated August 4, 1955, at page 38, of the Opinions from 1955 to 1956, I would assume that the town would not be precluded provided the requirements of both the town and county were uniform.

“The town of Wytheville has requested that I secure your opinion on this particular point, which would be appreciated.”

This question has been the subject of considerable consideration and in our opinion, §§ 13.1-468 and 15.1-469 of the Code apply. It will be noted that under § 15.1-468 the subdivision regulations adopted by the county must be acceptable to the town council before they can be put into effect. If the county and the town authorities cannot agree, the disagreement will have to be settled under the provisions of § 15.1-469. The town, of course, may insist upon regulations covering the two-mile area that will be acceptable to the town at such
time as it may wish to adopt a subdivision ordinance. If and when the town adopts an ordinance the opinion of this office dated August 4, 1955 (See, Reports of Attorney General, 1955-56, at p. 38) and to which you referred, will be applicable.

COUNTIES—Magisterial Districts—Limited to no less than thirty square miles.

February 3, 1965

Honorable John L. Scott
Member, House of Delegates

This is in reply to your letter of February 2, 1965, which reads as follows:

"Your opinion and advice is respectfully requested on the following:

"In Fairfax County there are seven magisterial districts all of which were created prior to 1928. Some of the districts have been rearranged since 1928. I understand that a group now intends to file a petition in the Circuit Court for further rearranging.

"Query: In the light of the foregoing may any of the resulting districts be less than 30 square miles?"

The first sentence of Section 111 of the Constitution provides as follows:

"The magisterial districts shall, until changed by law, remain as now constituted; provided, that hereafter no additional districts shall be made containing less than thirty square miles."

Under this constitutional provision no additional district may be created consisting of an area of less than thirty square miles. In my opinion, none of the existing districts could be reduced to an area of less than thirty square miles. This would apply even though in the process of re-arrangement the number of districts would not be increased beyond the present number of seven.

The object of the restriction as to area, in my opinion, is to prevent any new or further districts of less than thirty square miles from being created throughout the State.

COUNTIES—No Authority Under § 15.1-510 to Prescribe Standards and Qualifying Examinations for Journeymen and Master Electricians.

September 9, 1964

Honorable Stirling M. Harrison
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of September 8, 1964, in which you refer to my opinion of July 16, 1964, in which I expressed the opinion that the board of supervisors of your county does not have authority under § 15.1-510 of the Code to prescribe standards and qualifying examinations for Journeymen and Master Electricians.

You point out that Loudoun County meets the qualifications of § 15.1-522 (old § 15-10) of the Code and request my advice as to whether or not my reply
would have been different had this fact been called to my attention. Under § 15.1-522, Loudoun County is vested with the same powers and authority as the councils of cities and towns. This office has previously ruled that the provisions of § 15.1-522 relate to the powers granted to cities and towns under general law and not to those powers specially granted in charter provisions—see, Opinions of Attorney General (1959-60), p. 107.

The general law with respect to cities with respect to the matter under consideration is § 54-145.2—the same section that applies to county governments and, which, in my opinion, as stated in my letter of July 16, 1964, does not grant the authority to adopt and enforce an ordinance of the nature considered in that letter. The answer to your question is in the negative.

Since the other questions presented by you are conditional, depending on an affirmative reply to the question answered herein, I assume no answer to those questions is necessary.

COUNTIES—Ordinances—Regulating and licensing trailer camps—Must conform to enabling act.

ORDINANCES—County—Regulating and licensing trailer camps—Must conform to enabling act.

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

April 27, 1965

This is in reply to your letter of April 14, 1965, which reads in part, as follows:

"Effective January 7, 1965, this county enacted a trailer ordinance, copy of which is enclosed.

"You will notice that the definitions set forth therein are not the same as those prescribed by Code Section 35-64.3. In my opinion, the county ordinance cannot prescribe definitions different from those contained in the enabling act. If this is correct, are the provisions of the State law with respect to definitions automatically read into the existing ordinance by implication; or is amendment necessary?

"In reading our ordinance will you also indicate whether you find any other provisions that may be in conflict with the State law."

Examination of the copy of the ordinance furnished shows that it purports to derive its authority from Article 1.1 of Chapter 6, Title 35, Code of Virginia (1950), as amended, although it proceeds to enumerate various health and sanitation regulations. There is no such authority in Article 1.1, which authorizes the governing body of any political subdivision in this State "to levy, and to provide for the assessment and collection of, license taxes upon the operation of trailer camps and trailer parks and the parking of trailers." Article 1 of the same chapter and title, however, does authorize the sanitation regulations outlined in § 35-62 thereof, provided such regulations are not in conflict with the lawful regulations of the State Board of Health. Since the ordinance in question combines regulations, authorized under Article 1 and imposition of license tax, authorized under Article 1.1, I am of the opinion that both articles should be cited as authority for the enactment of such ordinance.

I find no authority under which a county adopting such ordinance may pre-
scribe definitions different from those contained in the enabling act. On the contrary, § 35-64.2 states, in part, that, "Whenever a license is required by ordinance no person, firm or corporation shall operate or conduct any trailer camp or trailer park, as hereinafter defined, in any political subdivision without first obtaining a license." (Emphasis supplied). This language indicates equal application to any "person, firm or corporation" so operating or conducting a "trailer camp" or "trailer park" as these terms are defined in Article 1.1. It follows that the definitions found in § 35-64.3 should be written into any ordinance adopted in pursuance of this article. In my opinion, therefore, the trailer ordinance adopted by King George County should be amended to reflect such statutory definitions and any other appropriate changes consistent with them.


HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

November 9, 1964

This is in reply to your letter of November 6, 1964, which reads as follows:

"The square mileage of Nansemond County as shown in the Report of the Secretary of the Commonwealth is 402 square miles. The square mileage as shown by the Highway Department map is approximately 428 square miles.

"I wrote to Miss Martha Bell Conway, Secretary of the Commonwealth, and asked how the figures were arrived at in the Report of the Secretary of the Commonwealth. In answer to my letter she stated that the figures for the land area as carried in the Blue Book were obtained from the State Highway Department and that the land area for Nansemond County is 402 square miles and 26 square miles of water area, making a total of 428 square miles.

"Under Section 56-291.4, subsection (9) of the Code as amended, the Board of Supervisors may license and require the payment of license tax on taxicabs in a county:

"'Having an area of more than three hundred ninety-six and less than four hundred twelve square miles.'

"In your opinion does Nansemond County fall within the provisions of Section 56-291.4. subsection (9) of the Code, as amended?"

The Division of Statutory Research and Drafting states that when that department drafts a statute which is to be effective only in a county or city of a certain area, they rely upon the statistical information furnished in the Acts of the General Assembly, which shows the land area in square miles of each of the counties and cities in the State. At the time (Special Session of 1945) the provision to which you refer was first enacted, this statistical table showed Nansemond County as having a land area of 402 square miles. See Acts of Assembly (1944), at p. 857. Under the table as published in 1944 and as published in the Acts of Assembly (1964), at p. 1177, Nansemond County is the only county that has a land area of more than 396 square miles and less than 412 square miles.

It would seem, therefore, that the provisions of § 56-291.4 of the Code apply to Nansemond County.
COUNTIES—To Provide Court with Equipment Necessary for Efficient Operation.

COURTS NOT OF RECORD—Equipment for Office—County to provide.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

November 16, 1964

Honorable Harold B. Singleton,
Judge, Amherst County Court

This is in reply to your letter of November 9, 1964, in which you cite § 16.1-48 of the Code of Virginia and present the following statement and questions:

"* * * Our office has to have a new electric typewriter costing $427.50. The Board of Supervisors refuses to appropriate more than $250.00. It is my opinion that this is inadequate and that a manual typewriter is not what we need in my office. We have one electric typewriter that is nine years old and our Deputy Clerk has to use an old typewriter of the approximate age of 30 years.

"It is my intention to seek a Court Order requiring the Board of Supervisors to comply with § 16.1-48 of the Code. My questions are these:

"(1) Am I the judge of what is necessary in the way of equipment for the efficient operation of my court, or is the Board of Supervisors the judge?

"If you note the last sentence of 16.1-48 reads ‘such county shall also provide all necessary furniture, filing cabinets and other equipment necessary for the efficient operation of the court.’

"My other question is:

"(2) In case I file proceedings who will represent the County Court of Amherst County? The Commonwealth Attorney represents the Board of Supervisors. Would I be represented by the Attorney General?"

In my opinion, it is mandatory that the governing body of your county shall provide your office with a typewriter that is sufficient to enable the office to be operated efficiently.

I note that you contemplate seeking the aid of the court. I believe it will be the function of the court, after considering the evidence presented as to what type of typewriter is “necessary for the efficient operation of the court,” to make the decision.

I feel that any request made by the county judge for necessary equipment must be honored if the request is in line with the general accepted requirements of a modern office.

With respect to your question (2), there is no statute which would permit or require this office to represent the county court in the proceeding contemplated by you. If you wish counsel in this matter, it appears you will have to make the arrangements.
COUNTIES, CITIES AND TOWNS—Authority—May make contributions to nonprofit organizations.

HONORABLE GEORGE B. DILLARD
Judge, Municipal Court of City of Roanoke

This is in reply to your letter of January 26, 1965, which reads as follows:

"Your opinion is respectfully sought to the following questions:

"(1) Is it legal for a volunteer life saving, or rescue squad to respond to a call for aid, and to transport ill or injured persons to a hospital, or any other place, when there is in operation a private duly licensed ambulance service in the community?

"(a) If the volunteer life saving, or rescue squad, operate on funds donated by individuals, or is supported and maintained by local government subsidization?

"(b) Does the fact that an emergency, or a non-emergency condition exists have anything to do with the volunteer or life saving squads entering into competition with a duly licensed, privately owned ambulance service?

"(c) Under what conditions and circumstances may cities and counties subsidize or provide funds to privately owned ambulance service?"

With respect to questions (1) and (2), I know of no reason why under either of these circumstances any law would be violated. There is no statute that would restrict the services of a voluntary life saving or rescue squad in localities where they may be in competition with a privately owned ambulance service.

Your question (b) is answered in the negative.

With respect to question (c), §§ 15.1-25 and 15.1-26 are applicable. Under these sections the governing bodies of counties, cities and towns may make contributions to nonprofit organizations of the type mentioned by you.

COUNTIES, CITIES AND TOWNS—Regulation of Traffic—On land upon which is situate county court house.

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

This is in reply to your letter of August 15, 1964, in which you request my opinion as to whether a county may adopt an ordinance to regulate the operation of vehicles, traffic and parking upon a travelway (street) within an incorporated town which travelway is a part of the county square of real estate upon which is situate the county courthouse.

Generally speaking, the power which has been delegated by the General Assembly for the regulation of traffic within municipalities must be exercised by the governing body of the municipality. In the instant case, however, it appears that the travelway is a portion of the courthouse grounds over which the county governing body has jurisdiction and responsibility. Assuming that the county has
not divested itself of title to this travelway as is permitted in § 15.1-257 of the Code of Virginia (1950), as amended, I am of the opinion that the governing body of the county is empowered to regulate traffic and parking within the travelway in question.

COURTS—Costs under § 46.1-351.2—When paid by Commonwealth.

MOTOR VEHICLES—Seizure—Delivered to innocent lienor where lien equals value of vehicle.

HONORABLE T. C. ELDER
Commonwealth’s Attorney for the City of Staunton

This is in reply to your letter of November 27, 1964, from which I quote the following:

"The Code Section, Section 46.1-351.2 (f) states that in such an event the lienor gets the vehicle and the cost of the proceedings are paid by the Commonwealth.

"In such an event may the Commonwealth proceed to collect the cost from the owner? If so, just how is this done?"

Paragraph (f) of § 46.1-351.2, Code of Virginia (1950), as amended, to which you refer, relates to a situation in which the claimant is a lienor who was ignorant of the fact that the vehicle was being used for illegal purposes when it was seized under the provisions of § 46.1-351.1, Code of Virginia (1950), as amended, and such illegal use was by the owner or with his knowledge or consent. The words of the statute pertinent to your question quote as follows:

"In the last mentioned event, if the lien established is equal to or more than the value of the conveyance or vehicle, such conveyance or vehicle shall be delivered to the lienor, and the costs of the proceedings shall be paid by the Commonwealth as now provided by law;" (Emphasis supplied).

In consideration of the emphasized language in the quoted passage, I am of the opinion that the Commonwealth bears the costs in any such instance and that there is no authority for collecting such costs from the owner. Since my answer to your first question is in the negative, further comment relative to your second question would be superfluous.

COURTS—When County Court May Try Violations of Town Ordinances.

COURTS—County Courts—Salaries—How paid.

HONORABLE HAROLD G. POTTS
Judge, Clarke County Court

This is to acknowledge receipt of your letter of June 24, 1964, in which you state in part:

"Is the Judge of the Clarke County Court required to hear all traffic
and criminal cases of all the towns within his County without compensation from said towns, or may he contract with said towns for employment to hear cases involving violations of their town ordinances?"

Section 14.1-43 of the Code of Virginia (1950), as amended, provides that the State shall pay all the salaries of the county courts. This office, in an opinion expressed in a letter to the Honorable Marvin G. Graham, dated August 3, 1948, (Opinions of the Attorney General (1948-1949) p. 272), held that the salary fixed by the committee acting under § 4987(e) (1), now § 14.1-40 of the Code shall be the entire compensation paid to the trial justice, and a town would have no authority to contribute to the salary of the trial justice (now county court).

Furthermore, former § 4987f1(b) of Michie's Code, carried in the 1950 Code as § 16-66(2), provided that the trial justice shall have exclusive original jurisdiction of all offenses against the ordinances of the respective counties, cities and towns, etc. The Honorable Abram P. Staples ruled that notwithstanding the provisions of said subsection 4987f1(b), the Mayor of a town has exclusive jurisdiction to try cases involving violations of town ordinances, and therefore it would be better for the trial of such cases to be left to the Mayor. Opinions of the Attorney General (1939-1940) p. 253. When the statute involving trial justices (courts not of record) was revised in 1956, portions of paragraph (2) of § 16-66 were deleted, leaving the county court with exclusive original jurisdiction of offenses against the ordinances of the county. (Section 16.1-123). At the same time, Chapter 5, Title 16.1, was added to the Code. This chapter spelled out the jurisdiction of trial officers of towns, such as Mayor, Police Justices, etc., created under the provisions of municipal charters. The jurisdiction of such trial officers was limited to cases involving violations of town or city ordinances or cases instituted for the collection of town or city taxes (§ 16.1-70). Reading these sections together, it seems to me that the legislative intent thereof is to leave the trial of offenses involving the violation of town ordinances to Mayors or other trial officers.

I am of the opinion that the county court does not have jurisdiction to try offenses involving the violation of town ordinances unless the charter of the said town expressly vests the county court with such jurisdiction, except where the town court was established by resolution of the council (under former § 16-129) and subsequently abolished by a resolution of the council, as provided in the terminal paragraph of § 16.1-70. Furthermore, I am of the opinion that towns, unless specifically authorized by their charters, are without authority to contribute to the pay of the county courts of their county, and the Judge of said court is not authorized to receive any additional pay for his services as a judge or other than that which is provided in § 14.1-43 of the Code.

I understand that the Town of Boyce was incorporated by the Circuit Court in the year 1910, and I am unable to find that it has ever obtained a charter from the General Assembly.
COURTS NOT OF RECORD—Recording Preliminary Hearing—Section 17-30.1 not applicable.

November 5, 1964

HONORABLE WILLIAM F. WATKINS, JR.
Commonwealth's Attorney for Prince Edward County

This will acknowledge receipt of your letter of October 29, 1964, which reads in part as follows:

"It would be appreciated, if you would give me your opinion as to whether or not Section 17-30.1 or any other Section of the statutes of Virginia apply to the recording of preliminary hearings of felony cases in a county court or court not of record.

"I have pending in the County Court of Prince Edward County a preliminary hearing on a felony, which in my opinion should be recorded for the preservation of testimony and to assist in the trial in the Circuit Court of Prince Edward County. The defense attorney in this matter is also desirous of having the preliminary hearing recorded. This recording could be accomplished by the use of mechanical recording equipment owned by the County of Prince Edward and which would be operated by the reporter for this court. I am concerned, however, with the payment of the cost of the services of such reporter and all proper charges made for the use of the equipment."

You are, of course, familiar with the provisions of § 19.1-105 of the Code of Virginia, which reads as follows:

"Testimony may be reduced to writing and subscribed.—When the judge or justice of the peace deems it proper the testimony of the witnesses may be reduced to writing, and, if required by him, shall be signed by them respectively."

I am enclosing a copy of an opinion of May 26, 1964, to Honorable Vernon D. Hitchings, Jr., Judge of the Municipal Court, Part II, of the City of Norfolk, wherein it was pointed out that the provisions of § 17-30.1 of the Code of Virginia are not applicable to the recording of a preliminary hearing.

I am of opinion, however, that it would be appropriate, with the permission of the Circuit Judge, to use the electronic recording equipment to record the preliminary hearing and to have the Circuit Court Reporter transcribe the same. If the defendant is not indigent, it would seem that he should pay one-half of the charges involved, as is customary. The Commonwealth could pay the other half out of the Criminal Fund, if the Circuit Judge should allow the same, pursuant to the provisions of § 19.1-315 of the Code.

Your attention is also directed to the provisions of § 14.1-184 of the Code, which provides that a court-appointed attorney may with the approval of the court incur certain expenses. Such allowance is, of course, payable out of the Criminal Fund. If the defendant is represented by court-appointed counsel, his share of the expenses involved could be allowed by the Judge of the Circuit Court pursuant to the aforesaid provision of law.

In either event the costs would be paid by the Commonwealth out of the Criminal Fund.
CRIMES—Accessory After the Fact—Distinct offense from that of committing the felony.

CRIMINAL PROCEDURE—Accessory After the Fact—Prosecution not a bar to conviction for committing the felony.

HONORABLE ROBERT L. SIMPSON
Commonwealth's Attorney for the City of Virginia Beach

This will acknowledge receipt of your letter of September 16, 1964, in which you state in part:

"A defendant is charged in a warrant for breaking and entering. At the preliminary hearing on this warrant in the Municipal Court, the Judge, after hearing the evidence, reduces the charge to accessory after the fact and finds the defendant guilty thereof and imposes a jail sentence which is served by the defendant. Is this conviction of the defendant of being an accessory after the fact, a bar to his subsequent indictment for the breaking and entering?"

Your question is answered in the negative.

The offense of being an accessory after the fact is a separate and distinct offense from the offense of committing the felony in which the accused acted as an accessory after the fact, the former includes assisting the felon in order that he escape punishment, knowing that he has committed the crime,—Buck v. Commonwealth, 116 Va. 1031—whereas the latter offense includes all elements of the felony committed. The general rule is that if the facts which will convict in the second prosecution would not necessarily have convicted in the first, then the first (prosecution) will not be a bar to the second (prosecution), although the offenses as charged may have been committed under the same set of facts. Miles v. Commonwealth, 205 Va. 462, decided September 11, 1964. See, 22 C.J.S., Criminal Law, § 285. You state that the Municipal Court found the accused guilty of a misdemeanor, (§ 18.1-11 of the Code) aiding the felon who had committed the crime of breaking and entering, which aid was given after the perpetration of the felony. The facts are not necessarily the same, because, in the charge for breaking and entering, there must be evidence that the accused actually participated in the felony. In reaching the above conclusion, I am not unmindful of § 19.1-254 of the Code, which section is not applicable.

CRIMES—Change of Name or Assumption of Another Name—When unlawfully done constitutes misdemeanor.

CHANGE OF NAME—When Unlawfully Done Constitutes Misdemeanor under § 8-577.1.

HONORABLE WILLIAM F. WATKINS, JR.
Commonwealth's Attorney for Prince Edward County

This is in reply to your letter of July 21, 1964, in which you request my opinion as to whether persons using the family name of "X" in applying for hunting and fishing licenses would be guilty of violating § 8-577.1 of the Code of Virginia if such persons were not christened with that name and the name had not been changed as provided in § 8-577.1 of the Code.
REPORT OF THE ATTORNEY GENERAL

Section 8-577.1 of the Code proscribes the assumption of a name by a person residing in this State unless such person changes his name in the manner prescribed in that section. Violation of this prohibition constitutes a misdemeanor, punishable by fine, and upon repetition, punishable by confinement in jail.

I am of the opinion that any person residing in the County of Prince Edward who assumes a fictitious name, such as "X", without following the procedure prescribed by statute for so doing, has done so "unlawfully" within the meaning of that term as used in § 8-577.1 and would be guilty of a misdemeanor. This is in conformity with an opinion issued by this office on September 2, 1953, and published in the Report of the Attorney General, (1953-1954), page 233.

CRIMES—Failure of Operator of Tourist Camp to Keep Permanent Register—Each failure constitutes a separate offense.

HONORABLE JOHN P. ALDERMAN
Commonwealth's Attorney for Carroll County

This is in reply to your letter of September 4, 1964, in which you inquire whether the failure, on the part of a person keeping a tourist camp, to record the information required by Section 35-58 of the Code of Virginia as to either of two persons furnished lodging would be two offenses or one offense and whether it would make a difference if these lodgers "checked in" on different nights.

Section 35-58, Code of Virginia (1950), as amended, reads as follows:

"Each person who shall keep, maintain and operate in this State any tourist camp shall keep a permanent register on which he shall enter, or cause to be entered, the name and address of every person furnished lodging, at or in such tourist camp, and the license number and state of registration of the motor vehicle, if any, being used at such time by the person furnished such lodging. If any person who keeps, maintains and operates in this State any tourist camp shall fail or refuse to keep the register herein provided for he shall be guilty of a misdemeanor and upon conviction thereof shall be punished accordingly. He shall also be guilty of a misdemeanor and upon conviction thereof shall be punished accordingly if he shall knowingly enter or allow to be entered on such register the license number and state of registration of any motor vehicle not being used by the person for whom registered."

(Emphasis supplied)

The statute requires that the register shall contain a record of the name and address, and the license number and state of registration of the motor vehicle used, if any, of every person furnished lodging by such tourist camp. Under Section 35-59, Code of Virginia (1950), as amended, such register shall at all times be open to inspection by State and local law enforcement officers. For a tourist camp to maintain a partial register, containing the information as to part, but not all the persons furnished lodging, would not be sufficient to comply with the statute. To maintain records in some instances but not in others, would render the law a virtual nullity, for obvious reasons. Compliance is predicated upon maintaining the register for every person furnished lodging in the manner prescribed in the statute.
In regard to your questions, if the person who keeps, maintains and operates such tourist camp should fail or refuse to keep the register as to one person so furnished lodging, in my interpretation, it would be an offense in violation of the statute. The failure to keep such register as to two persons furnished lodging would be two offenses under the statute, in my opinion, regardless of whether the lodgers “checked in” on the same or on different nights.

CRIMES—False Report As to Commission of Crime—Burden of proof.

HONORABLE RICHARD C. COTTER  
Judge, Mathews County Court

This is in reply to your letter of April 29, 1965, which reads as follows:

“I am writing to request your opinion concerning a situation which I am informed will come before me in the very near future, and I would, therefore, like a very early reply.

“A report was made to a police officer by a citizen that he had been assaulted by two colored persons, and an investigation was immediately begun but was fruitless and no proof was found that any crime had actually been committed. The citizen who made the original complaint has now retracted his story, so far as the statement that an assault was committed by two unidentified colored persons.

“A warrant has now been served on this citizen for giving false information to a police officer concerning this alleged crime. In your opinion, is it necessary that proof of the commission of a crime be adduced under § 18.1-401 of the Code?”

I enclose copy of an opinion of July 26, 1956 (Report of Attorney General, 1956-57, at p. 78) to the Commonwealth’s Attorney of Sussex County, in which this section of the Code (formerly § 18-335) was discussed.

In my opinion, in a trial alleging a violation of § 18.1-401, the burden would be on the Commonwealth to offer evidence—(1) that the supposed crime which was the subject of the alleged false report was not committed, (2) the accused made the statement to the officer knowing that it was entirely false, and (3) that the accused made the statement with the intent to mislead the officer.

CRIMES—Sale of Toy Firearms—§ 18.1-347 not applicable unless pistol is a toy.

HONORABLE C. F. CALLIS  
Justice of the Peace

This is in reply to your letter of January 26, 1965, in which you ask whether or not the section of the law dealing with the selling or giving toy firearms covers a pistol which shoots 22-caliber blank cartridges.

The applicable section of the Code is 18.1-347, and it provides that it is unlawful to sell “any toy gun, pistol, rifle or other toy firearm, if the same shall, by means of powder or other explosive, discharge blank or ball charges.”
Whether or not the pistol to which you refer is a toy, I cannot determine.

I enclose copy of an opinion published in the Report of the Attorney General (1962-63), at p. 51, to the Commonwealth's Attorney of Danville, in which we held this section of the Code did not apply to a pistol that shoots blanks and is used to signal the start of various sporting events at high school and track meets.

CRIMES—"Sunday Closing Law"—Operation of coin-operated car-wash facility—Depends upon determination of necessity.

SUNDAY—Operation of Coin-Operated Car-Wash Facility—May not constitute crime if necessity.

December 14, 1964

HONORABLE ROBERT I. ASBURY
Commonwealth’s Attorney for Smyth County

This is in reply to your letter of December 11, 1964, which reads, in part, as follows:

"May I have your opinion as to whether or not the owner and operator of a coin-operated car wash violates § 18.1-358 of the Code of Virginia of 1950, by permitting the facilities to be used for the purpose of washing automobiles on Sunday? There is no attendant at the car-wash facility and customers who wish to use the facility may go upon the premises; insert a coin which releases either water or detergent for a specified period of time. The customer uses the hose-apparatus to wash his own vehicle.

"I have read your opinion reported in OAG 1961-1962, at page 63, in which you state: 'The fact that the owner or an attendant is not always physically present, or that the customer serves himself is irrelevant.' In that opinion, you were referring to a coin-operated laundry.

"In the last sentence of § 18.1-358 of the Code, it is provided that: "The section shall not apply to the servicing, et cetera, of motor vehicles.'"

The exception relating to motor vehicles provides that the section shall not apply "... to the servicing, fueling or emergency repair of motor vehicles ..." It would seem that the washing of a motor vehicle would not ordinarily come within any of the above categories. Therefore, the question is whether or not the service is a work of necessity. I can see no distinction between the case here and the one discussed in our opinion of October 10, 1961, relating to coin-operated laundries, and contained in the Attorney General Report (1961-62), at p. 63, to which you made reference. The terminal paragraph of that opinion applies. In that opinion we expressed the view that whether or not there is a violation of the statute depends upon the facts in each instance.
CRIMINAL PROCEDURE—Blood Analysis—Instruments used in withdrawing blood sample.

CRIMINAL PROCEDURE—Costs—When fee for withdrawing blood sample may be paid.

October 28, 1964

HONORABLE C. F. CALLIS
Justice of the Peace

In response to your inquiry of October 16, 1964, I am of the opinion that the phrase "chemically clean sterile disposable syringes" utilized in § 18.1-55.1(d) of the Virginia Code includes chemically clean sterile disposable *needles* as instruments which may properly be used to withdraw an accused's blood sample under the amended Virginia "implied consent" law.

With respect to your second inquiry, I am of the opinion that it is permissible for an accused to pay the physician or nurse withdrawing his blood sample personally at the time the blood sample is taken and that it is not necessary for the fee in question to be billed to the court in such instances.

CRIMINAL PROCEDURE—Blood Analysis—When certificate showing results should be admitted into evidence.

MOTOR VEHICLES—Blood Analysis—When admitted into evidence.

October 29, 1964

HONORABLE WILLIAM A. JONES
Commonwealth's Attorney for Richmond County

I am in receipt of your letter of October 22, 1964, in which you call my attention to § 18.1-55.1(d), (i) and (s) of the Virginia Code and present certain situations and inquiries involving application of the amended Virginia "implied consent" law. These questions will be considered seriatim.

Section 18.1-55.1(d), (i) and (s) of the Code of Virginia (1950), as amended, respectively prescribe:

"(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a court of record acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof."

"(i) In any trial for a violation of § 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is
not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence or the subject of comment." (Italics supplied).

"(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced." (Italics supplied).

Question 1:

"'A' is arrested for a violation of 18.1-54. The arresting officer neglects to advise 'A' as to his right to a blood test and no blood test is taken. At the trial the evidence is conclusive beyond any reasonable doubt that 'A' was intoxicated. Will the failure of the officer to inform 'A' of his rights thereby depriving him of a blood test be grounds for dismissal of the charge unless 'A' can prove affirmatively that such failure resulted in his being deprived of evidence which might have resulted in an acquittal?"

Initially it should be noted that § 18.1-55.1(b) of the Virginia Code provides that a person who operates a motor vehicle on a public highway in Virginia after July 1, 1964, shall be deemed "to have consented" to have a sample of his blood taken for chemical analysis to determine its alcoholic content, if such person is arrested for operating a motor vehicle while under the influence of intoxicants within two hours of the alleged offense. The provision in question does not prescribe—as did its predecessor, § 18.1-55(b)—that such person "shall be entitled" to have a blood sample taken or that such person "shall be entitled to the benefit of such test." Nevertheless, an arresting officer should advise the arrested person of the requirements of the amended Virginia "implied consent" law and the penalty for unreasonable refusal to submit to a blood test. In light of the language of § 18.1-55.1(s) italicized above, however, I am of the opinion that the failure of an arresting officer to so advise an accused would not be ground for dismissal of the charge unless 'A' can prove affirmatively that such failure resulted in his being deprived of evidence which might have resulted in an acquittal.

Question II:

"'A' is arrested for a violation of 18.1-54 and all formalities and steps are strictly complied with, but the containers are lost or destroyed in transit. The evidence is conclusive that 'A' was intoxicated should this entitle 'A' to a dismissal?"

Question III:

"'A' is taken to a hospital to have a blood sample taken, the attendant in the laboratory informs the arresting officer that he is a graduate technician. All the real evidence indicates conclusively beyond any reasonable doubt, that 'A' is under the influence of an intoxicant.

"All the steps pertaining to the extraction of the blood sample are
strictly adhered to. It subsequently is discovered that the person extracting the blood is not a graduate technician, although he is performing such duties in the hospital and has so lead the arresting officer to believe.

"Question. Is the analysis of the blood sample, so taken, admissible in evidence?"

I am of the opinion that your second inquiry should be answered in the negative (i.e., the charge should not be dismissed) and that your third inquiry should be answered in the affirmative (i.e., the certificates showing the results of the analyses of the accused's blood samples would be admissible in evidence). In this connection, I am forwarding to you a copy of an opinion of this office, dated August 28, 1964, to the Honorable John P. Alderman, Commonwealth's Attorney for Carroll County, in which a situation substantially similar to those which you present were considered and discussed. As you will note from the enclosed opinion, the absence of any provision in the amended Virginia "implied consent" law similar to that formerly embraced in § 18.1-55(f) of the predecessor statute and the existence of § 18.1-55.1 (s) in the present statute combine to support the view that the prosecution mentioned in Question II should not be dismissed and that the certificate showing the results of the analyses specified in Question III should be admitted in evidence.

CRIMINAL PROCEDURE—Change of Venue—Responsibilities of Commonwealth Attorney.

COMMONWEALTH ATTORNEYS—Duties—Responsibility in change of venue cases.

Honorable Joseph Motley Whitehead
Commonwealth's Attorney for Pittsylvania County

August 31, 1964

This is in reply to your letter of August 24, 1964, in which you request my opinion regarding the duties and functions of the Commonwealth's Attorney of a county to which a criminal case is removed after a change of venue pursuant to § 19.1-224.

Section 19.1-226 of the Code, which provides the procedure following a change of venue, imposes no express duties upon the Commonwealth's Attorney but it does contemplate that the court to which the case is removed shall proceed with the case as if the prosecution had been originally therein. I am of the opinion that the Commonwealth's Attorney, as well as all other court officers, should perform the same duties and exercise the same responsibilities upon such removal as if the prosecution had originated in his county.
CRIMINAL PROCEDURE—Costs—Capias pro fine.

CRIMINAL PROCEDURE—Fee—For admitting to bail.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

This will acknowledge receipt of your letter of March 9, 1965, which reads as follows:

"We have had a discussion of the costs on a Capias Pro Fine where the body is taken as where a person fails to appear in Court and a Capias is issued for him.

"It seems to me that under 14.1-123 (1) the costs in our office would be $1.00 and under 14.1-105 (3) the costs would be $5.00, making the total court costs $6.00. Please advise if this is correct.

"We do not exactly understand that part of 14.1-123 (1) which says, ‘provided that when such fee is collected for the defendant or other person for him, such fee shall be $2.00.’ Does this mean that when a defendant summonses a witness he must pay $2.00 in this office and a $1.25 to the sheriff for summoning the witness? Also under 14.1-123 (5) we have heretofore charged $2.00 for admitting a person to bail, but the fee is now $1.00. Is this the correct amount?

"We would like to get these things straight, frankly the wording of the law confuses us. I would appreciate your opinion."

In answer to your first question, I enclose herewith copy of an opinion furnished Hon. David G. Hanby, dated February 16, 1965, which I believe, is in point.

As you point out, the proviso contained in paragraph (1) of § 14.1-123 is confusing on account of the use of the word “for” after the word “collected.” This proviso was first placed in the Code by Chapter 286, Acts of 1958, and the word was “from” instead of “for,” and the fee was $1.50. By Chapter 278, Acts of 1960, this was amended so as to substitute $2.00 for $1.50 and the word “from” was continued in that provision. By Chapter 546, Acts of 1962, again the section was amended and the word “from” continued to be in that section.

This section was at that time numbered 14-132, but in 1964, the Code Commission, at the direction of the General Assembly, revised Title 14 and gave it a new number, namely 14.1. The Code Commission did not recommend any change in this section which in the revision became 14.1-123, and its report (House Document No. 7 of 1964) contained a specific recommendation that no change be made in that section. However, a typographical error was made and the word “from” was changed to “for.” This office has previously taken the position that the report of the Code Commission may be taken into consideration in construing statutes.

Therefore, in my opinion, the word “for” used in § 14.1-123 should be construed to be “from” since it is obvious that the word “from” is the proper word. Under that section, whenever a subpoena is issued at the request of a defendant or other person for him, the fee for issuing the subpoena is $2.00.

With respect to the proper fee for admitting a person to bail, the fee is $1.00. This fee was fixed at $1.00 in Chapter 385, Acts of 1936, and has never been changed.
CRIMINAL PROCEDURE—Costs—Electronic recording equipment—When taxed.

COSTS—Criminal Procedure—Electronic recording equipment—When taxed.

HONORABLE T. F. TUCKER
Clerk of Corporation Court of City of Danville

January 26, 1965

This is in reply to your letter of January 22, 1965, which reads as follows:

"The second sentence of Section 14.1-116 reads as follows:

"'In any court of record in which electronic devices are used for the purpose of recording testimony, for each case of misdemeanor tried in his court, the clerk of such court shall tax as costs a sum not to exceed one dollar for each day or part of the day for the trial of each misdemeanor. Such fees shall be paid by the clerk into a special fund to be used for the purpose of repairing, replacing or supplementing such electronic devices.'

"Since the effective date of this act, I have been taxing the sum of one dollar for each day for each case of the misdemeanor tried in this court regardless of whether or not the machine was actually used to record the testimony in the particular case. The wording of this particular sentence appears to make the taxing of this fee mandatory regardless of whether or not the machine is used, for it says, in effect, it shall be done in those courts in which electronic devices are used for the purpose of recording testimony. Am I correct in my interpretation that there shall be taxed as costs a sum not to exceed one dollar for each day or part of a day of a trial of such misdemeanor even though the testimony is not actually recorded by the machine?

"As we use the electronic device to record the testimony in all felony cases tried in this court, I did not think it necessary to refer to the first sentence of this section."

In my opinion your interpretation of the provision which you have quoted is correct. In each case where a person is tried upon a misdemeanor charge, if such person is found guilty, the charge of one dollar shall be taxed as a part of the costs.

Although the point raised by you is not specifically mentioned in the two opinions relating to costs in connection with electronic equipment published in the Report of Attorney General (1963-64), at pp. 86 and 88, these opinions may be of interest to you. These opinions were furnished to the clerks of Nansemond and Brunswick counties.

CRIMINAL PROCEDURE—Costs—Jury—How divided where two defendants tried in one day.

JURIES—Costs—How divided where two defendants tried in one day.

HONORABLE L. H. SANDS
Clerk of Circuit Court of Bland County

June 30, 1965

This will acknowledge receipt of your letter of June 24, 1965, which reads as follows:
"We understand that in civil cases, unless there is a special jury, that the jury costs are not taxed as costs to either party. On the other hand, we further understand that in criminal cases, either misdemeanor or felony, if the defendant is convicted, that the entire jury cost is taxed against the defendant even though the jurymen or jurywomen are paid by vouchers issued by the Commonwealth.

"Our problem is simply one of how to fairly divide jury costs and the following examples are stated which we would appreciate your opinion thereon.

"1. If two misdemeanor cases are tried on one day, should the jury costs be equally divided between those cases?

"2. If two misdemeanor cases are docketed for a jury trial, and one case is continued either at the request of the Commonwealth's Attorney or counsel for defendant, should not the continued case have as taxable costs the pro-rate division of the total costs for that day?

"3. If on any day, one civil jury trial and one misdemeanor jury trial is had, should not the entire jury cost be taxed against the defendant in the criminal case?

"Your opinion and authorities in answer to the above questions will be most appreciated by all concerned and most particularly by those criminal defendants whose costs may well exceed four times the amount of the imposed jury fine."

I am enclosing herewith copy of an opinion dated October 13, 1953 to R. D. Huffman, Clerk of the Circuit Court of Page County (See, Opinions of Attorney General, 1953-54, at p. 41). I assume you have in your office a copy of our 1963-64 Report of the Attorney General, and you are referred to three opinions therein which are as follows:

Opinion to J. Fulton Ayres, dated February 26, 1964 (Page 60)
Opinion to R. D. Huffman, dated February 5, 1964 (Page 86)
Opinion to R. D. Huffman, dated March 12, 1964 (Page 90)

I believe these opinions will enable you to find the answers to your questions. Specifically, the answers to your questions (1) and (2) are in the affirmative. In my opinion, the answer to your question (3) must be in the negative. In such cases the costs should be prorated.

CRIMINAL PROCEDURE—Costs—Supplying indigent prisoner certified copies of his court record where appeal involved.

JAILS AND PRISONERS—Costs—Indigent prisoner supplied with certified copies of his court record where appeal involved.

February 8, 1965

HONORABLE T. F. TUCKER
Clerk of Corporation Court of City of Danville

This is in response to your letter of January 27, 1965, in which you ask the following questions:
"Is the Clerk required to furnish copies of the Court record (excluding the transcript of evidence covered by Section 17-30.1) free of charge upon receipt of an oath as a pauper when the purpose of the use of these records is not specifically stated?

"Does Section 14.1-183 (formerly Section 14-180) cover a request for a copy of the transcript of evidence? Several of these Affidavits have cited Section 14.1-183 as the authority for the Court to order a copy of the transcript of evidence be sent to the prisoner free of charge. It is my understanding that Section 17-30.1 controls this; that the prisoner, in order to secure a copy of the transcript of evidence for an appeal, must file an Affidavit with the Court and offer other evidence that he intends to seek an appeal and is financially unable to pay the cost of the transcript; further, that he cannot have a copy of this transcript of evidence unless it is for an appeal or unless he pays for it himself. Am I correct in this interpretation? Also, would Section 17-30.1 authorize the Court to order the evidence transcribed for purposes other than an appeal, such as a Petition for a Writ of Habeas Corpus, Mandamus, etc?"

I do not believe that it is necessary for you as Clerk to furnish to an indigent prisoner certified copies of his court record (which would include certified copies of the warrant, indictment, court orders, and pre-sentence report, excluding the transcript of evidence) unless he states the purpose for which these records are to be used. Your attention is directed to my opinion to Honorable John Wingo Knowles, Judge, of May 25, 1964, (Opinions of Attorney General, 63-64, Page 91). You will recall that in that opinion Judge Knowles was advised that if the prisoner filed an affidavit of Poverty as prescribed by Section 14.1-183 of the Code and specified that he desired certified copies of his court records for the preparation of a habeas corpus petition, the same could be furnished him without cost. I adhere to my previous expressed opinion that if the indigent prisoner does not specify the purpose for which he desires to use his court records the Clerk need not furnish them to him. The statement that he desires the court record for the purpose of bringing a habeas corpus proceeding, would entitle him to the complete record.

I am further of opinion that Section 14.1-183 of the Code does not authorize the preparation of a transcript of the evidence under the circumstances set forth in your letter. Section 17-30.1 of the Code, of course, provides that the transcript may be furnished an indigent prisoner for the appellate review. I do not believe that this Section is applicable to the initial request of a prisoner for a transcript if for the purpose of habeas corpus (see, U. S. v. Glass, 317 F. 2d 200, 4th Circuit, 1963). Of course, if after a petition is filed and if it should appear necessary I am of opinion that the Court may order the preparation of the transcript pursuant to the provisions of Item 81 (g) of Chapter 658 (The Appropriation Act, of Assembly, 1964). In other words, Section 17-30.1 is applicable only to an appeal by the indigent prisoner.

CRIMINAL PROCEDURE—Defense Counsel—When appointed.

April 15, 1965

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

This will acknowledge receipt of your letter of March 18, 1965, which reads, in part, as follows:
For the purpose of this inquiry, assume that 'A' is accused of a felony and is competent and capable of understanding. Upon his appearance in court oral examination is made by the court and the court as a result thereof ascertains that the defendant is not represented by counsel and that the accused does not have sufficient funds with which to employ counsel. The court then advises the accused that he is entitled to counsel by law and that he will appoint an attorney to represent him. The accused states to the court that he understands his rights under the statute and though he is not a lawyer, he considers himself capable of defending the charges against him and that he not only does not want a lawyer, he will refuse to permit any lawyer to talk with him or in any way interfere with his management of his case.

"Under the foregoing circumstances, would you please let me have your opinion as to:

"(1) Whether or not the presiding judge in the foregoing case is required to appoint counsel.

"(2) If your answer to the preceding inquiry is in the affirmative, would your answer be different if the defendant was not indigent.

"(3) Would your answer to inquiry (1) be different if the accused in the example was an attorney licensed to practice law in the Commonwealth.

"(4) Could a lawyer, notwithstanding his appointment by the court, participate in the case against the will of the accused—for example, suppose the attorney felt that certain procedures should be followed preparing for the defense or conducting the trial and he insisted on pursuing such procedures over the objection of the accused. Inasmuch as the example presupposes that the accused does not want any counsel, the attorney's right to withdraw from the case need not be discussed."

Your attention is directed to § 19.1-241.1 of the Code, which reads as follows:

"Every person charged with the commission of a felony shall be entitled as hereinafter provided to representation by local counsel at every stage of any proceeding against him based upon such charge held in any court in this State."

In answer to your first question, I am of the opinion that, to obviate the possibility of future litigation, it would be advisable to appoint counsel to assist the defendant in the preparation and trial of his case. The defendant may desire to conduct the entire matter himself, but it would be advisable for the court to appoint counsel. In this connection, you might desire to review the opinions in the case of Furber J. Coleman v. W. Frank Smith, Jr., 166 F. Supp. 934, 260 F (2d) 518. Certiorari denied, 359 U. S. 966.

In answer to your second question, whether or not the accused is indigent is not controlling. For the same reasons as were set forth in response to your first question, I am of the opinion that it would be advisable for the court to appoint counsel.

In answer to your third question, I am of the opinion that it is still incumbent upon a court to appoint counsel to assist an indigent in preparing his defense and in trying his case, even though he may be an attorney licensed to practice law in the Commonwealth of Virginia. This answer is predicated upon the reasons stated in the answer to question number one.
With regard to your fourth question, it would seem that a person is entitled to represent himself. The purpose of appointing counsel under these circumstances is to make sure that he has legal advice. If he does not desire to follow the recommendations of his attorney, this is, of course, his prerogative.

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CRIMINAL PROCEDURE—Expense of Witness—May be paid out of criminal fund.

February 9, 1965

HONORABLE CHARLES G. STONE
Commonwealth's Attorney for Fauquier County

This will acknowledge receipt of your letter of February 8, 1965, which reads as follows:

"I am shortly to be confronted with a problem and your advice will be appreciated.

"Several months ago a young man deliberately shot and killed his father in this county. Only those two persons were present at the time. The defendant fled the scene and wound up in California, where he was taken into custody and brought back to Fauquier, where he was indicted for murder, and the trial is set before a jury in March. He has private counsel.

"Several days after his arrest in California, the defendant was admonished by a relative against making any statement of any kind to police officers about the affair. Hence, he refused to tell our Deputy Sheriff anything when he was brought back here. However, upon arrest in California, the defendant talked to the arresting officer rather freely, and made a full confession of guilt.

"It is essential that I have this testimony from the officer in California to prove said admissions and confession. He is willing to fly here for that purpose, but the expense of such a round trip will be substantial.

"My question is: (1) Whether there is any way whereby such expense could be ordered advanced; and if not, (2) Can I assure him that these travel costs will be promptly paid from some source?"

I enclose copy of an opinion rendered by the late Abram P. Staples, Attorney General, to the Commonwealth's Attorney of Amherst County on December 29, 1939 (Report of Attorney General, 1939-40, at p. 264), which relates to this matter.

Section 4957, referred to therein, is now § 19.1-312. Section 4960 is now §§ 19.1-311, 19.1-313 and 19.1-315. Section 19.1-311, of course, is not applicable in this instance. The expenses, of course, would be paid out of the criminal fund under § 19.1-315.

In my opinion, under these sections, the court may authorize the payment by the State Comptroller of the expenses of the witness in question.
CRIMINAL PROCEDURE—Failure to Keep Right of Way Clear—How violation charged.

May 11, 1965

HONORABLE S. PAGE HIGGINBOTHAM
Commonwealth's Attorney for Orange County

This is in reply to your letter of May 7, 1965, which reads as follows:

"We would like an opinion as to the proper construction of Section 56-426 of the Code of Virginia with reference to how often a violation may be charged and conviction thereon properly had on the same set of facts. "Does each day the railroad allows the prohibited condition to exist constitute a separate offense or does each week or each month or each year constitute a separate offense? More pointedly, the question is, if there is a prosecution against the railroad for allowing said condition to exist and the railroad allows the condition to continue, when may a second warrant be sworn out and a conviction had thereon? "We would like to point out that the statute does not provide that each day shall constitute a separate offense."

As you pointed out, § 56-426 of the Code does not provide a period of violation for the purpose of determining separate or successive offenses. Section 56-427, relating to spark arresters, does contain such a provision and this would justify the conclusion that the General Assembly did not intend that each day, or other period, of violation would be a separate offense. Generally, I believe, under the rule of strict construction of penal statutes, successive or continuing offenses are subject to only one penalty for acts prior to the institution of criminal proceedings. I would assume that if a conviction is obtained and the offense is not abated promptly, a subsequent criminal action would be appropriate.

Although the question presented by you was not discussed in a former opinion of this office pertaining to § 56-426 (formerly § 3991), I am enclosing a copy of that opinion, which is published in the Report of Attorney General (1946-47), at p. 43.

CRIMINAL PROCEDURE—Felony Cases—Recording of evidence and incidents of trial— Sufficiency of order.

COSTS—Criminal Cases—Recording of evidence and incidents of trial—When assessed.

July 1, 1964

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This will acknowledge receipt of your letter of June 26, 1964, in which you quote from my opinion to you under date of May 21, as follows:

"Under this language in all felony cases it is mandatory that, prior to the commencement of the trial, the court or judge trying the case shall enter an order providing for the recording verbatim of the evidence and incidents of the trial."
You request my advice as to whether a separate order must be entered in each case, and enclosed a specimen form of order in which the names of all persons indicted for a felony would be listed and immediately following would be this language:

"It is ordered that the evidence and incidents of trial in each of the above felony cases in which the Grand Jury has returned 'true bills' be recorded verbatim by Dictaphone Recording Equipment, which is approved by the court; and that $10.00 be assessed as costs for each day or part of a day that said Dictaphone Equipment will be used in each case, for the purpose of repairing, replacing or supplementing such Dictaphone Recording Equipment."

In my opinion of May 21, I had assumed that a separate order would be entered in each case, but I feel that a single order of the type suggested would be sufficient. In case of an appeal a copy of the order as entered would have to be included in the record of the trial of the accused.

That portion of the proposed order relating to the costs would have to be revised due to the fact that the costs may be assessed only against those persons who are found guilty. The costs you had in mind in drafting this proposed order, I assume, is the charge allowed under § 14.1-116 (prior to July 1, being § 14-125.1). This must not be confused with per diem charges provided for in § 17-30.1, as amended by Chapter 533, Acts of Assembly (1964), nor with those fees payable to the clerk under § 14.1-112(15) (prior to July 1, 1964, § 14-123(57)) and § 14.1-115 (prior to July 1, being § 14-125).

I enclose copies of two opinions which may be helpful—one, dated June 25, 1964, to Hon. J. Gordon Bennett, and two, dated June 18, 1964, to Honorable L. J. Hammack, Jr.

You will observe that the per diem charges provided for in § 17-30.1, when collected, are payable into the State treasury. The charges collected under § 14.1-116 are placed in the custody of the clerk in a special fund to be used for the purposes therein provided.

CRIMINAL PROCEDURE—Preliminary Hearing—Procedural and not jurisdictional.

CRIMINAL PROCEDURE—Preliminary Hearing—Accused not required to enter plea.

HONORABLE MARK D. WOODWARD
Judge, Juvenile and Domestic Relations Court of Page County

May 24, 1965

This will acknowledge receipt of your recent letter in which you ask whether or not an accused should be asked to enter a plea at the time of the preliminary hearing on a felony charge.

The preliminary hearing is provided for by Article 2 of Chapter 6 of Title 19.1 of the Code of Virginia.

Section 19.1-163.1 reads as follows:
"Preliminary examination of person arrested on charge of felony.— No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to such hearing unless such hearing is waived in writing. (1960, c. 389.)"

The preliminary hearing is conducted by a Judge of a court not of record as provided for by § 16.1-127 of the Code. The Supreme Court of Appeals of Virginia has held that a preliminary hearing is procedural, and not jurisdictional, Snyder v. Commonwealth, 202 Va. 1009, 121 S. E. 2d 452.

In the case of Webb v. Commonwealth, 204 Va. 24, 129 S. E. 2d 22, the Supreme Court of Appeals stated:

"The primary purpose of a preliminary hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and the person charged is the one who has committed it. 22 C. J. S., Criminal Law, § 331, pp. 844, 845; 14 Am. Jur., Criminal Law, § 241, p. 935."

I am of opinion, in view of the above-mentioned statutes and the decisions of the Supreme Court of Appeals of Virginia, that the purpose of the preliminary hearing is to ascertain whether or not there is reasonable ground to believe that the accused has committed a felony. If the Court believes that there is reasonable ground to believe that a felony has been committed, it is the duty of the Judge hearing the matter to certify the case to the Grand Jury. I am advised that under certain circumstances a plea is accepted at the time of the preliminary hearing; and, although I find no specific fault with such a procedure, I believe that it is not required by the applicable statutes of Virginia. In other words, it is not necessary that the Judge of the court not of record presiding over the preliminary hearing require that the accused enter a plea.

CRIMINAL PROCEDURE—Speedy Trial—What constitutes.

March 3, 1965

HONORABLE PETER K. MCKEE
Acting Commonwealth's Attorney for Frederick County

This is in answer to your letter of February 17, 1965, which reads, in part, as follows:

"In the July, 1958 Term of the Circuit Court of Frederick County, an accused was indicted for unlawfully, feloniously and maliciously shooting and wounding a bank guard, and by such means causing him bodily injury, with intent to maim, disfigure, disable and kill. This same accused was charged with bank robbery in the federal court and was tried by that court and convicted and sentenced to ten years in the federal penitentiary. He was sent to Lewisburg, Pennsylvania.

"In December of 1959, the accused filed a petition for a writ of habeas corpus, ad prossequi in the Frederick County Court, alleging inter alia that he did not enjoy the right to a public and speedy trial. On behalf of your office a demurrer and motion to dismiss was filed, the essential allegation of which was that the petitioner was not in the
actual or constructive custody of the Commonwealth of Virginia, or any agent thereof, and the petitioner was in fact detained by the federal authorities of Lewisburg, Pennsylvania. The accused refused to accept the court-appointed counsel and the matter was heard in the spring of 1960 on the issues raised in the petition. On the authority of Whiting v. Chew, decided by the Fourth Circuit Court of Appeals, the Court sustained the position of the Commonwealth and dismissed the petition. The accused then sought a writ of error in the Supreme Court of Appeals which was denied on October 6, 1960.

"In 1961 the accused wrote a letter to the Commonwealth's Attorney of Frederick County from the federal penitentiary in Atlanta, Georgia, in which he stated that he was entitled to an immediate trial and requested that his case be placed upon the trial docket and disposed of at the earliest convenience.

"In March of 1964, the accused filed what was called an 'application for a writ of restraint' in the United States District Court for the District of Kansas seeking to restrain the United States Department of Justice from transporting him out of the State of Kansas without first giving him an extradition hearing. This petition or application was denied.

"The accused has recently been returned to Frederick County for the purpose of standing trial for the State offense. His attorney filed a motion to quash and discharge, asserting that he has been deprived of his constitutional right to a speedy trial and that he was denied a speedy trial in accordance with the provisions of Section 19.1-191 of the Code of Virginia."

You ask my opinion as to whether or not the accused has been denied the right to a speedy trial as a matter of law.

We have examined the Note, "Right to a Speedy Criminal Trial," 57 Colum. L. Rev. 846, 850-1 (1957), the Annotation at 118 A.L.R. 1037, 1046 (1939), and its supplements, most of the significant federal decisions on the question, and have read the more recent decisions from other states. The law review note, supra, is accurate in its summation of the law as of 1957. It states (57 Colum. L. Rev. at 850-1):

"B. Exceptions to Right of Speedy Trial

* * * * *

"* * * An additional situation outside the scope of speedy trial is the case of a defendant imprisoned in another jurisdiction for a different crime. (citing cases). This exception is justified by pointing to the inability of a state to acquire jurisdiction of the accused without the consent of its sister state (citing cases). Within the past few years, however, a minority has accorded the right of prompt trial to a defendant in this situation, the state being required to use diligence to obtain his extradition (citing cases)."

The majority view on the subject is also expressed at 118 A.L.R. 1037, 1946 (1939), where it is pointed out that constitutional or statutory guarantees of a speedy trial do not apply so as to entitle an accused to a discharge from indictments pending in the state courts where, contemporaneously, the accused is serving a sentence in federal prison for violation of federal statutes.

A most recent encyclopedic treatment of the question is found at 22A C.
REPORT OF THE ATTORNEY GENERAL

J.S. Criminal Law § 427 (2) (b) (1961). Most of the applicable cases are there cited.

It is appropriate to note at this point that the enumeration in § 19.1-191 of the Code of Virginia (1950) does not exclude others of a similar nature or in pari ratione. Commonwealth v. Adcock, 8 Gratt. (49 Va.) 661. This is also the rule in states following the majority view, which have a statute similar to § 19.1-191 of the Virginia Code. Statutes of this type are enacted for the purpose of enforcing the constitutional right to a speedy trial, and they constitute a legislative construction, definition and interpretation of the constitutional provision. Flanary v. Commonwealth, 184 Va. 204; 22A C.J.S. Criminal Law § 467(4) (b) (1961).

The question which you ask appears to be one of first impression here in Virginia. I have found no Virginia cases in point. However, I am lead to the conclusion, from a review of all of the authorities, that the State cannot compel the federal government to deliver an accused up for trial, see Ponzi v. Fessenden, 258 U.S. 254 (1922); and where an accused is incarcerated in a federal penitentiary, such incarceration is a good cause for delay in bringing the accused to trial on a state charge, even where the state authorities wait until his release from the federal penitentiary before requesting his delivery to the state court and notwithstanding the fact that permission for delivery prior to release would have been granted if it had been sought. This conclusion is amply supported, in my opinion, by the prevailing weight of authority. See the cases cited in the attached appendix.

In addition, here it appears that the accused, in March, 1964, attempted to prevent this transfer by the federal authorities from the State of Kansas. This action on his part might well be construed to constitute a waiver by him of his intention to insist upon the right to a speedy trial. See 22A C.J. S. Criminal Law § 469 (1961). His intention to insist on a speedy trial was first evidenced in his 1961 letter to the Commonwealth's Attorney of Frederick County. He could hardly demand trial in Virginia on the one hand and then on the other resist his removal from Kansas without, at least, evidencing an intention not to insist on his right to a speedy trial. Again, see 22A C.J.S. Criminal Law § 469 (1961).

For these reasons, it is my opinion that the accused in this case has not been denied the right to a speedy trial.

CRIMINAL PROCEDURE—Statute of Limitations—Affect thereon of issuance of warrant.

HONORABLE MAURICE E. GRIFFIN, JR.
Justice of the Peace

November 27, 1964

This is in reply to your letter of November 24, 1964, which reads as follows:

"Please advise me as to what is the Statute of Limitations on a misdemeanor warrant in Virginia, on file."

Section 19.1-8 of the Code relates to limitation of prosecutions and reads as follows:
“A prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty or amercement, shall be commenced within one year next after there was cause therefor, except that a prosecution for petit larceny may be commenced within five years, and for an attempt to produce abortion, within two years after commission of the offense; and a prosecution for obtaining, attempting to obtain, aiding or abetting in obtaining public assistance under the Virginia Public Welfare and Assistance Laws by means of a willful false statement, representation, impersonation or other fraudulent device shall be commenced within five years next after the commission of the offense. Nothing in this section shall be construed to extend to any person fleeing from justice, or be construed to limit the time within which any prosecution may be commenced for desertion of a wife or child or for neglect or refusal or failure to provide for the support and maintenance of a wife or child.”

I assume that your inquiry relates to a pending case which will require a trial judge to pass upon the question. This office has consistently taken the position that no opinion will be furnished with respect to a case pending in court, unless request therefor is made by the trial judge.

The opinion rendered by our Supreme Court in Commonwealth v. Christian, 7 Gratton (48 Va.) 631, and an opinion handed down by the Supreme Court of Appeals of West Virginia in 92 S. E. (2d) at p. 910, which apparently had a similar statute under consideration, seem to hold that the issuance of valid warrant constitutes a commencement of a prosecution and, hence, stops the running of the statute of limitations. A statement contained in 22 C.J.S.—Criminal Law, Section 234, at p. 631, is to the same effect.

CRIMINAL PROCEDURE—Warrants—For violation of State law within jurisdiction of town—How executed.

SHERIFFS AND SERGEANTS—Warrants—Execution in town for violation of State law.

HONORABLE CHARLES G. STONE
Commonwealth’s Attorney for Fauquier County

June 23, 1965

This is to acknowledge receipt of your letter of June 18, 1965, in which you state in part:

“I am frankly confused about the meaning of the last sentence of Section 19.1-91 of the Virginia Code, which provides for the issuance of criminal warrants. The concluding sentence reads as follows: ‘But in a city or town having a police force, the warrant shall be directed ‘To any policeman of such city (or town), and shall be executed by the policeman into hands it shall come or be delivered.’

“The Town of Warrenton has a full-time police force with a Chief at its head. If a violation of State law (felony or misdemeanor) occurs within the Town limits and a criminal warrant therefor is issued, does this Section mean that the warrant MUST be directed to any policeman of the Town, rather than to the County Sheriff, and that it MUST be executed by a Town policeman?”

Your question is answered in the negative. Whenever any warrant is issued
for violation of a State law within the jurisdiction of the town, the warrant may be directed to the sheriff and executed by him.

CRIMINAL PROCEDURE—Warrants—Issued by town officers—Where returnable.

December 8, 1964

HONORABLE ARTHUR C. STICKLEY, II
Judge, Municipal Court of Town of Haymarket

This is to acknowledge receipt of your letter of December 2, 1964, in which you request my opinion on the extent of the jurisdiction of the Municipal Court of the Town of Haymarket. I quote from your letter:

"My question at this time is—if the Town Sergeant makes an arrest, should the warrant be issued on a town warrant or a county warrant? Also, would the fine and costs go to the town or to the county?"

Section 18, Chapter 7, Acts of 1952, page 9, amending and reenacting portions of the charter of the town of Haymarket, provides in part:

"The trial justice is hereby vested with all the power, authority and jurisdiction and charged with all the duties within and for the town of Haymarket, and in criminal matters for one mile beyond the corporate limits thereof, which are or may hereafter be conferred upon the trial justice by the laws of the State of Virginia, so far as the same may be applicable, and not in conflict with the provisions of this charter.

*     *     *     *

"All fees and costs collected by the said trial justice and all fines collected for violations of all laws and ordinances of the town shall be paid into the town treasury for the use and benefit of the town." (Extra Session, 1952).

Section 15.1-141, Code of Virginia (1950) as amended by Chapter 623, Acts of 1962, provides:

"The jurisdiction of the corporate authorities of each town or city, in criminal matters, shall extend one mile beyond the corporate limits of such town or city . . . ."

In view of the opinion of the Court in the case of Kelley v. County of Brunswick, 200 Va. 45, ordinances of the town are not effective in areas one mile beyond the corporate limits thereof. However, the town would have the authority to enforce county and police regulations and law in the area involved. Murray v. City of Roanoke, 192 Va. 321.

I am therefore of the opinion that warrants in such cases where arrests are made by town officers should be made returnable before the County Court of Prince William County.
CRIMINAL PROCEDURE—Warrants—To whom addressed.

CRIMINAL PROCEDURE—Search Warrants—Authority of State police.

HONORABLE A. DOW OWENS
Commonwealth's Attorney for Pulaski County

September 30, 1964

This is to acknowledge receipt of your letter of September 25, 1964, in which you enclosed a copy of a blank search warrant used by your local police officer. I shall answer your questions seriatim.

"1. It will be noted that the warrant is addressed, "To Any Police Officer, Greeting". Please be kind enough to advise as to whether this makes the warrant invalid in view of the provisions of Section 19.1-86 of the Code of Virginia, that the same shall be directed to the Sheriff, Sergeant, Policeman or Constable of the County in which the search is to be conducted."

The wording of the salutation in the search warrant should follow the language of the statute. However, I do not believe that this failure in the warrant would invalidate the same as the term "any police officer" would embrace the four types of officers mentioned in the statute. The last clause of § 19.1-86 of the Code of Virginia (1950) is as follows:

"and [the search warrant] shall be executed by the policeman or other officer into whose hands it shall come or be delivered."

The word "policeman" here would either refer to the "policemen of the said city or town" or policemen of the county (in the first sentence) or both. The term "other officer" would also apply to those officers mentioned in the first sentence or any other officer having authority to execute warrants. In this connection, it is well to bear in mind the provisions of § 8-44 of the Code, although that section deals specifically with process issued by a court. The pertinent language in that section is as follows:

"If it [process of any court] appears to be duly served and good in other respects, it shall be deemed valid although not directed to any officer or if directed to an officer though executed by some other person."

"2. Please compare Section 19.1-86 and Section 52-8 and give me your opinion as to whether or not a member of the Virginia State Police can obtain and serve a search warrant or whether this must be done by an officer of the County."

Under the provisions of § 52-8 of the Code the State police officers are vested with powers of a sheriff for the purpose of enforcing all the criminal laws of the State. This office has heretofore held that these officers have authority to execute warrants. Opinions of the Attorney General (1940-1941), p. 211. The question is answered in the affirmative. Members of the State police in my opinion may obtain and serve search warrants.
CRIMINAL PROCEDURE—Witness—Shall not be compelled to give self-incriminating testimony at trial of accomplice.

CRIMINAL PROCEDURE—Witnesses—Uniform Act to Secure Attendance of Witnesses—Where witnesses incarcerated in other states.

May 21, 1965

HONORABLE CATESBY GRAHAM JONES, JR.
Commonwealth's Attorney for Gloucester County

This is to acknowledge receipt of your letter of May 6, 1965, in which you ask my opinion on the following questions: (1) May a witness be compelled to give testimony which would tend to incriminate him, at the criminal trial of his accomplice in crime? (2) Is the witness at the trial of his accomplice considered a "witness in his own behalf" in view of Hansel v. Commonwealth, 118 Va. 803? (3) At the trial of a criminal defendant in Virginia, may the Commonwealth secure the attendance, as witnesses, of the defendant's accomplices, who are at the time incarcerated in Pennsylvania and New Jersey, by virtue of Section 19.1-269, et seq., of the Code of Virginia, 1950, as amended? I shall answer your questions seriatim.

The general proposition that no man shall be compelled in any criminal case to be a witness against himself is guaranteed to every citizen by the Fifth Amendment to the Constitution of the United States and by Section 8 of the Constitution of Virginia.

"This rule applies whether the subject of the interrogation is relevant or not, and the privilege cannot be taken away by legislatures or courts . . . In determining the right of a witness to refuse to answer on the ground that his answer might tend to incriminate him, it is the province of the court to judge whether any direct answer to the question proposed will furnish evidence against the witness . . . But if the fact to which the witness is interrogated forms but a single remote link in the chain of testimony which may implicate him in a crime or misdemeanor, he is not bound to answer." 20 M. J., Witnesses, Section 80.

"The constitutional privilege of silence cannot be taken away by statute, unless absolute immunity is provided, and nothing short of complete amnesty to the witness, an absolute wiping out of the offenses as to him so that he can no longer be prosecuted therefor, will furnish that immunity . . . A provision merely that the testimony of a witness should not be used against him does not secure such absolute immunity." 20 M. J., Witnesses, Section 81.

"The privilege of the accused not to give evidence against himself is highly personal. If the witness wishes to answer, no one can object, and by the same token no one can waive for him this right." 20 M. J., Witnesses, Section 82.

See also 98 C.J.S., Witnesses, Sections 431, 439 and 443 (b) for additional authorities.

From the authorities cited, it is apparent to me that the answer to your first question must be in the negative (assuming the answer to the second question is also negative).

In regard to your second question, the following portion of Section 19.1-267 of the Code of Virginia, 1950, as amended, appears pertinent:
You ask whether *Hansel v. Commonwealth*, 118 Va. 303, is authority for the proposition that a witness when testifying at the criminal trial of his accomplice in crime may be considered a “witness in his own behalf,” and thus render his testimony admissible against him in a subsequent criminal proceeding against him? In the *Hansel* case, there were two trials; a civil trial, brought by Hansel’s accomplice, and a subsequent criminal trial in which Hansel was the Defendant. In the earlier civil trial, Hansel had testified on behalf of the Plaintiff (his accomplice) in a case whose facts were related to the latter criminal trial, and in the outcome of which Hansel had a financial interest. Later when criminal charges were brought against Hansel, the Commonwealth introduced the transcript of Hansel’s testimony at the civil trial. The Supreme Court of Appeals held that this was proper in that Hansel had, at the civil trial, been a “witness in his own behalf” in the terms of Section 3901 of the Code of Virginia, 1887 (the forerunner to the present Section 19.1-267, Code of Virginia, 1950) in that he had a financial interest in the civil case. It is my opinion that a witness, at the criminal trial of his accomplice in crime, which situation you pose here, would not be considered a “witness in his own behalf” under Section 19.1-267 of the Code; and the *Hansel* case would have no application to your set of facts.

In considering your third question regarding the “Uniform Act To Secure The Attendance of Witnesses” reference is made to 97 C.J.S., *Witnesses*, Section 17, p. 368, where the following appears:

“The Act does not give to the courts of a state extra territorial jurisdiction, but depends on the principles of comity and has no efficacy except through the adoption of the same act by another state.”

Statutes comparable to our Section 19.1-269, et seq., Code of Virginia, 1950, have been adopted in New Jersey and Pennsylvania. See Purdon’s Penna. Statutes Annotated, Title 19, Criminal Procedure, Chapter 9, Section 622.1, et seq.; and New Jersey Statutes Annotated, Title 2A: 81-18, et seq.

It is my opinion that since the states mentioned have adopted comparable statutes, there will be no problem in obtaining these witnesses by following the procedure outlined in Section 19.1-269, et seq., Code of Virginia, 1950.

In addition, you ask if there is any precedent to sustain a search and seizure involved in this case. Since the matter of search and seizure is one fraught with legal refinement, and the facts given leave some questions to be answered, may I suggest that, among others, you examine 16 M.J., *Search and Seizure*, Section 9: 79 C.J.S., *Searches and Seizures*, Sections 16 and 66 (h); *Searches, Seizures and Immunities* by Joseph A. Varon, Bobbs-Merrill Co., Inc. (1961).

DOG LAWS—Licenses—Kennel—Conditions for issuance.

HONORABLE LESLIE D. CAMPBELL, JR.
Member, Virginia State Senate

This is in reply to your letter of August 1, 1964, in which you request my opin-
REPORT OF THE ATTORNEY GENERAL

ion as to whether the owner of a dog kennel must have all dogs therein inoculated or vaccinated against rabies in order to obtain a kennel license.

Section 29-188.1 of the Code (1950), as amended, reads as follows:

“(a) No license tag shall be issued for any dog unless there is presented, to the treasurer or other officer of the county, city or town charged by law with the duty of issuing license tags for dogs at the time application for license is made, evidence satisfactory to him showing that such dog has been inoculated or vaccinated against rabies.

“(b) The provisions of this section shall not apply to the county of Accomack or the county of Northampton; provided, that the governing body of the county of Accomack or the county of Northampton, may, by ordinance, provide that before licenses are issued within such county, dogs shall be inoculated or vaccinated for rabies.”

As amended in the 1964 session of the General Assembly, the Act becomes effective November 1, 1964, but with the added proviso that inoculations shall not be required under this Act until January 1, 1965.

It is to be noted that the prohibition contained in this section relates to the issuance of license tags for dogs unless evidence is presented, at the time application for license is made, of inoculation or vaccination against rabies. While true that a license may be issued for kennels of either twenty or fifty dogs pursuant to § 29-184 of the Code, § 29-189 of the Code specifies that the license tag for a kennel must have a metal identification plate for each of the dogs in the kennel, numbered to correspond with the serial number of the license tag. Accordingly, I am of the opinion that no kennel license tag may be issued after January 1, 1965, unless evidence is presented at the time of application for license that each dog covered by that license has been inoculated or vaccinated against rabies.

DOG LAWS—Licenses—Rabies inoculation requirements.

HONORABLE F. PAUL BLANOCK
Commonwealth's Attorney for Mathews County

August 7, 1964

This is in reply to your letter of August 4, 1964, in which you request my opinion as to whether § 29-188.1 of the Code of Virginia (1950), as amended, requires an applicant for a dog license between November 1 and December 31, 1964, for the license year 1965 to exhibit evidence to the Treasurer that the dog has been inoculated or vaccinated against rabies.

The section of the Code in question was amended by Chapter 449, Acts of Assembly of 1964, which reads as follows:

"1. That § 29-188.1, as amended, of the Code of Virginia be amended and recodified as follows:

"§ 29-188.1. * (a) No license tag shall be issued for any dog unless there is presented, to the treasurer or other officer of the county, city or town charged by law with the duty of issuing license tags for dogs at the time application for license is made, evidence satisfactory to him showing that such dog has been * inoculated or vaccinated against rabies."
"(b) The provisions of this section shall not apply to the county of Accomack or the county of Northampton; provided, that the governing body of the county of Accomack or the county of Northampton, may, by ordinance, provide that before licenses are issued within such county, dogs shall be inoculated or vaccinated for rabies.

"2. This act shall become effective November one, nineteen hundred sixty-four; provided, that inoculations shall not be required thereunder until January one, nineteen hundred sixty-five."

Although the effective date of this Act is November 1, 1964, the proviso expressly provides that inoculations shall not be required thereunder until January 1, 1965. When the Legislature speaks in certain and unambiguous terms, that language must be given effect. In the instant case there can be no interpretation of intent as to when inoculations are required by virtue of this Act, since the time has been specified as January 1, 1965. Therefore, in spite of the fact that dog license tags for the calendar year 1965 are placed on sale November 1, 1964, there is no requirement that evidence of inoculation be submitted as a condition precedent to obtaining the 1965 license until January 1, 1965.

DOG LAWS—Special Dog Wardens—No authority in board of supervisors to appoint.

August 10, 1964

HONORABLE PAUL X. BOLT
Commonwealth's Attorney for Grayson County

This is in reply to your letter of August 4, 1964, which reads as follows:

"Over the past year there has been excessive damage, especially to sheep by stray dogs in Grayson County. Before the end of the last fiscal year there was not sufficient money in the Dog Fund for the payment of such damages. This year damages have increased and the money available in the Dog Fund is almost gone.

"The Grayson County Board of Supervisors wishes to hire a part time special Dog Warden for each of the four magisterial districts in Grayson County, in an attempt to curtail damages being suffered by farmers because of stray dogs; however, there are not sufficient funds to pay said special wardens available in the Dog Fund. In your opinion, would it be proper for the Grayson County Board of Supervisors to appropriate necessary money to pay special dog wardens from the General Funds or would it be necessary for such sum to be appropriated from the dog fund?"

Section 29-184.2 of the Code provides that "in any county having a population of not less than 17,300 nor more than 17,400, the circuit court shall appoint the dog warden and may appoint any deputy recommended by the dog warden, and shall fix the salaries of such dog warden or deputy so appointed; the maximum and minimum salary brackets shall be determined by the governing body." This population bracket applies to Grayson County, which has a population of 17,390, according to the 1960 United States census which is applicable under § 1-13.22 of the Code.

Under § 29-184.2, the sole appointing power is lodged in the circuit court. No provision is made whereby the board of supervisors may appoint special dog wardens with part time duty. Only such deputy dog wardens as the dog warden
may recommend to the court are authorized. In my opinion, the board of supervisors has no authority to appoint part time special dog wardens whose duties, no doubt, would be such as usually would be performed by deputy dog wardens.

In view of this conclusion, I assume that no answer to your question relating to compensation of special dog wardens is required.

EDUCATIONAL TELEVISION—Governing Bodies of Political Subdivisions—May provide funds for costs.

COUNTIES, CITIES AND TOWNS—Educational Television—Governing bodies authorized to provide for establishment and operation.

August 17, 1964

HONORABLE G. TYLER MILLER
President, Madison College

This is in reply to your letter of July 30, 1964, in which you request my opinion as to the legal authority of political subdivisions to participate in the establishment of an educational television station in the Harrisonburg area. You have suggested that proposals are under consideration for the establishment of such a station by the creation of a nonprofit corporation, or establishment through joint ownership by participating school boards. You are particularly interested in knowing if the governing bodies of the political subdivisions may provide pro rata capital outlay appropriations for partial costs of such a station either directly or through appropriations to the school board.

Section 15.1-23 of the Code of Virginia authorizes the governing bodies of the political subdivisions to provide for the establishment, ownership, maintenance and operation of educational television stations within or without the county, city or town or counties, cities and towns. This section further provides that the operation of any such station shall be under the direction of the school board of the county, city or town establishing such station.

By virtue of the foregoing legislative authority, I am of the opinion that the governing bodies of the several political subdivisions within the service area contemplated by the proposed educational television station may contribute pro rata shares to capital outlay for such a station whether the station be created as a non-stock, non-profit corporation similar to the Central Virginia Educational Television Corporation or an association of school boards similar to the Hampton Roads Educational Television Association.

ELECTIONS—Ballot Box—People not to be within forty feet.
ELECTIONS—Challenge—How accomplished.
CRIMES—Loitering within Forty Feet of Ballot Box.

December 7, 1964

HONORABLE JOSEPH MOTLEY WHITEHEAD
Commonwealth’s Attorney for Pittsylvania County

This will acknowledge receipt of your letter of November 25, 1964, which reads as follows:
"Section 24-186 of the Code of Virginia states that except for the judges of election and clerks, no person other than the elector offering to vote shall be within forty feet of the ballot box. Assuming a situation where A is stationed at the polls on election day distributing campaign literature in an attempt to influence voters and pursuant to the above section Officer B challenges A, whereupon A immediately leaves the voting place; then has a crime been committed by A? If so, what penalty should be applied?"

Section 24-186 of the Code, cited by you, provides as follows:

"Except for the judges of election and clerks, no person other than the elector offering to vote shall be within forty feet of the ballot box. In case of a challenge the challengers and challenged and the witnesses may appear before the judges. When such challenge is decided, only the elector having the right to vote shall remain within the prescribed limits."

Section 24-455 of the Code provides the penalties for violation of any provision of Title 24 for which no punishment has been otherwise provided. This section reads as follows:

"Any violation of the provisions of this title for which no punishment has been otherwise provided, shall be deemed a misdemeanor and shall be punished by a fine of not exceeding one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment."

It would seem that the act referred to would constitute a violation of § 24-186 of the Code, even though no warning had been given to A. Any person found guilty of violating this section would be guilty of a misdemeanor, subject to the penalty provided for in § 24-455.

ELECTIONS—Ballots—Candidate for House of Delegates may also be candidate for democratic committeeman.

Mr. JAMES E. BAYLOR
Member, Electoral Board of City of Norfolk

April 19, 1965

This is in reply to your letter of April 16, 1965, which reads as follows:

"Can a candidate run for the House of Delegates from the City of Norfolk, and also run for Democratic Committeeman from the City of Norfolk, in the same election, thus having his name on the voting machine twice?"

I am not aware of any statute which would prevent a person from being a candidate for the House of Delegates and also for Democratic Committeeman at the same primary election. There is nothing in the statute which prevents a member of the General Assembly of Virginia from being a member of the local Democratic Committee.
ELECTIONS—Ballots—Must be handed to judge of elections—Statute not in conflict with Section 21 of Virginia Constitution.

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of November 10, 1964, to which you attached a letter from Mr. George M. Ladd, in which he makes complaint about the method of depositing his ballot at a precinct in Rappahannock County. Mr. Ladd raises the question as to the constitutionality of § 24-247 of the Code, which provides as follows:

"The elector shall fold the ballot with the names of the candidates on the inside and hand the same to the judge of the election, who shall place the same in the ballot box without any inspection further than to assure himself that only a single ballot has been tendered and that the ballot is a genuine ballot, for which latter purpose he may, without looking at the printed inside of the ballot, inspect the official seal upon the back thereof."

On December 2, 1960, an opinion was issued by this office to the Honorable James C. Turk, State Senator, in which the constitutionality of § 24-247 was upheld. We now reaffirm that opinion.

Ordinarily, the ballot boxes are kept in the general area where the judges are conducting the election. A judge of election, upon receiving a marked ballot from a voter, after satisfying himself that the ballot is genuine, should deposit the same without delay in the ballot box. It would not be proper for a judge of election to receive a marked ballot at a distance of forty feet from the ballot box, and permitting him to carry them on his person to said ballot box and deposit it, or them, therein.

Sections 24-241 through 24-243 of the Code relate to ballot boxes. These sections read as follows:

"§ 24-241.—The governing body of each county and city shall, at the expense of their respective counties or cities, procure a ballot box for each place of voting in any election district destitute of the same, which box shall be provided with a lock and key and have an opening through the lid of sufficient size to admit a single folded ballot and no more. The boxes shall be kept by the judges of election for the use of their several election districts."

"§ 24-242.—The judges of election, or one of them, immediately before proclamation is made of the opening of the polls, shall open the ballot boxes in the presence of the people there assembled, and turn them upside down, so as to empty them of everything that is in them,
and then lock them, and the key thereof shall be delivered to one of the judges, and one of the judges shall forthwith proclaim that the polls are open. The boxes shall not be opened until the close of the polls and for the purpose of counting the ballots therein."

"§ 24-243.—The ballot box shall be kept in public view during all elections."

ELECTIONS—Candidates—Qualifications for city councilman subsequent to annexation.

April 16, 1965

MR. WILLIAM SLATE
Chairman, Electoral Board of City of South Boston

This will acknowledge your letter of April 14, 1965, which reads as follows:

"The City of South Boston annexed additional territory effective midnight December 31, 1964.

"A resident of the annexed area has filed to become a candidate for city council in the general election to be held June 8, 1965.

"Under previous opinions from your office it is recognized that residents of areas annexed are eligible for candidacy. In the case at hand, however, the candidate, though he has been a resident of the county (Bannister District) and the area annexed for several years he has maintained his voting rights in another district of the county (Birch Creek District).

"On April 6, 1965 he transferred his voting registration to the City of South Boston from the Birch Creek District of Halifax County (he resided in the area annexed—Bannister District).

"Under such circumstances would the individual be eligible to run for the office of city councilman?"

Section 15.1-1054 of the Code provides that any person residing in the annexed territory who shall not have registered shall be entitled to register in the city to which he was annexed if he would have been entitled to register and vote at the next succeeding election in the county. I construe this to mean that if the person was entitled at the time of the annexation to be registered (by transfer or otherwise) and vote in the rural precinct established for voters residing in the annexed area, he was similarly entitled to be registered in the city at the precinct serving the voters living in the area where he actually resides.

Although he was permitted under the law to continue to vote in the precinct in Birch Creek District so long as he had an intention to remove back to his former place of actual residence, he could at any time abandon the intent to return to that place.

This person has resided in the area where he now lives for a period of at least six months. He has become a registered voter in that precinct by transfer and, in my opinion, he is qualified to hold office in the city and, if otherwise qualified, is entitled to have his name placed on the official ballot for the June 8th election for members of the city council.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Death of Qualified Candidate Before Primary—Procedure for qualification of new candidates.

HONORABLE LANDON R. WYATT
Member, Virginia State Senate

I have your letter of April 20, 1965, advising that the primary to be held for the constitutional officers in the city of Danville includes the office of Treasurer of the city, that only one person qualified as a candidate for this position and after the closing date for the filing of candidates for this position, the only person who had qualified for the position of Treasurer died; that there are other officers to be selected at this primary at which there are contests and that the primary will actually be held July 13, 1965, for these officers in the city of Danville.

Chapter 615 of the 1964 Acts of the General Assembly covers this proposition. This chapter, codified as Section 24-350.1, is as follows:

"Notwithstanding any other provision of this Title, whenever during the period between the final date a person may file as a candidate for nomination for any office under the provisions of this chapter and the date on which the primary is to be held, any person who has filed as a candidate for nomination for such office shall die, the Party Committee that ordered the holding of the primary in which such person was a candidate, shall have the power to order the State Board of Elections to call off and cancel the primary for said office, and any such primary held for such office after such action by such Party Committee shall be void.

"The Secretary of the State Board of Elections upon receiving such order shall promptly notify the Secretary of each local electoral board of the action of the Party Committee.

"Whenever a primary election is cancelled under the foregoing circumstances, the Party Committee may call for a special primary on such date as will allow candidates to be nominated and certified for the ensuing general election, not later than ten days after such special primary. If a special primary is so set, the Party Committee shall require candidates to file declarations of candidacy with the party chairman at least ten days in advance of the special primary; the party chairman shall notify the State Board of Elections and such other officials as are requisite in order to have ballots printed and distributed to the polls on the date set for the special primary. Insofar as not in conflict with this section, the other provisions of this chapter shall apply to special primaries and the provisions of chapter 9 concerning special elections shall, respectively, apply mutatis mutandis to special primaries."

I am of the opinion that the Democratic Committee for the city of Danville should follow the procedure outlined in the above quoted section of the Code. A meeting of the Party Committee should be held and the State Board of Elections notified of the death of the only qualified candidate for the office of Treasurer and request made that the primary for this office be cancelled. The Committee then should call for a special primary to be held for this one office which could be called on the same day as the regular primary to be held for the other offices of the city of Danville. The Committee should set the date by which declarations for candidacy for the office of Treasurer would have to be filed with the party chairman, and after the date has elapsed in which the candidates shall qualify, the names of those qualifying for the office of Treasurer should be certified in
the usual way and a special and separate ballot printed for this office and the
special primary to be held on the same day as the primary held for the other
constitutional officers of the city of Danville. The same election officials could
act for the regular primary and the special primary.

Section 24-359 of the Code of Virginia provides for second primaries under
certain circumstances. This section is silent as to whether it applies to regular
primaries, special primaries or both. In the absence of any prohibition against
second primaries for a special primary, I am of the opinion that this can be
done provided Section 24-359 is followed as to procedures.

ELECTIONS—Death of Qualified Nominee before Primary—Procedure to be
followed where deceased only nominee.

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of May 11, 1965, in which you enclose a re-
quest signed by the chairman and the secretary of the Democratic Committee
for the City of Danville requesting you to cancel the primary for the election
of a city treasurer and establish a special primary. It appears that only one
person filed as a candidate for the office of treasurer in Danville and, as a
result, he was declared the nominee in accordance with § 24-350 of the Code.
The nominee has subsequently died.

The procedure in such a case is covered by § 24-391 of the Code. Section
24-350.1 applies where there are two or more candidates for nomination for a
particular office. It does not apply in cases where only one person filed and was
declared the nominee due to lack of opposition.

The provisions of § 24-391 provide that—

"Any person desiring to become a candidate for nomination by such
party at such primary who is otherwise qualified may file a notice of
and petition for his candidacy with the proper chairman or chairmen
of his party committee or committees."

Section 24-350.1 does not, in my opinion, supercede the provisions of § 24-391.

ELECTIONS—Districts—Size of precincts required under § 24-45

HONORABLE T. F. TUCKER
Clerk of Corporation Court of City of Danville

This is in reply to your letter of July 6, 1964, which reads as follows:

"Title 24, section 45, of the Code of Virginia is the authority for a
council of a city to establish election districts. This section further
states that such districts shall be established 'so that there shall not be
less than one election district for every 1000 voters or a fractional part
thereof above five hundred.' Does the language of this section mean
that the number of voters in an election district not exceed one thousand or not exceed fifteen hundred? It seems to me that the language quoted here means that there shall be at least one election district where the number of voters is between five hundred and one thousand. Am I correct in this interpretation?"

Section 24-45 of the Code, to which you refer, is as follows:

"The council of a city shall establish for each ward, or for the city at large, if there be no wards, as many election districts as it may deem necessary and a voting place in each district, except in cities in which officers are elected by wards the council in its discretion may establish election districts, the location of which may be within two or more wards. Such districts, except in a city having a population of more than twenty thousand but less than thirty thousand inhabitants, shall be established so that there shall not be less than one election district for every one thousand voters or fractional part thereof above five hundred. The council shall prescribe and cause to be published the boundaries of the districts. It may alter the boundaries of any such election district, and rearrange, increase, or diminish the number thereof, and change the voting places or establish others therein, not to exceed, however, one voting place for each election district. No change shall be made in any of the boundaries or voting places within thirty days next preceding any general election."

In my opinion, under this section there must be at least one precinct for 501 voters, up to and including, 1,000.

ELECTIONS—Electoral Boards—Members may serve and be paid until successors appointed by judge of the corporation court.

March 4, 1965

HONORABLE ROBERT F. BALDWIN
Member, Virginia State Senate

This is in reply to your letter of March 3, 1965, which reads as follows:

"The terms of two members of our three member Norfolk City Electoral Board expired February 28th. The Judge of the Corporation Court, who appoints the members of the Electoral Board, has indicated that it may be some time before the two vacancies are filled, stating that these two former members can continue to serve until the vacancies are filled. This gives rise to some questions in my mind which I shall appreciate your answering for me.

"1. Is there any provision in the law whereby a member of the Norfolk City Electoral Board can continue to serve after his term has expired contrary to what appear to be the provisions of Section 24-29 of the Virginia Election Laws?

"2. Is there any provision in the law entitling a member serving after his term has expired to be paid?

"3. Is there any provision in the law to provide for the filling of vacancies on the Norfolk City Electoral Board if the Judge of the Corporation Court fails to fill such vacancies:"

Your questions will be answered in the numerical order stated above:
(1) Section 33 of the Constitution of Virginia provides that such officers shall continue to discharge the duties of their office after their terms of service have expired until their successors have qualified. Electoral Board members are constitutional officers—Section 31 of the Constitution.

(2) The compensation of the members is fixed by § 24-37 of the Code and is based on a per diem basis of actual service. In my opinion, the members who are continuing to serve by reason of Section 33 of the Constitution are entitled to the statutory compensation.

(3) The answer to this question is in the negative. Section 31 of the Constitution provides that the members of the electoral board of a city shall be appointed by the corporation court of the city, or the judge thereof in vacation.

ELECTIONS—Eligibility to Vote—Paupers excluded—Persons on welfare not per se paupers.

December 2, 1964

Miss Mary E. Dudley
General Registrar of City of Norfolk

This is in reply to your letter of December 1, 1964, in which you direct attention to Section 23 of the Constitution of Virginia, in which it is provided that paupers are excluded from registering and voting in elections held in this State. You have requested my opinion as to whether “persons on welfare” would be excluded from registering under this provision. I assume you have reference to persons who are receiving welfare allowances under the provisions of Title 63 of the Code of Virginia.

It is difficult to determine who is a pauper. However, in my opinion, the fact that a person may be eligible for and receiving allowances under the modern welfare statutes would not, by itself, cause such person to be considered a pauper as that term is used in the Constitution.

ELECTIONS—Filing of Qualifying Papers—Time for filing.

February 25, 1965

Honorable Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of February 23, 1965, which reads as follows:

“The Governor issued a writ of election on February 17, 1965, a copy of which you will find enclosed.

“Since it was provided under § 24-13.1 of the Extra Session of the General Assembly that the senators may be nominated in the primary or by convention, I desire to know if I am correct in assuming that the senators who run in the primary will be required to file the usual qualifying papers under § 24-345.3 of the Code on or before April 14, 1965. Then will the nominees have to file papers again under § 24-131 of the Code thirty days prior to the Special Election to be held on November
2, 1965, just as any other candidate desiring to run for the State Senate for the unexpired term in this special election?

"I also would like to know what is the latest date in which a candidate running for the State Senate in this special election can file. This question is being asked constantly and I will appreciate it if you will give me your opinion in the matter."

Section 24-13.1 of the Code provides as follows:

"(a) Notwithstanding the provisions of § 24-13 of this Code, if the Attorney General of Virginia shall file with the clerk of the Virginia State Senate a copy of an order of the Supreme Court of the United States, or other federal court, finally adjudicating that the terms of the incumbent members of the Senate of the General Assembly of Virginia terminate on or before the convening in January, nineteen hundred sixty-six, of the regular session of the General Assembly, the Governor shall issue a writ calling a special election to elect the several members of the State Senate. The writ shall set forth the date of the election. All other provisions of law relating to the conduct of special elections shall apply. At such special election, the candidates for election to the several State senatorial districts, as such districts are then legally constituted, receiving the highest number of votes, respectively, shall be declared elected, and shall, upon qualifying for office, constitute the Senate of the General Assembly. Provided, however, if the Attorney General of Virginia shall file the copy of the order hereinabove mentioned with the clerk of the Virginia State Senate on or before the fifteenth day of March, nineteen hundred sixty-five, the Governor, in his discretion, is authorized to issue the writ calling an election to elect the several members of the State Senate on the date of the general election in November, nineteen hundred sixty-five. In such event, except as herein modified, all other provisions of law providing for primaries or conventions to nominate persons as candidates, and for the election of members of the State Senate, shall apply. The persons so elected and qualifying shall hold office for a term of two years commencing on the second Wednesday in January succeeding their election and ending upon the convening in January, nineteen hundred sixty-eight, of the regular session of the General Assembly.

"(b) Successors to the members of the State Senate elected for terms expiring in January, nineteen hundred sixty-eight, shall be elected in November, nineteen hundred sixty-seven, pursuant to the provisions of § 24-13 of the Code.

"(c) This section shall expire as of January ten, nineteen hundred sixty-eight."

In light of the provision just quoted, it is my opinion that you are correct in your conclusion that persons desiring to run in the primary election to be held on July 13, 1965, must comply with § 24-345.3 of the Code by filing on or before April 14, 1965. Under this Code section, it is provided that "the proper authorities of each political party shall certify the names of its candidates to the chairman of the electoral board, if required, and to the State Board of Elections not later than ten days after the Tuesday after the second Monday in July, or if a second primary was held not later than ten days after the date of such second primary." This, in my opinion, will assure that the names of the party nominees will be placed on the official ballot for the election to be held in November, 1965. No further notice of candidacy is required by persons who are party nominees either by convention or by primary. See, § 24-134 of the Code.
I am also of the opinion that any person who is not a party nominee must file within the time prescribed by § 24-345.3, and that § 24-131 is not applicable. You will note that § 24-13.1, in the first three sentences, provides for the calling of a special election and further provides that in such special election "all other provisions of law relating to special elections shall apply." The next two sentences are contained in a proviso, and they authorize the Governor, in his discretion, upon the timely filing of the court order mentioned therein, to issue a writ calling an election at the general election, in which event the provisions of law providing for the nomination and election of members of the State Senate shall apply. The Governor exercised his discretion and did not call a special election under the first three sentences of that section but called an election to be held at the election in November to which the law relating to general elections will apply.

ELECTIONS—Mayor and City Council—Day for election may not be same as that for elective officers provided for by Article VIII of the Virginia Constitution.

HONORABLE LEROY S. BENDHEIM
Member, Virginia State Senate

March 17, 1965

This will acknowledge receipt of your letter of March 15, 1965, in which you present the following question at the request of the Alexandria City Democratic Committee:

"'May the General Assembly, either by general legislation or by amendment to the Alexandria City Charter, change the time of election of the Mayor and members of the City Council to occur at the same time with the election of other constitutional officers, provided that the beginning of the terms of office of the Mayor and the Council do not coincide with that of said constitutional officers?'"

You further state:

"The Committee desires to recommend this change in city elections so that the terms of office of the City Council members might be extended to terms of four years rather than three years as at present, with three members of the Council to be elected each two years, so that half of the total number of Council members (6) would not be subject to election. No change would be recommended in the duties, functions or method of election of Mayor, Vice-Mayor or Council Members.

"Our problem, of course, is involved in the language of Section 122 of the Constitution of Virginia and we would appreciate your advice and opinion as to whether or not this could be accomplished."

Section 122 of the Constitution provides that the mayors and councils of cities shall be elected on the second Tuesday in June, and their terms of office shall begin on the first day of September, succeeding. All other elective officers, provided for by Article VIII of the Constitution, shall be elected on the Tuesday after the first Monday in November, and their terms of office shall begin on the first day of January succeeding, subject to an exception which is not material to this opinion. This section authorizes the General Assembly to change the time of the election of all or any of the said officers, except that the election and the
beginning of the terms of mayors and councils of cities shall not be made by the General Assembly to occur at the "same time with the election and beginning of the terms of office of the other elective officers provided for by this Constitution."

In my opinion, any act of the legislature, either as a general law or as an amendment to the charter of the city of Alexandria, which would fix the date of the election of the mayors and members of the city council to be held on the same election day as the election of other officers, would be in violation of this section of the Constitution. Furthermore, any such law which would fix the beginning of the terms of the mayors and members of city council as the beginning of terms of other officers would also be in violation of this section of the Constitution.

I do not consider that such legislation is authorized under Section 117 of the Constitution. The time for holding an election, in my opinion, does not apply to the organization and government of a city. Organization is a term relating to the type of government such as a manager form. See, Report of Attorney General (1958-59), at p. 14, opinion dated September 22, 1958.

Of course, the city charter may be amended so as to provide for the election of a part of the members of the council at one time and a part at another time so as to stagger their terms of office.

ELECTIONS—Poll Taxes—Paid by Mail—Date received by treasurer, not date of mailing, is date of payment.

June 25, 1965

HONORABLE GEORGE D. FISCHER
Commissioner of the Revenue for Arlington County

This is in reply to your letter of June 24, 1965, in which you state that a person paid his State poll taxes assessable for the year 1964 on May 3, 1965. The deadline for payment would ordinarily have fallen on May 2nd, but that being Sunday, it was necessary that the taxes be paid not later than May 1st. You state further "that payments of capitation taxes made by mail which were not actually received by the Treasurer until Monday, May 3rd, are considered to be timely paid" and for that reason this taxpayer feels that his personal payment made on May 3rd was timely.

In order for this person to be qualified to vote in the November election (1965), it was necessary that the treasurer be actually paid the tax prior to May 3rd. If the treasurer is of the opinion that taxes mailed to him on May 1st and received by him on May 3rd constitutes timely payment, this is not supported by the opinions of this office which have consistently held to the contrary, as will appear from the following opinions, copies of which I enclose herewith.

Opinion to Hon. Bays M. Todd—dated 12/1/41
(Opinions of Attorney General, 1941-42, p. 152)
Opinion to Hon. A. H. Bell—dated 2/8/49
(Opinions of Attorney General, 1948-49, p. 86)
Opinion to Hon. L. M. Robinette
Dated 6/20/51—(Opinions of Attorney General, 1950-51, p. 100)
ELECTIONS—Primary—Persons qualified to vote.

HONORABLE W. ROY SMITH
Member, House of Delegates

June 22, 1965

This is in reply to your letter of June 21, 1965, which reads as follows:

"The Petersburg Democratic Committee, by majority vote, has adopted a resolution directing the judges of election at the forthcoming Democratic Primary election to require that each person offering to vote must first sign the following pledge:

"'I, , do state on my sacred honor that I am a member of the Democratic Party and believe in its principles; that I voted for all of the nominees of said party at the next preceding general election in which I voted and in which the Democratic nominee or nominees had opposition; and that I shall support and vote for all the nominees of said party in the next ensuing general election.'

"I am a candidate for re-election to the House of Delegates, subject to the July 13th Democratic Primary. I am opposed by Charles P. Royall. There are no other contests to be decided by this Primary in Petersburg.

"The action by the Petersburg Democratic Committee has confused a great many people. Unless the correct meaning of this action is understood by the voters of Petersburg there will inevitably be mass confusion on election day. Many people entitled to vote, not understanding, may decline to exercise their right while others not qualified may attempt to do so.

"In order that authoritative advice might be available with which to dispel the confusion, I respectfully request you to furnish me with your official opinion on the following questions:

"1. Is the right of a person to vote in the July 13 Democratic Primary dependent on whether or not he voted for the presidential electors pledged to President Johnson?

"2. Is a person who voted for Senator Goldwater (i.e., his electors) prohibited from voting in this Democratic Primary election?

"3. In the November 1964 General Election, the Democratic nominees were Senator Harry F. Byrd and Congressman Watkins M. Abbitt. Is a person who voted in this election, but who did not vote for Senator Byrd and Congressman Abbitt, eligible to cast his ballot in the Democratic Primary on July 13?

"4. Senator Byrd was opposed in November, 1964 by a Mr. James Respess. Is a person who voted for Mr. Respess eligible to cast his ballot in the Democratic Primary on July 13?

"5. Congressman Abbitt was opposed in November, 1964 by Mr. S. W. Tucker. Is a person who voted for Mr. Tucker eligible to cast his ballot in the Democratic Primary on July 13?

"6. Am I correct in believing that any person who is entitled to vote in the forthcoming Primary may lawfully sign the pledge required by the Petersburg Democratic Committee?

"I regret the necessity of burdening you with this request at this
time; however, the confusion that has been caused by this and other unusual actions of the local Democratic Committee makes it necessary to have authoritative answers to the questions that are in the minds of many people today. Since the Primary is only three weeks away I would appreciate a reply at your earliest convenience."

I shall answer your questions in the order presented.

1. The answer is in the negative. This office has consistently ruled in opinions dating back to January 31, 1929, that the term "nominees of such party," as used in § 24-367 of the Code and the Democratic Party Plans do not include presidential electors. I am enclosing copies of these opinions, including the opinion furnished you on April 8, 1965.

2. The answer is in the negative for the reason governing the answer to question 1.

3. The answer to this question is in the negative. Both Senator Harry F. Byrd and Congressman Watkins M. Abbitt were nominees of the Democratic Party in the General Election held in November, 1964. Any person who participated in that election who failed to vote for both of these candidates is not entitled to vote in the Primary Election to be held on July 13, 1965, for members of the General Assembly of Virginia.

4. The answer to this question is in the negative for the reasons stated in my answer to question 3.

5. The answer to this question is in the negative for the same reasons stated in my answer to question 3.

6. The answer to this question is in the affirmative. This is authorized by Section 2 of the Party Plans under the heading "Members of the Democratic Party" (page 12 of Party Plans) and by § 24-368 of the Code.

ELECTIONS—Primary—Qualifications of candidates.

April 8, 1965

HONORABLE W. ROY SMITH
Member, House of Delegates

I have your letter of April 7, 1965, in which you advise that you propose to file with the Chairman of the City Democratic Committee your written declaration of candidacy for the House of Delegates in the form provided by § 24-371 of the Code of Virginia and petitions signed by more than fifty qualified voters. I assume you will also file with him a receipt showing the payment to the treasurer of Petersburg in the amount of two per centum of one year's salary as provided by §§ 24-398 and 24-401 of the Code and will sign the pledge of honor required by the Democratic Party Plans (page 12 paragraph 1, Declaration of Candidacy).

By an unbroken line of opinions of the Attorneys General of Virginia, beginning with that of Attorney General Saunders, dated January 31, 1929, it has been held that presidential electors are not nominees of the party within the meaning of the Virginia statutes, and that the right to vote or be a candidate in a primary for any office is not to be tested by the vote of such person for pres-
idential electors and that Democrats or Republicans who voted against the electors of their party in a presidential election, if otherwise qualified, are entitled to vote in any primary election of their party for any office within the State or to be a candidate in such primary election.

If all of these papers are properly filed with the Chairman of the City Democratic Committee, under § 24-375 of the Code of Virginia, he has no option but it shall be his duty, to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots, your name to be printed thereon, and he shall also furnish your name to the State Board of Elections.

Enclosed are copies of the previous opinions referred to above:

See, Opinions of Attorney General (1928-29), p. 96
See, Opinions of Attorney General (1952-53), p. 91
See, Opinions of Attorney General (1960-61), p. 122

ELECTIONS—Primary—Write-in Votes—Not valid in primary to be held on July 13, 1965.

May 13, 1965

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of May 13, 1965, in which you request my advice as to whether or not write-in votes will be valid in the primary to be held on July 13, 1965.

You are advised that under § 24-252 of the Code, a write-in vote would not be valid. This statute confirms the opinion of this office with respect to the same question which was furnished to Hon. E. L. Turner, Secretary of the Electoral Board of Charlottesville, on July 2, 1957 (Report of Attorney General, 1957-58, at p. 113).

The fact that the constitutional amendment similar to § 24-252 did not carry has no effect whatsoever upon the statute.

Your inquiry was prompted by a letter from Mr. M. J. Horan, Secretary of the Electoral Board of Alexandria, Virginia. I believe you should call his attention to the fact that there is no primary for the offices of Governor, Lieutenant-Governor and Attorney General this year on account of the fact that only one candidate filed for each office and these were declared the nominees.

ELECTIONS—Primary Ballots—Candidate qualification.

April 29, 1965

HONORABLE WILMER L. O'FLAHERTY
Secretary of Electoral Board of City of Richmond

This will acknowledge receipt of your letter of April 27, 1965, containing a
copy of a resolution adopted by the Electoral Board of the City of Richmond and in which the Attorney General is requested to furnish Electoral Board

"... an opinion as to whether or not the name of Edward E. Haddock should be printed on the Democratic Primary Election Ballot as a candidate for nomination by the Democratic Party of Virginia to the office of State Senator from the 30th Senatorial District to be made at the Democratic Primary Election to be held on July 13, 1965, in the city of Richmond, Virginia."

You attached to your letter a photocopy of the communication made to the Electoral Board of the City of Richmond by Joseph A. Howell, Jr., Chairman of the City Democratic Committee of Richmond.

Mr. Howell filed with the Electoral Board the names of four persons who, in his opinion, have complied with the statutes and the Democratic Party Plans and are entitled to have their names printed on the official ballot as candidates for nomination for State Senate from the 30th Senatorial District at the primary election to be held on July 13, 1965. The four persons are:

FitzGerald Bemiss
W. Griffith Purcell
J. Westwood Smithers
Edward E. Willey

Mr. Howell forwarded to you all the papers filed with him by Edward E. Haddock.

As you will note, Mr. Howell stated that "it is clear on the record that Edward E. Haddock has not complied with the requirement of the Party Primary Plan concerning the pledge of honor to be filed by candidates for nomination in primary elections." He cited § 24-370 of the Code which provides that no candidate's name shall be printed on any official ballot used at a primary unless in addition to other requirements he "has complied with the rules and regulations of the proper committee of his party."

Inasmuch as Mr. Howell has not filed the name of Edward E. Haddock with the Electoral Board to be printed on the ballot as required by § 24-375 of the Code, in my opinion the Electoral Board has no authority to cause the name of Edward E. Haddock as a candidate for nomination for State Senate to be printed on the official ballot at the primary election to be held on July 13, 1965.

ELECTIONS—Registrar—Office secretary employed by county not disqualified from serving.

Honorable Andrew J. Ellis, Jr.
Commonwealth's Attorney for Hanover County

May 3, 1965

This is in reply to your letter of April 29, 1965, in which you refer to § 24-52 of the Code of Virginia and request my advice as to whether or not the office secretary employed by the county in the office of the Executive Secretary may hold the office of general registrar.

In my opinion, the position named is not an office within the meaning of
§§ 24-31 and 24-52 of the Code. Therefore, the person is not disqualified by these sections from holding the office of general registrar while she is employed by the county as an office secretary. Section 15.1-67 of the Code would not apply.

ELECTIONS—Registration—Persons whose names purged from books must again register before being placed on other books.

Miss Mary S. Dudley
General Registrar for City of Norfolk

November 18, 1964

This will acknowledge receipt of your letter of November 17, 1964, which reads as follows:

"We are in the process of purging the State Registration Books of the City of Norfolk.
"May the names that are purged from the State Books be placed on the Federal Books: or do those persons have to register again to vote only in Federal Elections?"

Whenever the name of a registered voter is removed from the registration books by purging, that person's name cannot again appear on the registration books in this State until he has again registered. This applies to registration under §§ 24-67 and 24-67.1 of the Code.

The answer to your question, therefore, is in the negative.

ELECTIONS—Registration and Payment of Poll Tax in State Elections.

ELECTIONS—Capitation Taxes—Payment required in State elections.

Honorables Henry E. Howell, Jr.
Member, House of Delegates

July 24, 1964

This is in reply to your letter of July 23, 1964, in which you present the following question:

"Does a person who registers for the first time in Virginia to vote in a federal election without the payment of poll tax, have to re-register when he subsequently pays sufficient poll tax so as to be eligible to vote in an election for state offices?"

In my opinion, any person who is registered under the provisions of § 24-67 of the Code, has not been registered pursuant to the provisions of Section 20 of the State Constitution and is not entitled to have his name placed upon the registration book mentioned in § 24-67 merely by paying the State capitation tax at a subsequent time. As a condition precedent to registration under Section 20 of the Constitution and § 24-67 of the Code, the required poll tax must be paid prior to registration.

Section 24-67.1, paragraph (c), provides as follows:
"Persons registered under paragraph (a) of this section shall be registered to vote only in primary or other elections for President or Vice-President of the United States, for electors for President or Vice-President of the United States or for Senator or Representative in the Congress of the United States, and shall not by virtue of registration under this section be deemed to be registered to vote in any other general, special or primary elections held in this State."

In this connection, the State Board of Elections is furnishing all election officials throughout the State a memorandum conforming to this opinion.

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**ELECTIONS—School Board Member—Must actually reside in magisterial district at time of election.**

**SCHOOLS—School Boards—Member at time of election must be bona fide resident of magisterial district from which elected.**

June 7, 1965

**HONORABLE ROBERT C. GOAD**

Commonwealth's Attorney for Nelson County

This will acknowledge your letter of June 4, 1965, which reads as follows:

"The School Trustee Electoral Board of Nelson County will meet on June 14, 1965, to elect a member of the Nelson County School Board from the Lovingston Magisterial District, for the term beginning July 1, 1965.

"One of the candidates for this position now physically resides just a short distance over the county line in Buckingham County, but the main part of his farm is in Nelson County, where he was born. His child goes to school in Nelson County, he buys his automobile tags in Nelson County, he has always claimed Nelson County as his residence, and he has always voted in Nelson County. He has recently bought another home in Nelson County, and he is now in the process of repairing the home and will move into this new home in Nelson County within the next several weeks. All of the above references to Nelson County mean the Lovingston Magisterial District of Nelson County.

"I will appreciate your opinion on whether or not this man is eligible to be appointed as a member of the Nelson County School Board on June 14, 1965, for the term beginning July 1, 1965, under Section 22-68 of the Code of Virginia. Will he have to be a physical resident of Nelson County on June 14th or on July 1, 1965?"

Section 22-68 of the Code reads as follows:

"Each member of the county board at the time of his election shall be a bona fide resident of the magisterial district or town from which he is elected, and if he shall cease to be a resident of such district or town, his position on the county school board shall be deemed vacant, except in counties where magisterial districts have been abolished, in which case he may be appointed at large, but he must be a bona fide resident of that county and upon his ceasing to be a resident of that county his position on the county school board shall be deemed vacant."
In my opinion, under the provisions of this section it is necessary that the person in question shall be an actual bona fide resident of the magisterial district at the time of his election—that is, if the election takes place on June 14th he must be a bona fide resident of the magisterial district on that date. The language of the section with respect to this matter is free from ambiguity and I see no escape from the conclusion reached herein. In connection with his eligibility for election I refer you to an opinion furnished Hon. Levin Nock Davis, dated February 13, 1958 (Report of Attorney General, 1957-58, at p. 111), which relates to a similar matter.

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**ELECTIONS—Special Election on Bond Issue—May be held same day as primary, but separate set of election officials must be appointed.**

March 16, 1965

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney for Dinwiddie County

This will acknowledge receipt of your letter of March 15, 1965, which reads as follows:

"The Board of Supervisors of Dinwiddie County are discussing a bond issue and I have been requested to write you to determine whether or not the election pertaining to the issuance of the bond could be held the same day of the July Primary. I realize that the code speaks of special election pertaining to the issuance of bonds, however, if it could be held on the same day the primary is held we could save considerable money."

There is no constitutional objection to holding the bond issue election on the same day as a primary election. However, the electoral board would have to appoint two sets of election officials—one for holding the bond issue election, and one for holding the primary election. The officials appointed for the purpose of holding the primary election would not be in compliance with the provisions of § 24-141 of the Code if they conducted the bond issue referendum.

The judges of the primary election are appointed under § 24-353 and all of them must be of the same political party. The judges for the special election must be appointed under § 24-30 of the Code—two being representatives of one political party and one representative of another political party.

It would seem that having the special election at the same time as the primary would not result in a substantial reduction of expenses.

In connection with this question, I refer you to an opinion of this office furnished to Hon. Levin Nock Davis on June 5, 1961 (Report of Attorney General, 1960-61, at p. 128).

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**ELECTIONS—Voting Machines—Conditions under which may be used.**

October 21, 1964

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of October 20, 1964, which reads as follows:
"The Board of Supervisors of Roanoke County has decided to test the advisability of installing voting machines in a number of the larger voting precincts in Roanoke County, and for the purpose of experimenting with same, have received thirteen machines from the Shoup Company for use in the election of November 3rd. These are to be used in only about half of the voting precincts in the County. The other precincts will use the official paper ballot.

"The Electoral Board has raised the question, and wishes me to find from you, if, in case the vote is so heavy that the machine cannot take care of the load, will it be permissible for some of the voters to use the official paper ballot, and others to use the machine?

"I would appreciate a reply at your earliest convenience, for if it is not permissible, it might be advisable that two machines be placed at some of the larger voting precincts, and none at those somewhat smaller."

The statutes are vague with respect to the question presented, but I believe it would be unwise to permit the voters to vote with paper ballots where a voting machine is being used, except, of course, paper ballots shall be used for absentee voters and counted as provided in § 24-313. I call attention to § 24-315 which permits the use of paper ballots for constitutional amendments and other public measures, but no authority is granted by this section for using paper ballots having printed thereon the names of the same candidates that are provided on the machine. Section 24-307 indicates that the ballot installed in the machine is to be used exclusively, except where the voter wishes to vote for some person whose name is not on the machine ballot. I do not construe the term "independent ballot" to relate to a regular ballot having the same list of candidates that appears on the machine.

I believe that your suggestion that two machines be used in the larger precincts is a good idea.

EMINENT DOMAIN—Board of Supervisors—May condemn private property for courthouse and parking area to serve same.

BOARDS OF SUPERVISORS—Authority—May condemn land for courthouse and parking area to serve same.

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

February 9, 1965

This will acknowledge receipt of your letter of February 5, 1965, which reads as follows:

"Our county Board of Supervisors may wish to acquire a tract of land adjoining the rear of the present courthouse property for the purpose of maintaining a parking area and possible future building expansion. The owners of said land refuse to sell at this time. Please advise whether the Board has the legal right to obtain such land by condemnation proceedings. If they do have such power, I assume that the procedure would be as proscribed in Code § 25-46.1 and the sections following."

Under Chapter 5 of Title 25 of the Code, the governing body of a county has
the authority to acquire by condemnation land to be used for any public purpose authorized by law. The procedure to be followed is set out in Chapter 1.1 of Title 25 and any such suit should be brought in the name of the board of supervisors, as provided in § 15.1-506. Under § 15.1-257, the governing body of a county is required to provide a courthouse with suitable space and facilities to accommodate the various courts of record and the officials of the county.

In my opinion, although the question is not entirely free from doubt, the governing body could acquire by eminent domain land adjacent to the courthouse for parking space to accommodate the officials of the county and the citizens having official business in the courthouse. In my judgment, the board of supervisors clearly has the power to condemn real estate for the purpose of providing space on which to build a county building.

ESCHEATS—Where Decedent a Resident of Another State.

Mr. J. Hubbard Davis
Escheator for the City of Norfolk

This is in reply to your letter of December 15, 1964.

Your letter and enclosures indicate that a resident of South Carolina died April 25, 1960; that an administrator qualified in South Carolina on January 16, 1961; that an ancillary administrator qualified in Virginia on January 16, 1962; that prior to decedent's death he had entered into an executory contract for the sale of certain real estate in Norfolk, Virginia, executing a deed which was placed with an escrow agent; that subsequent to decedent's death the purchasers paid the balance of the purchase price for the land, and the escrow agent later paid the funds in his hands to the ancillary administrator, who has paid all debts decedent owed in Virginia and Virginia administrative expenses; that neither the administrator nor the ancillary administrator has located any heirs. As Escheator of the City of Norfolk, Virginia, you ask my opinion as to whether the remaining funds in the hands of the Virginia ancillary administrator escheat to the Commonwealth of Virginia as either realty or personalty.

I have not found any decision of the Supreme Court of Appeals of Virginia ruling on the situation you have presented, and there seems to be a split of authority in other jurisdictions. Under these circumstances, the ancillary administrator may not deem it prudent to release the funds in his hands without a court order. As you are probably aware, § 55-197 of the Code of Virginia (1950), as amended, authorizes an escheator to proceed by bill in equity for the recovery of property subject to escheat.

The following observations are made for whatever value they may be to you in developing the Commonwealth's theory in the event of litigation.

The executory contract, which was subsequently performed, would seem to constitute personal estate of the decedent. See, Sale v. Swann, 138 Va. 198; Johnson v. Merritt, 125 Va. 162.

Inasmuch as the decedent apparently owed debts in Virginia at the time of his death, and had "estate" in Virginia within the meaning of § 64-72 of the Code, the appointment of the ancillary administrator seems proper. See, Dominion Bank v. Jones, 202 Va. 502.
Section 64-12 of the Code of Virginia (1950), as amended, reads as follows:

“To the Commonwealth shall accrue all the personal estate of every decedent, of which there is no other distributee.”

Ordinarily, the law of the domicil of decedent prevails in the ascertainment of the persons entitled to take as heirs or distributees. 11 Am. Jur., Conflict of Laws, § 82. However, the majority of jurisdictions appear to hold that in the case of a person dying intestate without heirs, for the purposes of escheat the maxim “mobilia sequuntur personam” does not apply, the basis of the decisions being that escheat is not in the nature of succession, or that the interest of the state where the property is located is more compelling than the extraterritorial claim of the domiciliary state. 11 Am. Jur., Conflict of Laws, § 83; Anno: 50 A.L.R. 2d 1375. See also 19 Am. Jur., Escheat, § 2, wherein escheat is distinguished from distribution of an estate.

FEES—Blood Sample—Amount allowed for withdrawing in criminal case.

MOTOR VEHICLES—Blood Analysis—Fee for withdrawing sample in criminal case.

October 28, 1964

HONORABLE C. VINCENT HARDWICK
Judge, Essex County Court

I am in receipt of your letter of October 15, 1964, in which you call my attention to § 18.1-55.1(h) of the Virginia Code which directs the allowance of a fee not exceeding five dollars to be paid from the appropriation for criminal charges to persons withdrawing an accused’s blood sample under the amended Virginia “implied consent” law. In this connection, you state that some physicians charge a ten dollar fee for withdrawing an accused’s blood sample, and you make inquiry concerning the proper amount to be taxed as part of the costs of the criminal case if an accused is convicted.

Section 18.1-55.1(h) of the Virginia Code prescribes:

“A fee not exceeding five dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.1-54 or of a similar ordinance of any county, city or town, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.” (Italics supplied).

It is manifest that the maximum fee which may be paid out of the appropriation for criminal charges under the above-quoted provision of the Virginia Code is five dollars. In those instances in which a physician charges a fee of ten dollars, the amount in excess of the statutory allowance must be paid by the accused. Although the statutory provision under consideration directs that “the amount charged by the person withdrawing” a blood sample shall be taxed as part of the costs of the case in instances of conviction, the amount taxed can only be paid into the general fund of the State treasury when collected, and I do not believe it is the design of the statute to cause an accused to refund to the
State treasury any amount in excess of that actually paid out of the State treasury for the service in question. I am therefore constrained to believe that the language of the provision under consideration should be construed to require that the amount allowed and paid out of the appropriation for criminal charges pursuant to § 18.1-55.1(h) should be taxed as part of the costs of the criminal case and that no amount in excess of five dollars should be so taxed.

FEES—Courts Not of Record—Not chargeable on pleading of crossclaim or counterclaim.

COURTS—Not of Record—Fees—Not chargeable on pleading of crossclaim or counterclaim.

HONORABLE E. BALLARD BAKER
Judge, Henrico County Court

This is in reply to your letter of July 27, 1964, which reads as follows:

"I would appreciate your opinion on whether a fee is properly chargeable in a county court when a crossclaim or counterclaim is filed?

"Sections 8-239.1 and 8-239.2 permit the defendant to plead a crossclaim or a counterclaim. Section 14.1-125 provides for a $3.00 fee for services in '... each ... civil warrant ... or other civil proceeding ...'. Usually, the original warrant and the defendant's claim are tried together."

The terminal paragraph of § 14.1-125 of the Code provides that—

"... The fees prescribed in this section shall be the only fees charged in civil cases for services performed by such judges and clerks. and when the services referred to herein are performed by justices of the peace such fees shall be the only fees charged by such justices for the prescribed services."

This provision, in my opinion, prevents the collection of a fee on the filing of a crossclaim. I do not construe the term "other civil proceeding," as used in this section, to include a counterclaim. A counterclaim is a pleading filed in a pending proceeding, and this is supported by the language of § 8-239.1, in which it is provided that: "In any proceeding before a trial justice (county court) a defendant may, at his option, at any time before trial, plead in writing as a counterclaim * *.*"

Section 14.1-126 provides that:

"Enumeration of the foregoing fees shall not relieve any judge or clerk of a county or municipal court from performing any duty imposed upon him by law, although no fee be herein set forth covering the services required. In all proceedings the judge or clerk shall tax as costs all charges properly constituting the same."

The court's service in connection with a counterclaim, in my opinion, is a service required of any judge of county court for which no fee, in addition to the initial three dollars, is provided.
REPORT OF THE ATTORNEY GENERAL

This opinion applies to crossclaims filed under § 8-239.2 of the Code. It is my understanding that in a court of record the writ tax is required upon a crossclaim, but there is no similar tax in a court not of record.

FEES—Levies—Sheriff’s fee allowable is fifty cents.

SHERIFFS AND SERGEANTS—Fees—Levies—Amount allowable is fifty cents.

HONORABLE GUY WHITED
Sheriff of Russell County

June 30, 1965

This will acknowledge receipt of your letter of June 29, 1965, which reads as follows:

"Some question has been raised as to the interpretation of Code of Virginia, Section 14.1-93 dealing with the Sheriff's fee to be charged on certain levies. Heretofore, we have been charging $3.00 on all levies, including those returned 'No Property Found.' The question arising is as to whether the Sheriff’s fee should be $3.00 on levies returned 'No Property Found' or only 50¢. I hope you will advise me as to this."

The sheriff's fee in such cases is fifty cents. I am not familiar with any statute which would allow a fee of $3.00. Section 14.1-93, to which you refer, is, in my opinion, free from any ambiguity.

In connection with this matter, I enclose copy of an opinion to the Constable of the City of Richmond, dated January 24, 1956 (See, Report of Attorney General, 1955-56, at p. 80), which relates to this question.

FEES—Service at Different Times of Papers Closely Related—One fee chargeable.

HONORABLE W. CARY CRISMOND
Clerk of Circuit Court of Spotsylvania County

September 21, 1964

Reference is made to my opinion of September 16, 1964, in reply to your request of September 10, 1964, in which your question was as follows:

"Will you advise me if one or two service fees are due the serving officer if a notice to take depositions, restraining order or any other paper is attached to the copy of the bill of complaint in a divorce suit." (Underscoring supplied.)

I replied, citing two former opinions of this office, that in my opinion only one service fee would be allowed under the provisions of the law.

Today, Mr. James H. Young, Sheriff of Richmond, discussed this opinion with this office, stating that it is customary for lawyers to send the notice to take depositions and the subpoena in connection with the bill of complaint to the sheriff as separate papers, the notice to take depositions not being attached to the subpoena, thus requiring two returns of service to be made and, in such
cases, the subpoena is mailed to the proper clerk's office and the notice to take depositions, with the sheriff's return thereon, is mailed to the attorney who sent the papers to the sheriff to be served.

Under these circumstances, my opinion of September 16 would not apply, since obviously in such case the officer would be entitled to two service fees.

FEES—Service Together of Papers Closely Related—One fee chargeable.

HONORABLE W. CARY CRISMOND
Clerk of Circuit Court of Spotsylvania County

This is in reply to your letter of September 10, 1964, the first paragraph of which reads as follows:

"Will you advise me if one or two service fees are due the serving officer if a notice to take depositions, restraining order or any other paper is attached to the copy of the bill of complaint in a divorce suit?"

This office has previously ruled that there is only one service fee for serving papers of this nature. These rulings are found in Report of Attorney General (1942-43), at p. 242, addressed to Lee F. Lawler, and in Report of Attorney General (1949-50), at p. 147, addressed to Edgar L. Winstead.

I am not familiar with any statutory changes that would cause me to depart from these rulings.

FIDUCIARIES—Commissioner in Chancery—No authority over bequests in trust to State institution.

STATE INSTITUTIONS—Bequests in Trust—Not subject to Chapter 2, Title 26.

MR. L. DANIEL CROOKS
Comptroller, Medical College of Virginia

This will acknowledge receipt of your letter of March 2, 1965, which reads, in part, as follows:

"Mrs. Stuart McGuire by her will left her estate to Medical College of Virginia 'to be held by it in trust * * * the corpus to be invested and reinvested from time to time as the Board of Visitors of the Medical College of Virginia may in their discretion direct, and the income accruing from such corpus to be applied toward the maintenance of a chair of surgery to be known as the Stuart McGuire Chair of Surgery.' "

"Mr. McDonald Wellford, Commissioner of Accounts of the Chancery Court of the City of Richmond, has raised a question as to whether the Medical College of Virginia, as Trustee under Mrs. McGuire's will, must file and settle its accounts with him by virtue of the provisions of Section 26-17 of the Code."
The Medical College of Virginia is authorized under § 23-50(5) of the Code to accept and administer bequests of the nature contained in the will of Mrs. McGuire. The accounts of the Medical College of Virginia are audited by the Auditor of Public Accounts pursuant to § 2-127 of the Code. The College is required by § 23-50(11) to make an annual report to the State Comptroller.

Section 26-8 of the Code provides as follows:

"The judge of each court having jurisdiction of the probate of wills and granting administration on estates of decedents shall appoint a commissioner of accounts, who shall be removable at pleasure and who shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts."

In my opinion, the provisions of Chapter 2, Title 26 of the Code do not apply to an institution of the State to which a bequest has been made to be held by it in trust. This Chapter only applies to fiduciaries who have qualified in a proper court of record, and does not apply to a testamentary trustee where such trustee is an agency of the State subject to the control of the General Assembly. I am advised that the Medical College did not qualify as a fiduciary when Mrs. McGuire's will was probated.

FORFEITURES—Seizure of Money and Paraphernalia Found in Connection with Gambling and Betting—Time made.

January 7, 1965

HONORABLE ALFRED W. WHITEHURST
Commonwealth's Attorney for the City of Norfolk

This is in reply to your letter of January 5, 1965, which reads as follows:

"This question has presented itself in reference to § 18.1-321 and § 18.1-341, must the seizure of the property be at the same time as the arrest of the person as required in the confiscation of automobiles under § 46.1-351.1?"

In our opinions heretofore rendered with respect to § 46.1-351.1 of the Code, we held that the statute authorizes the arresting officer to seize and take possession of the motor vehicle at the time the arrest is made if such officer reasonably believes that he has arrested a person who will be subject to the penalties prescribed by § 46.1-350 and § 46.1-351, and that the seizure may not be made at a subsequent time.

Sections 18.1-321 and 18.1-341, in my opinion, do not contain language similar to that found in § 46.1-351.1 justifying a conclusion that the seizure of the properties involved in those sections must be made by the same officer who makes the arrest of the person and at the same time the arrest is made. Therefore, your question is answered in the negative.
GAME AND INLAND FISHERIES—Commissioner May Prohibit the Taking of Certain Oysters from James River.

HONORABLE WALThER B. FIDLER
Member, House of Delegates

November 12, 1964

This is in reply to your letter of November 11, 1964, in which you request my opinion as to whether the Commission of Fisheries has authority—

"... by regulation to prohibit the taking of oysters from the natural rocks, beds or shoals in the James River measuring less than three inches in length for shucking or processing purposes, if in the opinion of the Commission it will protect and promote the growth of oysters and will tend to restore the river to greater productiveness?"

Section 28.1-85 gives the Commission the power "to close and open any area or restrict the manner or method of taking oysters in any area of the natural, or public, rocks, grounds, or shoals" if it considers such action advisable so to do for the purposes therein set forth.

In my opinion, this authority is not impeded or affected by any of the language used in § 28.1-126. The language used there exempts a portion of the James River from the application of § 28.1-124 and § 28.1-125.

This exception applies only when the provisions of § 28.1-85 have not been invoked. If the authority contained in § 28.1-85 has been exercised, no oysters may be taken from the area affected while such authority is in effect, and this would apply to the James River area mentioned in § 28.1-126.

GAME AND INLAND FISHERIES—Fishing License—General statutory licensing provisions applicable on waters at Camp Bibee.

HONORABLE JOHN W. TISDALE
Judge, Mecklenburg County Court

July 20, 1964

This is in reply to your undated letter relating to fishing license requirements in the waters at Camp Bibee, a camp abutting Buggs Island Lake which is operated by the Lynchburg Y.M.C.A., under a long term lease from the United States government.

The statutory requirements for hunting and fishing licenses are set forth in Chapter 5, Title 29 of the Code of Virginia (1950), as amended. The exemptions appear in § 29-52 of the Code. You will note that there is no exception or exemption in this section for the areas or persons using the waters of Buggs Island Lake other than the general exception for persons under the age of sixteen. Accordingly, I am of the opinion that the general license requirements are applicable at Camp Bibee.
HEALTH—Rabies Vaccine—Define as dangerous drug within meaning of § 54-440(1).

DRUGS—Rabies Vaccine—Construed as dangerous within meaning of § 54-440(1)

October 23, 1964

HONORABLE G. M. WEEMS
Treasurer of Hanover County

This is in reply to your letter of October 14, 1964, which is as follows:

"In accordance with our telephone conversation yesterday I am writing to ask your opinion as to whether or not rabies vaccine is a dangerous drug which § 54-442 prohibits a dog owner to have in his possession.

"Opinions March 4, 1960, March 10, 1960 and March 24, 1960, pages 265 through 268 of the Report of the Attorney General for the fiscal year ending June 30, 1960, hold that rabies vaccine cannot be sold without a prescription but that it may be administered by the animal owner (bottom page 266) *if the owner or employee of an owner comes into possession of the vaccine without obtaining it on a proper prescription, there is no statutory provision preventing him from administering the vaccine under the exception contained in § 54-786.*

"There has been a great deal of discussion in Hanover County as a result of the dog ordinance recently passed, and I understand that the question has been raised as to whether any one may possess rabies vaccine without violating § 54-442.

"A number of kennel owners have been ordering the vaccine by mail from outside the State. I understand from the postal authorities that there may be no prohibition against sending such vaccine through the mail even though it cannot be sold in Virginia without a prescription."

Section 54-442 of the Code of Virginia (1950), as amended, in part, provides as follows:

"No person shall have in his possession a dangerous drug the sale of which is restricted to prescription by law unless such person shall have obtained such dangerous drug on a prescription in accordance with § 54-443, or such dangerous drug has been delivered by a practitioner designated in § 54-443 lawfully practicing his profession . . ."

The remainder of the section sets forth certain specific exceptions not here material.

Dangerous drugs are defined in § 54-440 of the Code and subsection (1) thereof is as follows:

"§ 54-440. What are dangerous drugs.—In this article the words 'dangerous drugs' shall include:

(1) Every drug or device which because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not generally recognized among experts, qualified by scientific training and experience to evaluate its safety and efficacy, as safe for use except by or under the supervision of a practitioner licensed by law to prescribe or administer such drug or device."
The response to inquiries made by this office of two persons deemed qualified to evaluate rabies vaccine within the meaning of § 54-440(1) indicates that the vaccine would be considered to be a dangerous drug within the meaning of that section. This opinion would seem to be strengthened by the provisions of § 54-441.1, which expressly prohibit the sale of rabies vaccine "except on the prescription of a practitioner, lawfully practicing his profession, and licensed by law to prescribe or administer such biological products."

You called my attention to language appearing in an opinion of this office, dated March 10, 1960, given Honorable Mack I. Shanholz, Commissioner, Department of Health, (Report of Attorney General, 1959-60, at p. 265), to the effect that there is no statutory provision prohibiting an owner from administering rabies vaccine to his own animals. While I think this language is technically correct, it should not be construed as approving illegal possession of a dangerous drug, a question not therein considered.

HEALTH—Sewage Disposal—Jurisdiction between State and county—Specific statutory grant of authority controls over general.

SEWERAGE—Jurisdiction Between State and County—Specific statutory authority controls over general.

COUNTIES—Ordinances—Regulating Sewage Disposal—When controlling.

HONORABLE MACK I. SHANHOLTZ
State Health Commissioner

April 26, 1965

This is in answer to your letter of March 15, 1965, in which you state that the State Board of Health has adopted regulations "Governing the Disposal of Sewage" and that these regulations became effective on October 1, 1962. A copy of these regulations was enclosed with your letter. You also enclosed a copy of Ordinance No. 174 of Henrico County, approved by the Board of Supervisors on August 19, 1959. This ordinance provides "for the regulation and control of the installation of septic tank systems and other sewage disposal devices; to regulate the disposal of household wastes or other fluid or liquid wastes from the premises; to provide for rules, regulations and specifications; to provide for posting of premises; to provide penalties for violation of the provisions of this ordinance; . . ."

Your letter also states as follows:

"We would appreciate being advised concerning the following questions:

"(1) Are the State Sewage Disposal Regulations applicable to Henrico County at the present date?

"(2) If the answer to Question Number One (1) is in the affirmative, which regulations are applicable in cases of technical conflict?"

A review of the ordinance indicates that it purports to regulate the installation and operation of septic tank systems and pit privies, makes it unlawful to misuse or neglect sewage disposal devices, requires permits for septic tank installations, repairs and cleaners, provides for inspection of a septic tank cleaner's equipment and for disposition of material removed from septic tanks, requires
the Health Officer to establish rules and regulations for the administration of the ordinance, and provides for prosecution and penalties for violations of the ordinance.

An examination of the regulations of the State Board of Health indicates that they purport to regulate the installation and operation of septic tank systems, pit privies, stabilization ponds and other sewage treatment plants for schools and "other public buildings" and contains "general requirements for sewage disposal systems."

The power of the State Board of Health to adopt such regulations is contained in §§ 32-6 and 32-9 of the Code, which read as follows:

"§ 32-6. The Board may make, adopt, promulgate and enforce reasonable rules and regulations from time to time requiring and providing for the subjects which follow in this chapter."

"§ 32-9. The Board may regulate the method of disposition of garbage or sewage and any other refuse matter or any combination thereof in this State . . . ."

In addition, certain provisions relative to sanitary privies or closets are contained in §§ 32-64 through 32-68 of the Code.

It seems clear that the State Board of Health had the power and authority to adopt its regulations. It is to be noted that its regulatory power is couched in broad or general terms—"may regulate the method of disposition of garbage or sewage and other refuse matter or any combination thereof in this State."

On the other hand, there is a specific grant of power to the County of Henrico for the regulation of septic tanks. This is contained in § 15.1-520 of the Code, which reads as follows:

"§ 15.1-520. Any county may regulate the installation of septic tanks on property located therein, and may require any person desiring to install a septic tank to secure a permit to do so and may prescribe reasonable fees for the issuance of such permits."

I find no specific grant of power to the County with respect to the regulation of the installation of pit privies, the other major item covered by the County's Ordinance.

In determining the respective jurisdiction of the State and the county, a particular or specific statutory provision applicable to a particular or specific situation will control over general or broad statutes governing general or broad situations. See, 39 C.J.S., Health, § 9.

Therefore, it is my opinion that the portions of the County's ordinance regulating septic tanks prevail over the State's regulations and, for this reason, those portions of the State's regulations dealing with septic tanks which are inconsistent with the requirements of the County's ordinance must give way to the ordinance. It is also my opinion that in all other respects, the State regulations are applicable to the County and the regulations would prevail where the ordinance and regulations might be in conflict.
HONORABLE DOUGLAS B. FUGATE
Commissioner, Virginia Department of Highways

This is in reply to your letter of April 27, 1964. I regret that circumstances have prevented an earlier reply. Several questions were raised in your letter concerning the provisions of § 33-67.3 (f), Code of Virginia (1950), as amended.

Section 33-67.3 (f) which became effective on March 31, 1964, provides:

“(f) The provisions of this section shall not be construed to apply to any action or proceeding brought or agreement made prior to March thirty-first, nineteen hundred and sixty-four.”

I shall answer your inquiries in the order in which they were presented.

“(1). Where a landowner executed an option and it was accepted in writing prior to March 31st, 1964, but deed had not been executed nor the property vacated, will the landowner or tenant, if the property is rented, be eligible to receive moving cost?”

I am of the opinion that this question should be answered in the negative since the offer and acceptance would constitute an agreement prior to the effective date of the statute.

“(2). Where offer was made to a landowner and the offer confirmed and certificate filed prior to March 31st, 1964, but no petition filed with the Court for the completion of condemnation proceedings, will the landowner or tenant, if the property is rented, be eligible to receive payment for moving cost?”

I am of the opinion that the landowner or tenant, as the case may be, would be entitled to the payment of removal cost as provided in § 33-67.3 of the Code since the action would not have been brought prior to March 31, 1964. This assumes that the suit will be instituted subsequent to March 31, 1964.

“(3). The same conditions as outlined under (2), except condemnation petition filed with the Court prior to March 31st, 1964, but the proceedings have not been completed, will the landowner or tenant be eligible to receive payment for moving expenses?”

The answer to this question would hinge upon the subsequent course which the matter might take. If the landowner entered into an agreement after certificate subsequent to March 31, 1964, I feel the owner would be entitled to the payment of removal cost of any personal property involved. If the proceedings were concluded by an award of commissioners which was confirmed by order of the court, then no removal cost of personal property would be payable under the statute.

“(4). Where an option was executed by the landowner prior to March 31st, 1964, and the acceptance letter written after March 31st, 1964, is the landowner or tenant eligible to receive payment for moving expenses?”
This question is answered in the affirmative since the "agreement made" did not come into existence until the acceptance by the Department of Highways of the offer which agreement would have occurred after March 31, 1964.

"(5). Where offer was made to the landowner prior to March 31st, 1964, with confirmation letter written and Certificate filed after March 31st, 1964, but no petition filed with the Court for condemnation proceedings, will the landowner or tenant be eligible to receive payment for moving expenses?"

The owner or the tenant, as the case may be, would be entitled to the removal cost of personal property. Since there are only two methods for closing such matters, the condemnation proceeding would be instituted after March 31, 1964, or an agreement after certificate would be reached subsequent to March 31, 1964.

"(6). Where an offer was made and Certificate filed prior to March 31st, 1964, and subsequent to March 31st an Agreement After Certificate is reached, will the landowner or tenant be eligible to receive payment for moving expenses?"

I am of the opinion that the agreement after certificate would constitute an agreement within the terms of the statute and under the facts contained in your question, the agreement would come into being subsequent to the effective date of the Act. Therefore, the landowner or tenant would be entitled to removal cost as provided in § 33-67.3 of the Code.

"(7). Where an offer was made, Certificate filed, and condemnation petition filed with the Court prior to March 31st, 1964, and subsequent to March 31st an Agreement After Certificate is reached, will the landowner or tenant be eligible to receive payment for moving expenses?"

I am of the opinion that in this instance the landowner or the tenant, as the case may be, would be entitled to the payment of removal cost since an agreement was reached subsequent to March 31, 1964.

"(8). The Act provides that the maximum amount to be paid for moving of personal property of an individual or family shall not exceed Two Hundred Dollars ($200.00). It also provides that a business concern, including farm operations or non-profit organizations, may be paid an amount not to exceed Three Thousand Dollars ($3,000.00). There are instances where farm operations will require that a dwelling be vacated, also that certain farm operations will have to be relocated. In this case, will the Department be obligated to pay up to Two Hundred Dollars ($200.00) for the moving of personal property and in addition, pay Three Thousand Dollars ($3,000.00) for the relocation of farming equipment, etc? This applies to those instances where the dwelling and farm operations are owned by one and the same person. What would be the interpretation if the farm operations were owned by the landowner and the dwelling occupied by a tenant?"

I am of the opinion that if it is necessary to acquire a dwelling and also require the relocation of a farming operation, that the landowner would be entitled to collect removal cost for the cost of removing the personal property from the dwelling and in addition the cost of removing personal property for the farm operation to the extent provided in § 33-67.3. In other words, if a farmer's home and
his barns, grainery and other outbuildings are acquired, he would be entitled to a maximum amount of $200.00 for removing his personal property from the home and the removal cost of the equipment and other tangible personal property for the carrying on of the farm operations to a maximum of $3,000.00 as provided in § 33-67.3. I do not feel the interpretation would be any different if the dwelling were occupied by a tenant except that the removal cost as to the personal property of the tenant would be paid to the tenant.

“(9). In some instances we find that there is a business operated by an owner and he will occupy a portion of the same building for living quarters, will this operation require us to pay the Two Hundred Dollars ($200.00) for relocation of personal property from living quarters and the Three Thousand Dollars ($3,000.00) for relocation of the business?”

I am of the opinion that where there is a business operated by a owner and a portion of the same building is used for living quarters, the person would be eligible to receive payments as an “individual” or a “family” as well as a “business concern.” The amount would be determined as set forth in § 33-67.3 of the Code.

HIGHWAYS—Condemnation—Payment of delinquent and current real property taxes—Responsibility for.

TAXATION—Delinquent and Current Taxes on Real Property Acquired by Condemnation—Responsibility for payment.

June 21, 1965

HONORABLE A. A. RUCKER
Commonwealth’s Attorney for County of Bedford

This is in reply to your letter of May 29, 1965, in which you made certain inquiries regarding the non-payment of delinquent and current real property taxes in connection with the acquisition of land by the Highway Commissioner. These questions will not be set forth in this letter, but will be considered seriatim.

(1) Section 33-67.2 and Section 33-70.11 of the Code both provide for the distribution of funds in highway condemnation cases and state that the court shall order the disbursement of the funds “* * * after payment therefrom of any taxes * * *.” Since the trial judges generally rely on counsel representing the parties in an action to prepare the necessary orders, I am of the opinion that counsel has a responsibility to see that provision is made in the final order for payment of taxes.

(2) Since an affirmtive reply was made to Question No. 1, no reply is necessary to this inquiry.

(3) & (4) I am enclosing a copy of an opinion which was this day written to the Honorable Lacey E. Putney, which I believe fully answers both of these inquiries.

(5) It is my understanding that the Highway Commissioner did not acquire the entire parcel of land in this case. Therefore, I am of the opinion that the county may proceed against the residual estate pursuant to Section 58-1029, et seq.
Upon receipt of your letter, I discussed the contents thereof with the local attorney representing the Highway Commissioner in Bedford County, who advised that the situation in question arose out of a misunderstanding during a change in local counsel. He advised that this matter had been discussed with you and that he had assured you that he would see that the taxes were paid. He further advised that he was taking the necessary precautions to see that there was not a recurrence of this nature.

HIGHWAYS—Condemnation—When title to land vests in Commonwealth.

TAXATION—Credit—Manner of computation where land acquired by State.

June 21, 1965

HONORABLE LACEY E. PUTNEY
Member, House of Delegates

I have your letter of May 29, 1965, requesting my opinion regarding the time at which title to land vests in the Commonwealth in certain highway acquisitions. To be more specific I quote a portion of your letter:

“In determining the tax liability of a landowner whose property is taken for highway construction, the question has arisen as to the computation of a tax credit under Code Section 58-822. where the Commonwealth files a certificate pursuant to the provisions of Code Sections 33-70.3 et seq., following which a final order is entered vesting indefeasible title in the Commonwealth at a subsequent date. Section 58-822 provides for a credit “after the date upon which the title was or shall be vested in this State.” Is the date above quoted the date of the filing of the certificate or the date of entry of the final order vesting indefeasible title in the Commonwealth, whether it be by subsequent agreement or pursuant to condemnation?”

The Highway Commissioner is authorized under § 33-70.3 of the Code of Virginia (1950), as amended, to use a certificate in lieu of actual payment of funds in connection with the acquisition of rights of way for highways. Section 33-70.4 provides for the recordation of such certificate in the Clerk’s office of the court for the county or city wherein the land is situated. It is stated in part in this section that:

“Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth * * *.”

[Emphasis Added]

It is clear from the above quoted language that recordation of the certificate operates to transfer both legal title and beneficial ownership from the property owner to the Commonwealth. While the property owner retains interest in the property until indefeasible title is vested in the Commonwealth by the final order, I do not feel that this interest is sufficient to prevent the operation of § 58-822 at the time of the recordation of the certificate.

I am of the opinion that the tax credit provided by § 58-822, “ * * * after the date upon which the title was or shall be vested in this State * * * ” should
be computed from the date of the recordation of the certificate pursuant to § 33-70.4.

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HIGHWAYS—Establishment—New Construction—Not a highway until opened to public use.

MOTOR VEHICLES—Reckless Driving—Offense not committed unless driving on highway.

**HONORABLE CATESBY GRAHAM JONES, JR.**
Commonwealth's Attorney for Gloucester County

October 2, 1964

This is in reply to your letter of September 24, 1964, which reads as follows:

"U.S. Route 17 south of Gloucester Court House is in the process of being converted from a dual highway to a four lane highway with a median strip. A segment of this highway for about two miles south of Gloucester Court House has been hard surfaced and can accommodate traffic; however, this portion of the road has been barricaded.

"On September 23, a utility truck was lawfully on the new portion for the purpose of repairing a telephone line. An automobile not specifically authorized to travel thereon was heading north and collided with the utility truck. The State Trooper has encharged the driver of the automobile with reckless driving. You will note that the reckless driving statute refers to anyone driving a vehicle upon the highway. Highways are defined in 46.1-1(10) of the Code.

"I am wondering when, in your opinion, property which has been acquired by the Commonwealth of Virginia and is under construction becomes a highway as contemplated by the reckless driving statutes."

Section 46.1-1(10) of the Code of Virginia (1950), as amended, reads as follows:

"(10) 'Highway'—The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns."

Under the facts you have given, I assume that the alleged offense occurred on land acquired for highway purposes and upon which new construction is in progress, and that this proposed addition to the highway system has never been opened to public use. If this interpretation of the facts is correct, I am of the opinion that this segment of land does not become a highway within the meaning of § 46.1-1(10) of the Code until it has been opened to the use of the public for purposes of vehicular travel."
HONORABLE DOUGLAS B. FUGATE
Commissioner, Virginia Department of Highways

I have your letter of October 9, 1964, requesting my opinion regarding certain permits issued by the Department of Highways. To be more specific, I quote a portion of your letter.

"The Hampton Roads Sanitation District Commission has from time to time sought to locate their facilities within the rights of way of highways under the jurisdiction of the Highway Department. In each instance the Highway Department has taken the position that it was necessary for the Sanitation District Commission to obtain a permit before undertaking such work. This position was based on the fact that the Highway Commission, acting pursuant to § 33-12 (3) of the Code of Virginia had adopted a rule which provided as follows:

'No work of any nature which involves a disturbance of the surface of the right of way or interferes with its free or unencumbered use shall be performed on the right of way of any highway in the State Highway System until permission is first obtained from the State Highway Commission.'

"The Hampton Roads Sanitation District Commission has advised that Chapter 66 of the Acts of the General Assembly of 1960, authorizes them to locate in the highway rights of way in question without the necessity of obtaining a permit from the Highway Department.

"In view of the above conflict, I would appreciate your reviewing the matter and advising me as to whether the Highway Department has the authority to require the Hampton Roads Sanitation District Commission to obtain permits for the installation and operation of their facilities in highways under the jurisdiction and control of the Highway Department."

By virtue of § 33-12 (3) of the Code of Virginia (1950), as amended, the State Highway Commission has been vested with the power to make rules and regulations, not in conflict with the laws of the State, for the protection and use of the State Highway and Secondary System. The rule to which you refer in your letter has been adopted pursuant to this authority and has been given the force and effect of law by § 33-18 of the Code.

The Hampton Roads Sanitation District Commission operates under the authority of Chapter 66 of the Acts of Assembly, 1960, and § 10 (k) of this Act authorizes the Sanitation Commission to construct its facilities in, along or under any streets or highways, but it is required to cooperate with the State Highway Commission and local governmental officials in such undertaking.

Since the Highway Commission's authority under § 33-12 (3) of the Code extends only to adopting rules and regulations not in conflict with laws of the State, it is necessary to determine if the rule quoted in your letter of October 9, 1964, is in conflict with § 10 (k) of Chapter 66, Acts of Assembly, 1960.

In my opinion there is no conflict between the Highway Commission's rule and § 10 (k) of Chapter 66, Acts of Assembly, 1960. The rule is reasonable and
is essential in order that the Department of Highways be informed of the type of work to be performed within its rights of way, the location and manner of such work and the use of any facilities placed within highway rights of way.

While the Sanitation Commission has the right to locate facilities in highway rights of way, it must cooperate with the State Highway Commission, and cooperation would include compliance with all reasonable rules and regulations of the Highway Commission for such use.

In view of the foregoing, I am of the opinion that the Highway Commission has the authority to require the Hampton Roads Sanitation District Commission to obtain permits for the installation and operation of facilities within highway rights of way.


HIGHWAYS—Weight Laws—Applicable to vehicles using public roads.

HONORABLE L. VICTOR MCFALL
Commonwealth's Attorney for Dickenson County

September 22, 1964

This is in reply to your letter of September 14, 1964, which reads as follows:

"In January, 1953, the Board of Supervisors of Dickenson County entered into an 'Agreement' and 'Supplementary Agreement' with an individual trading under the firm name of a local coal company.

"Among the various provisions of these agreements, the Board agreed to abandon 5.1 miles of secondary route 653 and 1500 feet of secondary route 651, and did so abandon said portions of the secondary highways, pursuant to Code Section 33-76.8.

"The coal operator agreed to maintain and repair the portions of said roads so abandoned in the same condition 'they now are in or in better condition.' It was also agreed that 'the public shall have the free and unrestricted right to use the routes or portions of routes so abandoned and above described in the same manner and to the extent as if the same were portions of the State Highway system.' It was further provided that the right of way for said routes so abandoned 'shall remain vested in and owned by the Board of Supervisors of Dickenson County, Virginia.'

"A copy of this Agreement, Supplementary Agreement and the resolution abandoning said portions of the secondary highway system are enclosed herewith.

"Since January, 1953, this coal operator has not been required to comply with the licensing, inspection and weight laws of the state, as the various officials of the county have assumed that the action of the 1953 Board of Supervisors relieved him from such compliance.

"These abandoned portions of highways have been continuously open to the use of the public for the purposes of vehicular traffic and so used by the public to the present time. For the purposes of this inquiry, assume that the coal operator has complied with the provisions of these agreements.

"In view of these facts, please advise: (1) whether the provisions of the 'Agreement' and 'Supplementary Agreement' constitute a valid con-
tract which is binding on the present Board; (2) whether the present Board may take back into the secondary highway system these abandoned portions of highway, and (3) whether these alleged contractual provisions relieve this coal operator from complying with the various licensing inspection and weight laws with reference to his vehicles operated exclusively on the said abandoned portions of highways."

In reply to your first question, inasmuch as the parties have presumably operated under this agreement for some eleven years, it would not seem appropriate for this office to express an opinion as to its validity. However, if it were binding on the county in the first instance, it would seem to be of the same effect now.

As to your second question, §§ 33-44, 33-46, 33-47 and 33-141 of the Code of Virginia (1950), as amended, appear to be generally applicable. If the road in question was legally taken out of the secondary system, it appears to be possible to have it returned thereto by following appropriate procedures. I express no opinion as to what effect, if any, such return would have upon the agreement.

In regard to your third question, whether or not the road was ever legally abandoned, it appears to have remained open to use by the general public, and such continued public use was expressly provided for in the agreement between the Board and the coal operator. A highway is defined as follows in § 46.1-1 of the Code:

"(10) 'Highway'—The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns."

I am, therefore, of the opinion that the coal operator was not relieved of the necessity of complying with the laws you mentioned.

HIGHWAYS—State Convict Road Force—Prisoner may be guilty of escape from foreman employed by Department of Highways.

JAILS AND PRISONERS—Escape—Member of State Convict Road Force may be guilty of escape from Highway employee.

HONORABLE W. F. SMYTH, JR.
Director, Division of Corrections
Department of Welfare and Institutions

August 25, 1964

This will acknowledge receipt of your recent letter in which you raised a question relative to escape by an inmate from a person not an employee of the penal system. The facts may be summarized as follows:

Inmates are assigned to the State Convict Road Force and are housed at different locations throughout the State. In the course of the supervision of these inmates while working, a guard is assigned to each detail of men. In order that the system may operate efficiently, it is sometimes necessary for a particular detail of men to be split into two
groups, and one of the groups is guarded by an employee of the State Highway Department. This employee has been sworn in as an officer, as are the guards regularly employed for such purpose.

You asked if an inmate who escapes from the custody of a foreman employed by the Department of Highways, who has been sworn in as an officer, can be charged with escape as defined in § 53-291 of the Code of Virginia.

Your attention is directed to § 53-225 of the Code, which reads as follows:

"Use of means reasonably necessary to prevent escape of prisoners.—Whenever any prisoner confined in the State penitentiary, State convict road force, or at any State owned or operated penal farm or institution shall attempt to escape, the officer, guard or overseer in charge of such prisoner may use such means as may be reasonably necessary to prevent the escape of such prisoner."

It would seem that the legislature has provided for this specific situation. I am constrained to believe that the foreman who has been sworn in as a guard is in fact an "officer, guard or overseer" as defined in the above section of the Code. I am therefore of the opinion that an inmate who escapes from the custody of a foreman employed by the State Department of Highways, who has been sworn in as a guard, may be charged with escape.

HOUSING AUTHORITIES—Land Acquisition—How acquired from political subdivisions.

COUNTIES, CITIES AND TOWNS—Authority—May sell or convey land to housing authorities.

HONORABLE E. RALPH JAMES
Member, House of Delegates

July 22, 1964

This will acknowledge receipt of your letter of June 30, 1964, in which you request my opinion as to whether, under Chapter 1 of Title 36 of the Code of Virginia, the Regional Redevelopment and Housing Authority of Hampton and Newport News has the legal right to acquire, by purchase, from the School Board of the City of Hampton, Virginia, 15.6 acres of land owned by the School Board and entirely surrounded by property now owned by the Redevelopment Authority. In this relation, the second and fourth paragraphs of your letter read as follows:

"The property of the School Board of the City of Hampton was originally owned by the Federal Government on which the U. S. Government constructed an elementary school building of temporary design and construction in 1941. In 1955 the Regional Redevelopment and Housing Authority did acquire all of the property contiguous to the school from the Federal Government and the School Board of the City of Hampton did acquire the fee simple title to the school site. This school building is still used by Hampton, but the building is in a deteriorated condition after some twenty-three years as a temporary structure and the School Board has already made plans to relocate the particular school in another area outside of the property of the Redevelopment Authority. We are enclosing herewith a plan of the
properties of the Redevelopment Authority showing location of the school site and also showing location of the new school site outside of the area owned by the Authority. It should also be noted in 1960 the Redevelopment Authority did purchase from the Commonwealth of Virginia a tract of land of 150 acres, undeveloped, which had originally been transferred to the Commonwealth of Virginia for the Virginia State School, but which site the State Board of Education determined was not needed by the said school and did sell to the Redevelopment Authority. You will note on the enclosed map that there are various industries located next to the school site.

"We submit for your study information it would be uncontradicted that the school building itself is a blighted building in a deteriorated condition. Also acquisition of the property would be needed for a proper redevelopment of the land and that it would be in the public interest to acquire the land."

It will be assumed that the "Authority" has been established and authorized to transact business and exercise its power in accordance with Chapter 1 of Title 36, Code of Virginia (1950), as amended, there being no question raised on this point. The fact that the "Authority" is regional or consolidated (including the two municipalities of Hampton and Newport News), and thereby subject to the provisions of Article 6 of such chapter, is of no significance in regard to the matter of land acquisition, as such powers of any "authority" under Chapter 1 are the same. Section 36-4, providing for the creation of redevelopment and housing authorities contains, in part, the following:

"The governing body may by resolution call for an election to determine whether there is need for an authority in the city or county, as the case may be, if it believes (a) that insanitary or unsafe inhabited dwelling accommodations exist in such city or county or (b) that there is a shortage of safe or sanitary dwelling accommodations in such city or county available to persons of low income at rentals they can afford or (c) that there is a blighted or deteriorated area which needs redeveloping."

As (a), (b) and (c) are stated in the alternative, it appears that any one of these three would support the creation of such an "authority." The portion of Section 36-49 relative to the acquisition of property, reads as follows:

"Any authority now or hereafter established, in addition to other powers granted by this or any law, is specifically empowered to carry out any work or undertaking (hereafter called a 'redevelopment project'):

"(1) To acquire blighted or deteriorated areas, which are hereby defined as areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community;

"(2) To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors or the cause of blight;

"(3) To acquire real property where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the
property and where the acquisition of the area by the authority is necessary to carry out a redevelopment plan;

"(6) To accomplish any combination of the foregoing to carry out a redevelopment plan."

The question to be determined is whether acquisition of the land by the "Authority" is lawful under the quoted statute or any combination of the several conditions stated. The specific powers enumerated under Section 36-49 are "in addition to other powers granted by this or any law," which includes the general powers enumerated under Section 36-19, which, along with Sections 36-3 and 36-4, proclaims an "authority" to constitute a political subdivision of the Commonwealth with all the powers necessary or convenient to carry out the purposes of Chapter 1 of Title 36. From the information furnished, it appears that all the other land surrounding such area qualifies for redevelopment as it has already been acquired by the "Authority," presumably, in accordance with the provisions and requirements of this chapter. In the case of Bristol Redevelopment and Housing Authority v. Denton, 198 Va. 171, the court stated that where an area as a whole is subject to rehabilitation, the conditions of a single structure is immaterial. Likewise, in Hunter v. Norfolk Redevelopment and Housing Authority, 195 Va. 326, the court held that if an area as a whole is subject to rehabilitation, the condition of a single structure is immaterial. In the Denton case the court also stated that primary responsibility for investigating conditions in the area proposed for redevelopment and determining whether it is a slum, blighted, or deteriorated area is delegated by Section 36-19 to the redevelopment authority. These cases, unlike the one under consideration, include the exercise of the right of eminent domain. In regard to the exercise of such right, Section 36-27 states that, "No real property belonging to the city, the county, the Commonwealth or any other political subdivision thereof may be acquired without its consent."

In reference to cooperation in undertaking housing projects, Section 36-6 states, in part, as follows:

"Any county, city or town, for the purpose of aiding and co-operating in the planning, undertaking, construction or operation of housing projects located within such county, city or town, may:

"(a) Dedicate, sell, convey or lease any of its interest in any property, or grant easements, licenses or any other rights or privileges therein to any such housing authority; * * * ""

There would be no purpose in these statutes if Chapter 36 precluded, altogether, the acquisition of any public property. They authorize any county, city or town to sell or convey to an "authority" and indicate that such acquisition by an "authority" may take place with the consent of the political subdivision owning the land, but not otherwise. It is stated in your letter of request for an opinion, now under consideration, to be an uncontradicted fact that the school building located on the 15.6 acres is "a blighted building in a deteriorated condition." Paragraph (1) of Section 36-49 does not seem to be wholly limited to dwellings nor to slum areas as defined in Section 36-3, paragraph (h). From a reading of paragraph (1) Section 36-49, it appears that a school building, as well as dwellings or other buildings, which, by reason of its dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, is detrimental to the safety, health,
morals or welfare of the community, may qualify as a blighted or deteriorated area. Paragraph (2) of Section 36-49, in providing for acquisition for the purpose of preventing blighting factors or the cause of blight, among other things, also leaves room for a rather wide or varied interpretation. It is also stated that acquisition of the property would be needed for a proper redevelopment of the land and that it would be in the public interest to acquire the land. If true, the existing circumstances may qualify as other conditions which “prevent a proper development of the property” under Section 36-49, paragraph (3), quoted above.

If this represents the findings of the “Authority,” and it has, likewise, been found by the “Authority” to be needed for proper development, I am of the opinion that the “Authority” has the legal right to acquire the property, provided that the City of Hampton, as present owner of the property, agrees to such acquisition. The fact that the property is completely surrounded by lands which have qualified as a blighted or deteriorated area and have been acquired by the “Authority,” leaving this isolated “island,” lends strength to this view.

HOUSING AUTHORITIES—Regional Development—Land acquisition—Land declared surplus by Federal Government.

July 28, 1964

HONORABLE LEWIS A. McMURRAN, JR.
Member, House of Delegates

This is in reply to your letter of July 23, 1964, which reads as follows:

“I have been requested by the Peninsula Industrial Committee to request an official opinion from you concerning the power of the Redevelopment Authority for Newport News and Hampton to purchase the 127 acre tract of land declared surplus by the Air Force. This was the subject of H. L. Nachman’s opinion to the City Council of Newport News, dated June 22nd, 1964, and John D. Gray’s opinion to Mr. Leonard Shield, Chairman, Regional Redevelopment Authority, dated May 27th, 1964.

“The Peninsula Industrial Committee is very much interested in the purchase of this property by the Regional Redevelopment Authority for use as a Research Industrial District adjoining the N.A.S.A. Cyclotron and the Virginia Associated Research Center.

“The governmental priorities for the acquisition of this land expire on August 1st, at which time the land must be offered for sale to the public on a sealed bid basis. Time is, therefore, of the essence if this land is to be preserved in the public interest. We believe this is essential to the full development of the high-level employment opportunities which can result from such a Research Center.”

The Regional Redevelopment and Housing Authority for Hampton and Newport News (herein referred to as Authority) was originally established in 1942 by the counties of Warwick and Elizabeth City under Title 36 of the Code of Virginia. Warwick County later became a part of the city of Newport News and Elizabeth City County became a part of the city of Hampton. By Chapter 323, Acts of Assembly (1956), the Authority was “authorized to exercise all its powers, duties and functions as provided by law within the territorial limits of the cities of Hampton and Warwick.” Upon the merger of the cities of Warwick and Newport News, as of July 1, 1958, “all rights, powers, liabilities and benefits of the former city of Warwick resulting from agreement or arising by law in the
Regional Redevelopment and Housing Authority for Hampton and Warwick, Virginia, shall inure to the Consolidated City—Chapter 141, Acts of Assembly (1958), p. 179.

The Authority has heretofore acquired from the United States Government two parcels of land that had been declared surplus, pursuant to an Act of Congress—Public Law 80-84th Congress-Chapter 149-1st Session, approved June 16, 1955. Subsequently in 1962, an additional parcel was purchased from the State Board of Education of Virginia, and under a favorable ruling of this office, dated July 22, 1964, to Honorable E. Ralph James and Honorable Hunter B. Andrews, negotiations are in progress to purchase a tract of 15.6 acres from the School Board of the City of Hampton, this tract being surrounded by one of the parcels acquired from the United States under the provisions of Public Law 80, referred to above.

The question presented here is whether or not the Authority has the power to purchase an additional tract of land consisting of approximately 127 acres declared surplus by the United States and located near the NASA Cyclotron, on which it is proposed to establish a project to be known as the Virginia Center for Advanced Technology, which project will cooperate with the Virginia Association Research Center, established under the provisions of Chapter 604, Acts of Assembly (1962). This 127 acre tract does not border on any property now owned by the Authority.

In the proposed plan for this Center (designated as VICAT), it is stated:

"... The primary purpose of this proposed organization is to administer and develop the research park property for the best public interest. However, there are broader considerations regarding the long-term future status of the general neighborhood surrounding the NASA-VARC-VICAT site. The vital significance of this total neighborhood to the future development of the Peninsula must not be ignored by civic and business leaders who are—or should be—responsible for intelligent planning to assure the future well-being of their community.

"Without intelligent planning and forthright action NOW, the neighborhood adjacent to the Science Complex may become, within five years, a hodge-podge of gasoline service stations, bowling alleys, used car lots, hamburger joints, neon signs, and fast-buck housing projects.

"Under existing zoning procedures there is no method whereby the City can preserve or protect this neighborhood from deterioration. The future development of this area can be controlled only by having the subject property owned by a quasi-public agency with sufficient integrity and fortitude to resist political or personal pressures. The Regional Redevelopment Authority for Hampton and Newport News, on its record, meets this criterion. Reinforced by the judgment, advice, and stature of the proposed VICAT Foundation, the resulting combination will provide a mechanism which can realize the full potential of the tremendous opportunity for a great stride forward which the Science Complex offers to the Peninsula and to Virginia."

The principal function of the Authority is to furnish aid in the redevelopment of the area in which it is established. It may acquire land if it is determined that conditions exist that prevent a proper development of the property and where the acquisition of the area by the authority is necessary to carry out a redevelopment plan. Section 36-49(3) of the Code. It seems obvious that unless the Authority acquires the land in question the area will possibly not be available for the purposes contemplated.
Since the power of eminent domain could not be exercised against a political subdivision of the State, such as a county, city or town, the General Assembly incorporated in this Act a provision authorizing such political subdivisions to make voluntary sales to the Authority. No such provision was necessary to authorize a private individual or an agency of the Federal government to make such sales.

The reason found for acquiring the 127 acre tract is that it is needed for a proper development of the property and that such development will be prevented if the property is not acquired from the Federal government. That is a valid reason under § 36-49(3) of the Code.

If the Authority deems it to be in the public interest to acquire the land in question for the purposes contemplated—that is, to assure a proper development of the property—its right to buy the property from an owner willing to sell, in my opinion, is not forbidden under any provision of Title 36 of the Code.

Any decision made by the Authority to the effect that it should acquire real property because there are conditions existing that prevent a proper development of the property and that its acquisition by the Authority is necessary to carry out its development plan is conclusive, subject only to review by a court of proper jurisdiction in a proceeding challenging the correctness of such decision.

The provisions of Article 7, Chapter 1, Title 36 of the Code should be liberally construed so as to accomplish sound development projects, so long as the rights of others are not abused.


HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

November 27, 1964

This will acknowledge receipt of your letter of November 18, 1964, relating to Chapter 643, Acts of Assembly (1964), which established an Industrial Development Authority within the cities of Virginia Beach and Danville and the county of Fairfax. You raise the following questions as to the constitutionality of this Act:

"We feel the basic legal questions raised by Chapter 643 of the Acts of Assembly of 1964 are as follows:

"(1) Does the title of the Act comply with Section 52 of the Virginia Constitution? It would seem in the present case that some reference to the financing of industrial facilities and the leasing of same to private corporations should be included in the title. The title as written simply refers to the creation of political subdivisions and the issuance of bonds by such subdivisions.

"(2) Does the Act violate Section 185 of the Virginia Constitution in that it authorizes a County to grant its credit to or in aid of a person, association, or corporation? This is a very serious question. It would appear that to sustain this Act one must conclude that the benefit to any lessee company would be incidental to the public purpose served by the relief of unemployment, the fostering of increased economic prosperity, et cetera, within the County. In this regard the Act
as passed seems to lack any legislative findings with respect to unemployment, loss of industry, et cetera, which would help in sustaining this Act.

“(3) Is the Act unconstitutional in that it authorizes the Authority to undertake the financing and construction of facilities which will not serve primarily a public purpose? This question is similar to Question No. 2.

“(4) Is the subject Act unconstitutional because it appears to be special legislation rather than general law applicable to all counties and cities?

“The Act further creates powers with regard to pledging grants or contributions from the Commonwealth of Virginia on any political subdivision which is a part of the Authority and the power to mortgage facilities of the Authority. Would these additional powers, if exercised in connection with financing, raise any additional serious constitutional questions?”

You suggest that a declaratory judgment proceeding may be brought for the purpose of obtaining a determination by a court as to the validity of portions of the Act.

We have conferred with representatives of the Division of Industrial Development and Planning with respect to this Act and have stated to them that we see nothing therein that violates any provision of the Constitution of this State. Upon consideration of the questions you have presented we hold to that view. Furthermore, we feel that the Title to the Act is sufficient to meet the requirements of Section 52 of the Constitution.

Inasmuch as your bond counsel may insist upon a court determination, which will require a thorough discussion and analysis of the Virginia cases involving Sections 52, 185 and perhaps other sections of the Constitution, I trust you will be satisfied at this time with our statement that in our opinion the Act is constitutional.

JAILS AND PRISONERS—Escape of Convict from Road Camp—Prosecuted under § 53-291 of the Code.

June 2, 1965

HONORABLE LEONARD F. JONES
Commonwealth's Attorney for Campbell County

This will acknowledge receipt of your letter of June 1, 1965, which reads as follows:

“'I would appreciate your opinion as to the proper statute under which to proceed in the prosecution of a convict for escape. The prisoner in question was serving a sentence for statutory burglary in a state convict road camp when he walked away from a work detail.

"'In these cases I have always proceeded under Section 53-291 of the Code, but a question has arisen to a conflict between that section and Section 18.1-290. The contention is that the latter section is broad enough to cover this offense, and being the last enacted statute, should govern.'"

In construing the two provisions of law mentioned in your letter, it would
appear that Section 18.1-290 pertains to escape from jail and not escape from a penal institution. Of course, a state convict road camp is part of the penal system, and all provisions of law governing prisoners in the penitentiary are made applicable to the state convict road force by Section 53-114 of the Code of Virginia. The Supreme Court of Appeals of Virginia so construed Section 53-114 of the Code of Virginia in the case of Ruffin v. Commonwealth, 62 Va. 790.

I am enclosing for your information a copy of an opinion of December 30, 1952, to Honorable Robert C. Goad (Report of the Attorney General 1952-53, page 128), which is applicable to your inquiry.

In view of the foregoing, I am of opinion that a prisoner who escapes from a state convict road force camp should be tried under Section 53-291 of the Code of Virginia.

JAILS AND PRISONERS—Medical Services Rendered Prisoners—Rate at which physician paid.

PHYSICIANS AND SURGEONS—Fees—For attending prisoners.

October 28, 1964

HONORABLE LEWIS JONES, JR.
Commonwealth's Attorney for Middlesex County

This is in reply to your letter of October 26, 1964, in which you state that the county of Middlesex and four neighboring counties operate an “area jail,” which I presume is an arrangement pursuant to the provisions of Chapter 7.1 of Title 53 of the Code. You state that the clerk of Middlesex County submitted a bill for charges made by the jail physician to the Department of Welfare and that the bill was returned unpaid with the following comments:

"Reference is made to the invoice from Dr. Marcellus E. Toney in the amount of $105.00 for professional services rendered prisoners confined in jail which was included with your report on Form W&I-JI for the month of July 1964.

"In order for the State to participate in expenditures for professional services rendered prisoners confined in jail, they must be approved by the Compensation Board in advance and reimbursement is made on the basis of two-thirds payable by the State and one-third by the County. If we do not have approval from the Compensation Board for a flat rate or salary, we can only reimburse at the rate established for the payment of physicians for caring for the sick in jail. This rate is based on the allowance of 75 cents for the first prisoner attended each day plus an allowance of 50 cents for all additional prisoners attended, as provided by § 19-295 of the Virginia Code of 1950. In either case reimbursement is allowed for two-thirds of the amount expended rather than based on the prisoner population. For this reason, we are returning the invoice from Dr. Toney and are eliminating it from your July report.

"Reimbursement for the jail physician's service should be requested on Form W&I-J5. We are sending you under separate cover a supply of this form.

"Section 53-185 of the Code provides for the payment of unusual medical, hospital or dental services for prisoners which services must be authorized and approved in writing by the jail physician and they are
reported in the same manner as other expenditures for the feeding and care of prisoners confined in jail."

The Code sections referred to in the above quoted letter are obviously erroneous. The applicable Code sections under Title 19 were § 19-285 (now § 19.1-310) and § 53-184.

If the counties wish to do so, they can agree upon a stipulated salary to be paid the physician and separately make application to the State Compensation Board under § 53-184 for approval. If the Board approves the suggested salary the State will reimburse the counties to the extent of two-thirds of the expense. Unless this procedure is followed, then the provisions of § 19.1-310 applies.

JAILS AND PRISONERS—Parolees—Time spent in jail must be credited on sentence.

October 7, 1964

HONORABLE CHARLES P. CHEW
Director, Parole Board

This will acknowledge receipt of your letter of September 30, 1964, which reads as follows:

"A question has been raised as to the allowance of credit for time spent in jail on the part of parolees who, during the period of parole, were on one or more occasions detained in local jails. These periods of detention resulted from the substantial belief on the part of the parole officer that the individual had violated one or more terms or conditions upon which the parolee was released on parole.

"Experience has shown that some short periods of detention have so impressed some parolees as to their responsibilities under parole that they have been considered proper subjects for continuance on parole without returning them to the Penitentiary and going through revocation procedures. In cases where detention has been followed by restoration to full parole supervision there has been no practice of allowing the period of detention to be credited against the time remaining to be served at the time of original parole release. In those cases where detention has resulted in ultimate return to custody and revocation consideration, the time in detention was credited against the time remaining to be served at time of parole release.

"The question then is, 'Shall periods of detention short of return to custody and revocation proceedings be credited against the time a parolee had remaining on his period of imprisonment at the time of release on parole?'

Your attention is directed to the provisions of § 53-256 of the Code of Virginia (1950) which are set forth below:

"The time during which a parolee is at large on parole shall not be counted as service of any part of the term of imprisonment for which he was sentenced upon his conviction."

During the time the parolee is in jail awaiting the decision of the Board as to whether or not he is to be continued on parole, he is not "at large on parole"
as contemplated in § 53-256 of the Code. He is in fact in custody and imprisoned.

It is interesting to note that the General Assembly has provided in § 53-208 of the Code that the time spent by the prisoner in jail prior to trial is credited on his sentence. I find no statutory authorization for the Board's practice as outlined in your letter wherein short periods of detention followed by restoration to full parole are not credited against the prisoner's sentence.

In view of the foregoing, I am of the opinion that the time spent by a parolee in jail under the circumstances set forth in the question propounded in your letter must be credited on his sentence.

JAILS AND PRISONERS—Voluntary Work on County Property—Court order must be obtained.

SHERIFFS AND SERGEANTS—Prisoners—Court order must be obtained for voluntary work.

SHERIFFS AND SERGEANTS—Tort Responsibility—County not liable for action of its sheriff.

May 26, 1965

Mr. W. E. Newman
Sheriff of Mecklenburg County

This is in reply to your letter of May 25, 1965, which reads as follows:

"Having quite a lot of work which needs to be done on the County property, such as the Court House and the lawn etc., and with prisoners confined in the County jail serving sentences or awaiting trial, whom could be used to a great advantage if this is permissible, which I believe it to be. Before I would want to use them for this work, I would appreciate a ruling as to whom would be responsible, should one get hurt while working? Naturally, I am more concerned about myself although I am considering the County and the State. It seems a pity to hire help when I have these men who wish to work rather than be confined in the jail. I do not intend to use them until I get your ruling and any other information you will send me."

You are referred to § 53-165 of the Code. Under that section the judge of the circuit court may allow such work on a voluntary basis by prisoners confined in the county jail.

You would not have authority to work these prisoners without first obtaining a court order as required by this section of the Code.

With respect to your question regarding tort responsibility in the event a prisoner should get hurt, it is well settled in Virginia that a county is not liable for tort claims. If an injury occurs on account of the negligence of a sheriff, the immunity enjoyed by the county would not extend to the sheriff. Under Section 114 of the Constitution no county can be held responsible for the action of its sheriff.
ATTORNEYS—Appointed as Judges—Limitations on practice of law.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

July 31, 1964

This will acknowledge receipt of your letter of July 22, 1964, in which you state that on August 1 you will take office as Judge of the County Court of Amherst County; that you represent a client in a case pending in the circuit court on appeal from the county court of which you will be judge, and also represent the same person in connection with an application pending before the Governor on a charge of violating a conditional pardon. You did not represent your client in the county court.

You state that you were retained by this person prior to your appointment as judge.

You request my advice as to whether you can continue to represent this person after you have assumed the office of judge.

Section 16.1-10 of the Code provides that:

"No judge of a court not of record shall appear as counsel in any case, civil or criminal, pending in his court or on appeal or removal therefrom; nor shall he appear as counsel in any civil case which involves substantially the same evidence and circumstances as were involved in a criminal case tried before him or in which a preliminary hearing was held before him; nor shall he accept or receive any claim or evidence of debt for collection when the enforcement thereof is within the exclusive original jurisdiction of his court."

Honorable Abram P. Staples, while serving as Attorney General, considered the question of the propriety of a trial justice representing a person in the circuit court upon an indictment upon a charge that had been before this same trial justice on preliminary hearing. The statute (§ 4987a of the Code) provided that:

"If an attorney at law is appointed a trial justice he shall not appear as counsel in any case civil or criminal pending in his court or on appeal or removal therefrom * * ."

In his opinion, Judge Staples stated:

"... when the reasons for and the nature of the prohibition are considered, it is my opinion that a trial justice should not appear in the circuit court in any criminal case that has been before him as trial justice."

This statement by Judge Staples would seem to imply that if the case had been heard in the trial justice court prior to the time the trial justice in question had qualified for the office, the prohibitions of the statute would not apply.

In my opinion this is a fair and reasonable interpretation. I do not feel that an attorney upon qualifying as a county court judge is prohibited from continuing to represent a client merely because his appeal is from a county court to
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which he was appointed and qualified as judge subsequent to the conviction in that court. The statute condemns the representation by a county judge of a person on appeal from a judgment or conviction had in his (the county judge's) court—that is, while he was the judge of such court.

You also request my advice with respect to the following question:

"I have a law office in Lynchburg, Virginia, and from time to time I receive claims varying in size from $50.00 to $2,000.00. So long as these claims are not brought in the County Court of Amherst County, would it be all right for me to handle claims of this nature?"

The terminal phrase of § 16.1-10 is repeated below:

"...nor shall he accept or receive any claim or evidence of debt for collection when the enforcement thereof is within the exclusive original jurisdiction of his court."

In my opinion, under this provision you cannot accept any claim or evidence of debt for collection if the county court of Amherst would have exclusive original jurisdiction under § 16.1-77, even though collection is made without bringing a suit.

In my opinion, this provision would prevent you from bringing suit in your court for any claim, even though the amount involved would be in excess of the exclusive jurisdiction amount set forth in § 16.1-77. You may, of course, accept claims of any amount against debtors where the jurisdiction for bringing suit thereon is not in your court.

JUDGMENTS—Commonwealth—No authority to release except upon full payment.

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the City of Hampton

March 19, 1965

This is in reply to your letter of March 9, 1965, which reads as follows:

"I would appreciate your opinion as to my authority and position in the following situation:

"The Commonwealth of Virginia secured seventeen judgments against a defendant on the account of cost in a criminal prosecution. He received a total of ten years in the State Penitentiary. The cost judgments amount to $979.00. He has a 1/10 interest in a parcel of real estate which is presently under contract for sale and his interest would amount to approximately $200.00.

"Specifically, my questions are as follows:

"(1) Do I have the authority to accept this partial payment and execute a release on behalf of the Commonwealth in respect to this parcel of land;
"(2) If not, does the Clerk of Court have this authority;
"(3) If neither has this authority, would a petition to a court
of record be proper, praying that the sum be accepted and the property in question be released from these judgments; and

"(4) Finally, would it be proper for me to join in this petition on behalf of the Commonwealth?"

With respect to questions (1) and (2), I am of the opinion that neither you, as Commonwealth's attorney, nor the clerk of the circuit court, has such power. Under the provisions of § 8-385 of the Code, the clerk, upon payment of the judgment, is authorized to mark the same satisfied. If the judgment is not paid in full, I feel that the clerk is authorized to note the partial payment on the judgment lien docket. The Commonwealth's attorney, in my opinion, has no authority to release the judgment.

I am not aware of any statute under which a court is authorized to order a release of a judgment in favor of the Commonwealth upon property being conveyed under the circumstances existing here, where there has been only a partial satisfaction of the judgment. This answers your questions (3) and (4).

JUDGMENTS—Order—How written where obtained against surety as well as principal.

October 22, 1964

HONORABLE S. L. FARRAR, JR.
Clerk of Circuit Court of Amelia County

This is in reply to your letter of October 14, 1964, which is as follows:

"Amelia County, by the Treasurer, obtained a judgment in Amelia County Court against a party for county taxes claimed to be due the county by this party. The defendant was granted an appeal to the Circuit Court from the judgment of the county court. When the case was heard in the Circuit Court the county again prevailed.

"As required by law the County Court required of the defendant a bond which the defendant gave with approved surety. It was an executed bond and no cash was involved. The condition of the bond is that if the defendant shall abide the judgment of the court upon the appeal, then the obligation is to be void, otherwise to remain in full force. The bond is executed apparently on the usual civil case appeal bond form.

"I would like your advice as to writing the court's order in this case. I am especially anxious to know if the judgment order should be written including therein the surety on the bond as well as principal defendant.

"Section 16.1-113 of the 1950 Code of Virginia says in part 'If judgment be recovered by the appellee, execution shall issue against the principal and his surety, jointly or separately, for the amount of the judgment, including interest and costs, with damages on the aggregate at the rate of ten per centum per annum, from the date of that judgment until payment, and for the cost of the appeal; and the execution shall be endorsed "No security is to be taken."' However, this does not say definitely if the court's judgment should be against the surety as well as the principal defendant and if judgment should be docketed on the judgment lien docket against both of them."

This office has been furnished with a copy of a form of order by one of the
clerk's offices in the City of Richmond, which copy is enclosed. As you will note, under this form, judgment is entered against the surety as well as the principal in cases of this kind.

While some doubt as to the validity of this practice may exist in view of the fact that the statute does not in express terms authorize judgment to be entered against the surety, the portion of the statute with which you are concerned appeared in substantially the same language in § 2957 of the Code of 1887, and ever since has remained a part of our statutory law. I have been unable to find any decision of the Supreme Court of Appeals of Virginia construing this statute on this particular point, and assume that the prevailing practice in other courts of the Commonwealth is similar to that indicated in the enclosed order.

JUDGMENTS—Satisfied—Must be attested by clerk of court.

CLERKS—Judgment Satisfied—Must be attested by clerk.

HONORABLE T. F. TUCKER
Clerk of Corporation Court of City of Danville

July 29, 1964

This will acknowledge receipt of your letter of July 27, 1964, which reads as follows:

"For several years certain attorneys have made it a practice to release judgments as attorney of record without having me or one of my deputies attest the same. When I have called their attention to this their answer has been that it is not necessary for the Clerk to attest the release or satisfaction of a judgment on the Judgment Lien Docket in order for the same to be valid.

"My question is: Is it necessary for the Clerk to attest a release or satisfaction of a judgment when it is made by the beneficiary of the judgment or the attorney of record."

Section 8-382 of the Code provides that whenever the amount of a judgment has been paid, or satisfied, it is the duty of the judgment creditor, himself, or by his agent, or attorney, to cause such payment, or satisfaction, to be entered on the judgment docket, or, if the judgment has not been docketed, then on the execution book in the office of the clerk from which the execution issued, and "such entry of payment or satisfaction shall be signed by the creditor, his duly authorized agent or attorney, and attested by the clerk in whose office the judgment is docketed, or, when not docketed, by the clerk from whose office the execution issued."

The clerk is allowed a fee of fifty cents for attesting satisfaction of the judgment, which the judgment debtor is required to pay. See, Code § 14.1-112 (9).

It is clear that the statutory procedure in marking a judgment satisfied is that the entry, in addition to being signed by the person making the same, shall be attested by the clerk.

In my opinion, your question must be answered in the affirmative.
JURY SERVICE—Exemption—Trainmen employed in train service.

HONORABLE Hodges S. Boswell
Clerk of Circuit Court of Nottoway County

This is in answer to your letter of December 16, 1964, which reads as follows:

"I would like to have your opinion as to the interpretation of Section 8-178, who are exempt from Jury Service as amended in 1964 cumulative supplement, paragraph 9.
"Train Dispatchers while in actual service as such, and trainmen employed in train service."
"My question is what is the meaning of Train Service?
"We have a number of men working in Crewe for the Norfolk & Western such as Brakemen, Firemen and Engineers that work on the yard in Crewe and may go as far as Burkeville on the local. Some of them never leave the Yard in Crewe. Would these men be considered employed in train service?"

It is my opinion that trainmen, such as those mentioned in your inquiry, who are employed at the yard at Crewe are "employed in train service" within the meaning of § 8-178(9) of the Code. The term "train service," as used in the statute, is not in any way limited. Brakemen, firemen, engineers and other trainmen perform "train service," in my opinion, while they are working on and about trains, whether it be in the yard, or on long or short runs, so long as they are in fact performing work directly connected with the operation of trains.

JUSTICE OF PEACE—Acting as Professional Bondsman—When prohibited.

HONORABLE Wilson Sullivan
Bail Commissioner, City of Fredericksburg

This will acknowledge receipt of your letter of November 5, 1964, which reads as follows:

"As Bail Commissioner for the City of Fredericksburg, I would appreciate your legal opinion on the following question. I refer to the law passed by the most recent Virginia General Assembly which prohibits a Justice of The Peace from engaging in business as a Professional Bondsman while serving as a Justice of The Peace.
"1. In the case of a person who has held the elected office of Justice of The Peace for a number of years and who has, during those same years, been engaged in business as a Professional Bondsman, and who was engaged in both capacities on the date the above referred to law became effective—Can this person continue to act as a Professional Bondsman and as a Justice of The Peace at this time under terms of the 'Grandfather Clause?' And/or
"2. Would there be any legal objection to a Justice of The Peace continuing to hold that status after the effective date of the above referred to law, while engaged in the business of a Professional Bondsman, if he did not exercise the authority of the office of a Justice of The Peace during the time concerned?"
The provision to which you refer is an amendment to § 58-371.2 of the Code of Virginia. This amendment appears in Chapter 576, Acts of Assembly (1964), and reads as follows:

"No person shall be licensed hereunder either as a professional bondsman or agent for any professional bondsman, when such person, or his or her spouse, holds any office as justice of the peace, magistrate, clerk or deputy clerk of any court."

This provision does not contain a so-called "grandfather clause," nor does it provide that any license held by a justice of the peace on the effective date of the amendment shall thereupon be revoked. It provides that no person "shall be licensed" under this section who holds one of the offices mentioned in the amendment.

In my opinion, the amendment is prospective and must be construed against forfeiture of a license held at the time the Act became effective. Of course, no justice of the peace nor any of the other officers mentioned in the amendment may be issued a license under § 58-371.2 after June 25, 1964.

JUSTICE OF PEACE—Authority—May not issue a summons in garnishment.

GARNISHMENT—Summons—No authority in justice of peace to issue.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

This is in reply to your letter of June 18, 1965, which reads as follows:

"For fourteen years Justices of the Peace in this County have been issuing garnishments.

"This procedure has been objected to and I am of the opinion from reference to sections 8-441 and Sections 39-4 and 5 of the Code of Virginia that Justices of the Peace do not have the power to issue garnishments unless attachments be construed as garnishments. Please advise as to what your opinion is on this subject."

Section 39-4 of the Code provides, in part, as follows:

"No justice of the peace shall, within any county or in any incorporated town located therein or in any city for which a trial justice is appointed under the provisions of chapter 2 of Title 16, exercise any civil or criminal jurisdiction conferred on such trial justice. Justices of the peace within their respective counties and on any property geographically within any city therein, which is owned and used by the county, shall, however, have the same power to issue attachments, warrants and subpoenas within the jurisdiction of such trial justice as is conferred upon the trial justice, and they shall also have power to grant bail in any case in which they are authorized by general law to grant bail and to receive their fees therefor; . . . ."

Section 8-441 of the Code provides, in part, as follows:

"On a suggestion by the judgment creditor that, by reason of the
lien of his writ of fieri facias, there is a liability on any person other than the judgment debtor, or, that there is in the hands of some person in his capacity as personal representative of some decedent a sum of money to which a judgment debtor is or may be entitled as creditor or distributee of such decedent, upon which sum when determined such writ of fieri facias is a lien, a summons may be sued out of the clerk's office of the court in which the judgment is, or, if rendered by a trial justice, may be issued by a trial justice, or sued out of the clerk's office to which an execution issued thereon has been returned as provided in § 16-35 against such person; . . . .

It will be noted by these sections that a trial justice (now a judge of a court not of record) is authorized to issue a summons in garnishment proceedings. The first sentence of § 39-4 prohibits a justice of the peace from exercising any civil jurisdiction conferred on a trial justice, subject to the exceptions appearing in the next sentence of that section. These exceptions must be strictly construed against the power of a justice of the peace and inasmuch as they do not contain a provision authorizing issuance of a summons in garnishment proceedings, I am of the opinion that a justice of the peace does not have authority to issue such a summons.

JUSTICE OF PEACE—Authority—May not issue warrant in non-support cases.

JUSTICE OF PEACE—Authority—Conditions under which may issue warrant for arrest of child.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

November 5, 1964

This is to acknowledge receipt of your letter of October 29, 1964, in which you state in part:

"Would you please advise whether in your opinion a Justice of the Peace may upon the filing of a petition before him issue a Non-Support Warrant and whether or not he may issue processes against juvenile defenders."

Non-support case are cognizable before the Juvenile and Domestic Relations Court and the law governing such cases is prescribed in Chapter 5, Title 20 (§§ 20-61 et seq.), Code of Virginia (1950). All proceedings under said chapter must be instituted by petition. See, § 20-64. Juvenile and Domestic Relations Courts have exclusive original jurisdiction in such cases (except where the defendant is a fugitive from justice). See, § 20-67. Hence, the petition under § 20-64 must be made returnable before the Juvenile and Domestic Relations Court. Upon considering the petition, such court or judge may cause the husband or father to be brought before it by summons or warrant. See, § 20-65. It is that court which is empowered to issue the warrant or summons. I can find no authority for a justice of the peace to act in such manner, except under the circumstances set out in § 20-70. A justice of the peace could take the oath or affirmation of the person filing the petition just as any other officer having the authority to administer oaths. I am therefore of the opinion that a justice of the peace has no authority to receive or act upon the petition filed under § 20-64, and that the question raised by you in this respect is answered in the negative.
You also inquire as to whether or not a justice of the peace may issue process against juvenile offenders. Proceedings against a juvenile are prescribed by Article 3, Chapter 8, §§ 16.1-158, et seq. Normally such proceedings are instituted by petition unless the court elects to proceed on its own motion without petition. See, §§ 16.1-164. However, in cases of violations of traffic laws and game and fish laws a proceeding against an infant may be instituted by a summons issued by the investigating officer. A summons, however, is not a warrant of arrest. Upon the issuance of a summons, if the offender promises to be present in court at a certain time and place, he is released. See, § 46.1-178 of the Code and § 29-34.1. Only in unusual cases, when the conduct of a child or the circumstances surrounding the case make it impracticable for the officer to follow the proceedings outlined in paragraphs 1, 2 and 3 or § 16.1-197 (by taking the child before the court immediately or surrendering him to a probation officer) is a warrant for the arrest of the child obtained from a justice of the peace.

I am enclosing a copy of an opinion issued by this office on April 14, 1964, in a letter to the Honorable W. A. Kelly, Chief Probation Officer, Juvenile and Domestic Relations Court, Roanoke, Virginia, in regard to the handling of children taken in custody.

JUSTICE OF PEACE—Authority—May not issue warrant returnable before State Corporation Commission or take recognizance of arrested person for appearance before said Commission.

July 8, 1964

HONORABLE W. R. LUMPKIN
President of Association of Justices of the Peace of Virginia

This is to acknowledge receipt of your letter of June 29, 1964, in which you state in part:

"The 1964 session of the General Assembly passed certain bills pertaining to enforcement by the State Corporation Commission that would be heard by the Commissioners in Richmond, Virginia.

"I refer to House Bill 666 and 667 and Senate Bill 97.

"The question I request a ruling on is; 'After a person is arrested and a warrant issued in the County in which the violation occurred, can a Justice of the Peace bond the arrested person for his appearance before the State Corporation Commission at Richmond on a given date?'"

I assume that the warrant and recognizance to which you refer arises under the violation of § 56-304.11, Code of Virginia (1950), as amended. Although the State Corporation Commission may proceed under § 56-304.12 of the Code to insure compliance with the statute and the enforcement of its rules and regulations, violations under said § 56-304.11 of the Code are tried in the local courts having jurisdiction in the county or the city wherein the offense is committed and not before the State Corporation Commission. Hence, the case you cite would be tried in the appropriate county or municipal court and the justice of the peace should make the warrant returnable to the appropriate court not of record. As the county court and municipal court have exclusive original jurisdiction of misdemeanors (unless otherwise expressly provided) (see, §§ 16.1-123 and 16.1-124 of the Code as amended), warrants for the violation thereof must be made returnable to said courts. There is no statutory authority for a justice of
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the peace to make a recognizance or issue a warrant returnable before the State Corporation Commission.

I am therefore of the opinion that a justice of the peace is without authority to issue a warrant for offenses arising under Chapter 12, Title 56, Code of Virginia, returnable before the State Corporation Commission or take a recognizance of the arrested person for his appearance before said Commission.

JUSTICE OF PEACE—Authority—When town ordinance violated.

BAIL AND RECOGNIZANCE—Fine and Costs in Criminal Cases—To whom payable.

September 15, 1964

HONORABLE ARTHUR C. STICKLEY, II
Judge, Municipal Court of Town of Haymarket

This is to acknowledge receipt of your letter of September 2, 1964, to the Honorable Francis C. Lee. Mr. Lee is no longer in this office. He is now a Special Assistant to the Governor. I shall answer your inquiries seriatim.

In your letter you state in part:

"It would be deeply appreciated if you would give me your opinion as to whether it will be possible for us to follow the opinion in the letter referred to above [to the Honorable W. H. Overbey, dated January 11, 1949, (Opinions of the Attorney General (1948-1949) p. 119)], and any other information which you may deem pertinent."

As you point out, Attorney General J. Lindsay Almond, Jr. held that a justice of the peace of a magisterial district in which a town is situated may issue warrants and grant bail in cases where the person is charged with a violation of an ordinance of such a town. This same view was expressed in an opinion in a letter to the Honorable George F. Abbitt, Jr., dated August 6, 1952. Opinions of the Attorney General (1952-1953), p. 132. Copies of these opinions are enclosed. I concur in these views. I am of the opinion that you could follow these opinions unless the charter of the Town of Haymarket prescribes a specific procedure which is for the enforcement of the town ordinance which is at variance with the procedure set forth in these opinions.

Quoting further from your letter:

"In your letter of October 4, 1963 to Colonel C. W. Woodson, I understand that all misdemeanors arising within the corporate limits should be tried here even though they are made by members of State Police. I note that they should be charged on State warrants and, in that case, would the fine and costs go to the Town or to the State?"

I call your attention to § 19.1-127 of the Code of Virginia which reads in part as follows:

"Recognizances in criminal cases, where the offense is charged to have been committed against the Commonwealth, shall be payable to the Commonwealth of Virginia. Recognizances in criminal cases where the offense charged is a violation of a county, city or town ordinance,
shall be payable to such county, city or town. Every recognizance under this title shall be in such sum as the court or officer requiring it may direct."

If the accused is charged with the violation of a State statute, then the fine and costs go to the State. If the offense charged is a violation of a town ordinance, then the fine and costs should be paid to the town. Opinions of the Attorney General (1938-1939), p. 55.

The 1964 General Assembly, in Chapter 524, authorized the Town Council to elect special justices of the peace known as issuing justices. These justices would have authority to issue warrants, and in the absence of the judge of the municipal court of the town, would have authority to admit persons to bail. It may be well for the Town Council of Haymarket to consider the feasibility of electing such a justice.

JUSTICE OF PEACE—Child Under Arrest—Not to be taken before justice of peace for bail.

JUVENILES—Warrants—Criminal warrant may not be issued against child charging him with violation of traffic offense.

JUVENILE AND DOMESTIC RELATIONS COURTS—Takes Custody of Child on Summons for Traffic Offense.

HONORABLE JAMES M. BRYANT
Probation Officer Juvenile and Domestic Relations Court of the City of Staunton

This is to acknowledge receipt of your letter of September 25, 1964, in which you request my opinion on certain questions relating to § 16.1-197, Code of Virginia (1950), as amended. I shall answer your questions seriatim.

"1. Our question is, 'can a Justice of the Peace release a child either on bail or on recognizance without the approval of the Court on the particular case in question.'"

"2. Also, Section 16.1-164 provides the method of bring [ing] a child charged with a traffic offense to the attention of the Court. Does this section restrict the use of a warrant in traffic offenses against children? If so, can this child be bonded as an adult or would section 16.1-197 apply?"

The term "summons" in § 16.1-164 of the Code, as amended, means the summons issued under § 29-34.1 or under § 46.1-178 of the Code, as the case may be. Under this section (16.1-164) a criminal warrant may not be issued against the child charging him with the violation of a traffic offense, but a summons may be issued by the investigating officer under § 46.1-178 of the Code. It is this summons on which the juvenile and domestic relations court proceeds.
The judge of such court may then take custody of the child in the manner prescribed in § 16.1-197.

JUSTICE OF PEACE—Persons Ineligible for Office.

HONORABLE DALE W. LARUE
Judge, Carroll County Court

October 21, 1964

This is in reply to your letter of October 19, 1964, which reads as follows:

"Your opinion would be appreciated on the proper construction of Section 7 of Title 39 of the 1950 Code as amended.

"Would it be lawful for the Judge of the Circuit Court to appoint or reappoint a Justice of the Peace in office on the effective date of the above mentioned statute, but whose term is now expired, and whose spouse is a law enforcement officer and now holding the office."

Section 39-7 of the Code provides that its prohibitions "shall not apply to incumbents of such office who are in office when this section becomes effective."

In my opinion, the person to whom you refer is eligible to be reappointed to the office of justice of the peace provided no person has been appointed to such office since his term expired and has qualified. This conclusion is based upon the provisions of Section 33 of the Constitution which reads as follows:

"Unless otherwise prescribed by law, the terms of all officers elected under this Constitution shall begin on the first day of February next succeeding their election, unless otherwise provided in this Constitution.

All officers elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

I do not feel that the last sentence of § 39-7 of the Code contemplates that it would apply to a person who was an incumbent at the time the law took effect unless such person has continued to hold that office without interruption. Even though his regular term has ended, unless the office has been filled by the appointment and qualification of another person, he continues to hold the office as a "hold-over" under the Constitution.

JUVENILE AND DOMESTIC RELATIONS COURTS—Child’s Residence—Follows residence of mother.

HONORABLE W. J. AUSTIN, JR.
Judge, Juvenile and Domestic Relations Court of City of Roanoke

February 15, 1965

This is in reply to your letter of February 11, 1965, in which you state that the Children’s Home Society of Virginia has petitioned your court to be relieved of the custody of a two-year old infant and that due to the mother’s recent marriage, financial situation, age, and the circumstances surrounding the conception of the child, she has requested that she be relieved of the custody of the child and that it be placed with the proper welfare department.
Under the circumstances stated, the mother being seventeen years of age and unmarried at the time of the child's birth, her residence was in Norfolk where her parents resided and apparently still reside. However, since that time the mother has married and, although she is still under the age of twenty-one, in my opinion, the mother's residence is now at the location where she and her husband reside. The child's residence follows the residence of the mother. Therefore, in my opinion, the term "residence," as used in § 16.1-178(3) of the Code, relates to the residence of the child at the time of the proceedings had under § 16.1-165, et seq.

JUVENILE AND DOMESTIC RELATIONS COURTS—Custody of Child—
May take where environment of child affected due to disruption of the home or marital relations.

September 28, 1964

MRS. BETTYE H. DALLAS, CLERK
Chief Probation Officer
Juvenile and Domestic Relations Court of City of Danville

This will acknowledge receipt of your letter of September 23, 1964, in which you state in part:

"I am writing you at the request of Judge Moore to get your interpretation of Section 16.1-158 of the Code of Virginia which gives the Juvenile and Domestic Relations Court jurisdiction when a person is charged with knowingly disrupting the marital relations of a home. Is there any punishment for this offense, and what is it?"

Section 16.1-158 of the Code grants jurisdiction to judges of juvenile and domestic relations courts over all cases, matters and proceedings involving:

"(9) Any violation of law the effect or tendency of which is to cause or contribute in any way to the disruption of marital relations or a home."

There is no crime or offense of "knowingly disrupting the marital relations of a home" either by statute or common law. Where it is shown by proper and sufficient evidence that a person or persons have violated a law which causes or contributes to the disruption of the home or marital relations, then the juvenile and domestic relations court may take custody of a child whose environment is affected by such violation to the extent that it is injurious to the child's welfare. Section 16.1-158(1) (f) of the Code.

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Charge of murder or manslaughter where offense committed by member of the family under 18 years of age.

December 31, 1964

HONORABLE EDWIN A. HENRY
Judge, Juvenile and Domestic Relations Court of City of Norfolk

This is in reply to your letter of December 9, 1964, which reads, in part, as follows:
The question, specifically, is whether the Juvenile and Domestic Relations Court of this city would have a concurrent jurisdiction with our Municipal Court in respect to the offense of murder or manslaughter committed by one member of the family against another member of the family.

"You will note under Section 16.1-158 the Juvenile and Domestic Relations Court is given certain original and exclusive jurisdiction in certain cases. However, paragraph eight of that section says that all 'offenses except murder and manslaughter committed by one member of the family against another member of the family, etc.'"

It is my opinion that, unless the municipal charter provides otherwise, the Juvenile and Domestic Relations Court of your city does not have concurrent jurisdiction with the Municipal Court of your city to act as examining magistrate with respect to all offenses of murder or manslaughter committed by one member of the family against another member of the family. In the first phrase of paragraph 8 of § 16.1-158 of the Code, murder and manslaughter are specifically excepted from the general grant to your court of exclusive original jurisdiction as to all offenses committed by one member of the family against another member of the family. Nowhere do I find a provision of the Code which grants to your court concurrent jurisdiction with the Municipal Court as to all offenses of murder or manslaughter committed by one member of the family against another member of the family. It would appear, however, that your court would have jurisdiction as to a charge of murder or manslaughter committed by one member of the family against another member where the offense is committed by a minor prior to the time he becomes eighteen years of age (see, § 16.1-158(4) and § 16.1-175, et seq.), and in the instance where one member of the family is complainant against another member of the family (see, § 16.1-158(8)).

JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Does not attach on charges against adult for reckless driving which resulted in injury to child.

MOTOR VEHICLES—Traffic Violations Involving Injury to Child—Does not vest juvenile and domestic relations court with criminal jurisdiction.

April 16, 1965

HONORABLE W. J. AUSTIN, JR.
Judge, Juvenile and Domestic Relations Court of City of Roanoke

This is in reply to your letter of April 9, 1965, which reads as follows:

"Your advice would be appreciated on the following questions:

"1) a. Do Juvenile and Domestic Relations Courts in Virginia have jurisdiction over persons eighteen years or older charged with reckless driving or other traffic violations involving personal injury to a person less than eighteen years old, or are such matters within the exclusive jurisdiction of municipal and county courts?

"b. Specifically, does Section 16.1-158 (7) confer jurisdiction on the Juvenile and Domestic Relations cases?

"2) Under existing Virginia law, does a judge of a Juvenile and Domestic Relations Court have authority to punish a woman for continuing to have illegitimate children on the theory that by so doing,
she is contributing to the delinquency or dependency of the children she already has?"

In respect to your first question, Juvenile and Domestic Relations Courts in Virginia do not have jurisdiction over persons eighteen years of age or older charged with reckless driving or other traffic violations, except where a minor is charged with having committed such violation prior to the time he became eighteen years of age. In my interpretation of paragraph (7) of § 16.1-158, Code of Virginia (1950), as amended, to which you draw my attention, the jurisdiction attaches only where certain offenses are committed against a child. Reckless driving is an offense against the laws of the Commonwealth, rather than against a child who may incidentally suffer personal injury as a result of such reckless driving. Such cases should be tried in the court having jurisdiction of traffic cases.

The law makes it a crime for parents to fail to provide for the support and maintenance of their children under necessitous circumstances under the age of seventeen years or of any age if crippled or incapacitated. In this regard, § 20-61, Code of Virginia (1950), as amended, provides that any parent who deserts or wilfully neglects or refuses to provide such support shall be guilty of a misdemeanor. Also, § 18.1-200, Code of Virginia (1950), as amended, provides for committing a person to control of the Board of Welfare and Institutions for rehabilitation, upon conviction of contributing to the delinquency, neglect or dependency of a minor under eighteen years of age. I find no specific law, however, authorizing a Juvenile and Domestic Relations Court to punish a woman on the theory outlined in your question numbered 2.

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**JUVENILE AND DOMESTIC RELATIONS COURTS—No jurisdiction to try adults for traffic violations.**

**COURTS—Municipal or County—No jurisdiction to try juvenile for traffic violations.**

May 5, 1965

HONORABLE W. J. AUSTIN, JR.
Judge, Juvenile and Domestic Relations Court of City of Roanoke

This is in reply to your letter of April 26, 1965, in further reference to your letter of April 9 and my reply of April 16, 1965. You outline a situation in which an adult operates a motor vehicle involved in collision with a motor vehicle driven by a juvenile, resulting in traffic charges against both adult and juvenile, and pose the four questions quoted below. Specifically, you inquire whether:

"(a) Traffic charges against adult as well as juvenile drivers can be determined by the judge of a Juvenile and Domestic Relations Court?

"(b) Traffic charges against juvenile as well as adult drivers can be determined by the judge of a Municipal or County Court, where there is no waiver by or on behalf of the juvenile of his right to have his charges heard in the Juvenile and Domestic Relations Court?

"(c) Traffic charges against juvenile as well as adult drivers can be determined by the judge of a Municipal or County Court, if the juvenile waives his right to have his charges heard in the Juvenile and Domestic Relations Court; and, if so, what are the procedural requirements for such waiver?"
"(d) Must the charges against the adult be heard in the Municipal or County Court and the charges against the juvenile in the Juvenile and Domestic Relations Court?"

In response to your question (a), I am of the opinion that the Juvenile and Domestic Relations Court is not vested with jurisdiction to determine traffic charges against an adult. It is obvious from your letter that this question is not concerned with the exception pointed out in my previous letter but with adults in general. While you are undoubtedly correct that it would be more convenient under certain circumstances if all charges could be heard and determined at one time, I do not find any law authorizing it. This is to be distinguished from the jurisdiction placed in such courts by § 16.1-158, Code of Virginia (1950), as amended, to prosecute certain offenses committed by adults. The latter has reference to a determination where the adult is charged with an offense against a child, rather than with a violation of the traffic laws. This is in accord with the opinion expressed in my letter of April 16, 1965, to which you refer, as well as a prior opinion on the subject, found in Report of Attorney General (1960-1961), p. 176.

Chapter 8 of Title 16.1, Code of Virginia (1950), as amended, provides, in § 16.1-142, that any specific provision of this chapter shall prevail over conflicting provisions of any other chapters of this title. Considering your question (b), § 16.1-158 places in the Juvenile and Domestic Relations Court, with exceptions not here applicable, "exclusive original jurisdiction" over all cases, matters and proceedings involving the disposition of a child who violates any state or federal law or any municipal or county ordinance. From this and related statutes, it is my interpretation that traffic charges against a juvenile may not be determined by a municipal or county court. See, Reports of the Attorney General (1953-1954), p. 147 and (1961-1962), p. 58. In my opinion, the juvenile may not waive his right to have his charges heard in the Juvenile and Domestic Relations Court and, therefore, I shall answer both questions (b) and (c) in the negative.

For the reasons stated in my response to questions (a), (b), and (c), I shall answer your question (d) in the affirmative.

JUVENILE AND DOMESTIC RELATIONS COURTS—Regional—Function in same manner as other juvenile and domestic relations courts.

JUSTICE OF PEACE—Fees—When entitled to fee for issuing warrant to a juvenile.

March 18, 1965

HONORABLE JOHN C. GOOLRICK
Justice of the Peace

This is to acknowledge receipt of your letter of March 7, 1965, in which you state in part:

"I have been asked by other justices of the peace here in Fredericksburg to seek your advice on a question of payment for warrants written for regional juvenile and domestic relations courts.

"As you are probably aware, such a regional court is now in operation in this area—including the city of Fredericksburg. However, there
seems to be no procedure established for paying justices of the peace for warrants written against persons to be tried in this court."

A Regional Juvenile and Domestic Relations Court formed under § 16.1-143.1 of the Code (1950), as amended, functions as any other juvenile and domestic relations court.

In the rare instances where warrants are issued against juveniles pursuant to §§ 16.1-195 and 16.1-197 of the Code, the justice of the peace who issues the warrants is entitled to the fee prescribed in § 14.1-128 of the Code as amended.

Section 14.1-129 of the Code is as follows:

"The fees allowed by § 14.1-128 shall be in full for all services rendered in each case by a justice of the peace but shall not be allowed or paid by the Comptroller without a certificate of the judge of the court, allowing the account, that he has actually examined the papers upon which the account is founded and is satisfied that the warrant was issued and trial or examination made as shown in the account."

In order that the justice of the peace be paid, he must execute a statement on Criminal Form No. 9 (a copy of which is enclosed) which must be filed with the Clerk of the Circuit Court. A certificate is made by the judge of such court (after the Auditor of Public Accounts has examined the statement and found it to be correct), that the warrant was issued. This certificate is made pursuant to § 14.1-129 of the Code. The items on this statement are entered by the Clerk of the Circuit Court on a form known as "List of Allowances Against the Commonwealth, Compt. 316.", and the same is forwarded by the Clerk of the Circuit Court to the Comptroller.

I understand that it is customary that the said statement made by a justice of the peace is sent to the court where the case is initially tried or heard which would normally be the juvenile and domestic relations court or the county court and is transmitted by that court along with the other papers in the case to the Clerk of the Circuit Court.

JUVENILES—Charged with Violating Traffic Laws—Officer may issue summons.

JUSTICE OF PEACE—No Authority to Admit Juveniles to Bail Nor to Commit to Jail.

HONORABLE RAY B. FITZGERALD
Justice of the Peace

November 10, 1964

This is in reply to your letter of October 20, 1964, concerning the procedure for arrest, detention and release of juveniles charged with traffic violations, in which you pose three questions, which I shall quote and consider separately, as follows:

"Question number 1. Quoting from Section 16.1-164 of the Code of Virginia, 'In case of violation of the traffic laws such summons may be issued by the officer investigating the violation in the same manner as provided by law for adults.' Does this mean the same procedure will be followed as if the juvenile were an adult?"
The sentence which you have quoted from § 16.1-164, Code of Virginia (1950), as amended, in my interpretation, does not refer to all procedure but has reference to any instance in which an officer who investigates a violation of the traffic laws issues a summons for such violation. Under the provisions of § 46.1-178, Code of Virginia (1950), as amended, the officer may issue a summons for a juvenile who violates certain traffic laws in the same manner as provided for issuing a summons for an adult who violates such laws. This, however, does not apply to the procedure to be followed by persons other than the arresting officer, nor by such officer where a summons would be inappropriate.

"Question number 2. Under the provisions of Section 46.1-178 of the Code, the circumstances are cited under which a warrant may be issued in a traffic violation, which is conclusive. However, Section 46.1-179 expressly provides for warrants to be issued in lieu of summons, at the election of the officer investigating, Section 46.1-179 paragraph (4) being the specific instance in the question at hand, would this statute be applicable to the case of a juvenile?"

In my opinion, § 46.1-179, Code of Virginia (1950), as amended, authorizing the arresting officer, under the stated conditions, to take the person arrested before a judicial officer or other person qualified to admit to bail, does not apply to the case of a juvenile. In the case of a traffic violation, a juvenile may be released upon a summons issued in accordance with § 46.1-178. If the violation be of such nature, however, that the arresting officer deems it necessary to take the child into custody, in lieu of issuing the summons authorized by § 46.1-178, the officer must proceed in accordance with Article 4, Chapter 8 of Title 16.1, Code of Virginia (1950), as amended. Thereunder, § 16.1-197 makes specific provision for the detention or release of a juvenile who is taken into custody, depending upon the circumstances existing at the time custody is taken. The arresting officer must be guided by the procedure prescribed by this section.

"Question number 3. Finally, with reference to bail or bond of a juvenile by a justice of the peace in a traffic violation, the above procedure being followed, Section 16.1-195 being complied with Section 16.1-197 being exhausted, as not being applicable to the case, can a justice of the peace admit to bail pending such hearing of juvenile charged with traffic violation, under the provisions of Section 19.1-110 with surety and recognizance as required under Sections 19.1-126 and 19.1-127 or commit him to jail under Section 19.1-135 of the Code as amended?"

No. In my opinion, the justice of the peace is neither authorized to admit the juvenile to bail nor to commit him to jail for failure to give a recognizance. Where a child fourteen years of age or over when taken into custody resists, or is in a drunken condition or the officer taking custody deems it to be to the best interest of the child or the public, or it is otherwise impractical or inadvisable to immediately take such child to the judge, clerk or probation officer, or otherwise release the child as provided in § 16.1-197, he may obtain a warrant from any person authorized to issue criminal warrants. While a justice of the peace may issue the warrant under this section, he is not authorized to admit to bail. Instead, the arresting officer must take the child to the special place of detention for juveniles or "to a separate cell of the jail apart from criminals or vicious or dissolute persons," and then notify the judge of the juvenile court, its clerk or probation officer and the parents, guardian or other person having custody of the child of said detention.
REPORT OF THE ATTORNEY GENERAL

JUVENILES—Definition—Not affected due to marriage.

CRIMES—Contributing to Delinquency of Minor—Conviction not barred by marriage of minor.

February 9, 1965

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

This will acknowledge receipt of your letter of February 2, 1965, which reads as follows:

"The Commonwealth's Attorney and I have had a discussion over the interpretation of whether a girl under 18 who is married can be treated as a juvenile delinquent and whether a person can be convicted under § 18.1-14 of the Code of Virginia for contributing to her delinquency. I say that she should be treated as a delinquent and that a person who contributes to her delinquency can be punished under that statute. The Commonwealth's Attorney has doubts. Please let me have your opinion on this matter."

Chapter 8, Title 16.1 of the Code provides for Juvenile and Domestic Relations Courts and prescribes how minors and children are to be tried and for the disposition of cases in which they are involved. Section 16.1-141 states in part:

"When used in this chapter, unless the context otherwise requires:

* * * * *

"(3) 'Child' or 'juvenile' means a person less than eighteen years of age;"

I cannot find where this definition is qualified due to the marriage of the child.

I am, therefore, of the opinion that a married girl under eighteen years of age can be treated as a juvenile.

Section 18.1-14 of the Code reads, in part, as follows:

"Any person eighteen years of age or older, * who shall cause or encourage any child under the age of eighteen years to commit any misdemeanor, * or who shall * contribute toward the * delinquency of any such child, shall be guilty of a misdemeanor; * ."

Sections 16.1-141 and 18.1-14 should be read together in order to ascertain the meaning of the word "child." This office has held that a person may be charged with inducing, encouraging or contributing toward the dependency, neglect or delinquency of a child under § 18-6 [§ 18.1-14]. See, Opinions of the Attorney General (1950-51), at p. 183.

Therefore, in my opinion, a person may be convicted under § 18.1-14 of the Code for contributing to her delinquency.
JUVENILES—Detention Facilities—Must be on property located within at least one of the governing bodies of joint juvenile detention commission.

COUNTIES, CITIES AND TOWNS—Construction of Juvenile Detention Facilities—Must construct on property located within territorial limits of at least one governing body of joint juvenile detention commission.

July 2, 1964

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

This is in reply to your letter of June 27, 1964, which reads as follows:

"The Cities of Waynesboro, Harrisonburg and Staunton are contemplating a Juvenile Detention facility under the provisions of Article 4.1 of Chapter 8 of Title 16 of the Code. Augusta County has indicated a lack of interest so that present plans do not include this County in the proposed facility. However, an Augusta County resident has indicated a willingness to offer a site in Augusta County, free of charge, for the use by the three cities if a commission is established for a Juvenile Detention facility.

"Does the provision of § 16.1-202.5(3) preclude the three cities named from establishing a facility that is not located within the corporate limits of one of the participating cities?"

Section 16.1-202.2 of the Code provides as follows:

"The governing bodies of three or more counties, cities or towns (hereinafter referred to as 'political subdivisions') may, by concurrent ordinances or resolutions, provide for the establishment of a joint or regional juvenile detention commission. Such commission shall be a public body corporate, with such powers as are set forth in this article."

Section 16.1-202.5 of the Code provides, in part, as follows:

"Each commission created hereunder shall have all powers necessary or convenient for carrying out the general purposes of this article, including the following powers in addition to others herein granted, and subject to such supervision by the Director of the Department of Welfare and Institutions as is provided in §§ 16.1-198 through 16.1-200 of the Code of Virginia:

  * * * * *

"(3) Acquisition of property.—To acquire within the territorial limits of the political subdivisions for which it is formed, by purchase lease, gift, or exercise of the right of eminent domain, subject to conditions hereinafter set forth, whatever lands, buildings and structures may be reasonably necessary for the purpose of establishing, constructing, enlarging, maintaining and operating one or more juvenile detention homes or facilities for the reception of juveniles committed thereto under the provisions of this chapter."

In my opinion, it is necessary that the facility shall be on property located within at least one of the cities. The Commission, in my opinion, would not have authority to acquire lands outside the territorial limits of the cities that unite in
the project. Under the law in this State, a city surrounded by or bordering on a county is a political subdivision separate from the county.

JUVENILES—Extradition—Parole or probation violator from foreign state when found in Virginia.

JUVENILES—Extradition—Nonresident of Virginia accused of felony—Procedure.

**HONORABLE DABNEY W. WATTS**
Commonwealth's Attorney for the City of Winchester

April 28, 1965

This will acknowledge receipt of your recent letter which reads in part as follows:

"1. May a juvenile seventeen years of age, who is a parole or probation violator from a foreign state, be returned to the foreign state when found in Virginia, when the juvenile expressly declines to waive extradition?

"From the information received from the foreign state, it appears that he had been committed to one of its correctional institutions as a juvenile offender and upon release from such institution on parole, he fled the foreign state's jurisdiction.

"2. May a juvenile under the age of eighteen years, who is a resident of a foreign state, be extradited and returned to Virginia where he is alleged to have committed the felony of grand larceny?"

With reference to your first question, a review of the Juvenile and Domestic Relations Court Law (§ 16.1-139 et seq. of the Code) and the Uniform Criminal Extradition Act (§ 19.1-49 et seq. of the Code) indicates that such a juvenile would be subject to extradition. It is also possible that if the demanding state has a procedure similar to that authorized by § 16.1-178 (4) which places the Department of Welfare in loco parentis that it would be unnecessary to pursue the matter through extradition. I am advised that the Department of Welfare under similar conditions as set forth in your first question would proceed to the asylum state with the original of the decree placing the juvenile in its custody, pick up the juvenile and return him to Virginia. It is possible that the demanding state may desire to proceed pursuant to the provisions of the compact relating to juveniles, which was authorized by Chapter 452, Acts of Assembly, 1956, and which compact has been entered into by the Governor pursuant to § 16.1-213.1 of the Code. I am advised that some thirty-eight other states have entered into this compact.

With reference to your second question, I am of opinion that such a juvenile may be extradited and returned to Virginia to stand trial. In that connection, your attention is directed to the provisions of § 16.1-175 of the Code. Should you proceed to indict such a juvenile prior to extradition, it would be necessary to follow the foregoing provisions of law upon his return.
REPORT OF THE ATTORNEY GENERAL

JUVENILES—Warrants—Issuance in traffic cases and game and inland fisheries’ cases.

JUSTICE OF PEACE—Issuance of Warrants—Limitation on authority.

HONORABLE HAROLD B. SINGLETON
Judge, Amherst County Court

March 30, 1965

This is to acknowledge receipt of your letter of March 11, 1965, in which you request my opinion on several questions concerning the issuance of warrants in juvenile cases. I shall answer the questions raised by you seriatim.

“(1) Can a criminal warrant be issued for a juvenile in a traffic case?”

Warrants for the arrest of children under the age of fourteen are prohibited under § 16.1-195 of the Code of Virginia (1950), as amended, except when authorized by the judge or clerk of the juvenile and domestic relations court or by a judge or clerk of a court of record. Warrants for the arrest of children between the ages of fourteen and eighteen may be issued by any authority authorized to issue warrants only when the use of such process is imperative. See, § 16.1-197 of the Code. The facts and circumstances surrounding the case determines whether it is imperative that the warrant be issued. This question, subject to the limitations contained in these sections, is answered in the affirmative.

“(2) Can a Justice of the Peace, who is a Bail Commissioner, issue a warrant for a juvenile in a traffic case or a game and inland fisheries’ case?”

The issuance of warrants by justices of the peace and bail commissioners for such offenses is also governed by § 16.1-195 of the Code. See, answer to question No. 1 above, supra. Police officers and other officers should be instructed to bring juvenile offenders before the judge of the juvenile and domestic relations court or its clerk if an arrest is deemed necessary. If a juvenile has violated the game and fish laws or the motor vehicle traffic laws, a summons may be issued (§§ 29-34.1 and 46.1-178 of the Code as amended) requiring him to appear for trial at a time and place specified therein before the court. The court may proceed on such summons without the filing of a petition or the making of an investigation. See, § 16.1-164 of the Code.

“(3) Can a Justice of the Peace, who is a Bail Commissioner, issue the petition and summons to be issued under section 16.1-164, 165, 166 and ff?”

Under § 16.1-164, the court may authorize any person to file a petition when the child is within the purview of Chapter 8, Title 16.1 of the Code. If such a person who normally makes the complaint or brings the child to the attention of the court does not file the petition, then the probation officer or a police officer must file it. The petition must be verified. See, § 16.1-165. A justice of the peace can administer the oath to the person signing the petition. However, there is no authority for the justice of the peace to file the petition unless expressly authorized to do so by the court. After the petition is filed, the judge of the juvenile and domestic relations court issues a summons directing that the child be brought before it. A justice of the peace has no authority to issue such a petition nor to issue such a summons. This question is therefore answered in the negative.
“(4) Can a Justice of the Peace, who is a Bail Commissioner issue a non-support warrant?”

Under the provisions of § 20-70, justices of the peace are prohibited from issuing warrants of arrest in nonsupport cases, unless an affidavit is filed setting forth reasonable cause to believe that the husband or father is about to leave the jurisdiction.

LICENCES—Electrical Contractors—Regulation of electrical contractors by locali-
ties limited by § 54-145.2.

COUNTIES, CITIES AND TOWNS—Licenses—When examination of electrical contractors may be required.

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

July 16, 1964

This is in reply to your letter of July 10, 1964, in which you enclosed an ordinance entitled “Loudoun County Electrical Ordinance” which you state was adopted by the Board of Supervisors of Loudoun County on February 15, 1962.

The second paragraph of your letter reads as follows:

“My inquiry is whether or not the Board of Supervisors can prescribe standards and qualifying examinations for Journeymen and Master Electricians. We believe that the Board enacted this ordinance pursuant to Section 54-145.2 of the 1950 Code, but this statute appears to confine the power and authority to persons who engage in, or offer to engage in, the business of electrical contracting. If this section does not empower the County to adopt an ordinance covering persons who are defined as Journeymen or Master Electricians, would Section 15-8 of the Code provide this authority?”

Section 54-145.2 of the Code authorizes the governing body of a county to adopt an ordinance not inconsistent with the provisions of Chapter 7 of Title 54 requiring persons who engage in or offer to engage in the business of electrical, plumbing or heating contracting in such county to obtain a license from such county and, among other things, to require the examination of every applicant for such license in order to determine his qualifications. This section, however, does not authorize the counties to require such contractors to procure such licenses and take such examination if they have already been licensed by the State under the provisions of § 54-129. Therefore, the only class of contractors who would be subject to the county ordinance would be those who do not hold the State license under § 54-129. Generally, this would be contractors who do not undertake contracts in an amount of $20,000 or more, as provided in § 54-113. In this connection, I call your attention to an opinion dated May 11, 1962, to Mr. E. L. Kusterer, which opinion is published in Report of Attorney General (1961-62), at p. 144. To the extent, therefore, that the Loudoun County Electrical Ordinance purports to apply to contractors holding electrical contractor certificates of the State, the ordinance is of no effect and is unenforceable.

Section 54-145.2, in my opinion, does not authorize the board of supervisors to adopt an ordinance requiring journeymen electricians and master electricians to take examinations and refrain from accepting employment in electrical work
unless they are the holders of certificates issued by the county. The authority contained in the section is limited to the licensing and examination of contractors and then only to the extent mentioned in the previous paragraph. Section 15-8 of the Code, to which you refer, has been recodified and divided into several sections. Although § 15.1-510 authorizes the counties to adopt ordinances to secure and promote the health, safety and welfare of the inhabitants of such counties, I feel there is grave doubt that this section would authorize the adoption and enforcement of an ordinance of the nature under consideration here. The authority of a county to regulate electrical service is limited by § 54-145.2 of the Code.

The third paragraph of your letter is as follows:

"A further question relates to the adoption by reference, The National Electrical Code, 1959, in the County ordinance. In your opinion does Section 27-5.2 of the Code authorize the adoption of a code promulgated by any authoritative body other than building, fire protection or fire prevention codes by reference? We assume that electrical installations are an integral part of buildings, but the County ordinance covers areas not related to buildings per se."

You refer to Code § 27-5.2, but this is apparently a typographical error, as the section relating to the adoption of ordinances by reference is § 27-5.1. Under the language of this section, your question is answered in the negative, since the statute specifically states that the county may adopt by reference "any building, fire protection or fire prevention Code *.*"

The fourth paragraph of your letter is as follows:

"A further question is, what is meant precisely by the exception in Section 56-145.2, such contractors examined and currently licensed under 54-129? Does examined mean an examination, oral or written? We understand that such examination has only been recently initiated by the Registration Board for Contractors."

Your reference to § 56-145.2, we assume, is a typographical error and that you intended to refer to § 54-145.2. The first question in this paragraph is already answered in the preceding paragraphs and also in the opinion of May 11 to Mr. Kusterer.

With respect to whether or not examination means an oral or written examination, I think it means either type of examination that may be required. It is my understanding that the State Registration Board for Contractors requires written examinations.

I also understand that in the early stages of the enforcement of Chapter 7 of Title 54, the Board examined some contractors orally, but, as stated, the Board now gives written examinations to all applicants.
LICENCES—Plumbing and Steam Fitting Contractors—Included in licensing provisions of § 58-299.

COUNTIES, CITIES AND TOWNS—Licenses—Plumbing and steam fitting contractors—Included in licensing provisions of § 58-299.

September 24, 1964

HONORABLE R. WILLIAM ARTHUR
City Attorney of City of Radford

This will acknowledge receipt of Mr. Buck's letter of September 16, 1964, relating to an ordinance of the town of Wytheville (referred to in the letter from Mr. R. W. Arthur dated September 1) imposing a license tax on plumbers and steam fitters, in which you gentlemen inquire as to whether the town may impose such a license on a person engaged in the business of plumbing and steam fitting with headquarters in the city of Radford. The license tax has been paid by this person to the city of Radford and the amount of business to be done by him in the town of Wytheville will not exceed $25,000.

Due to the definition of "contractor" in § 58-297 and the provisions of § 58-299, the town takes the position that the exemptions of § 59-299 do not apply to a plumbing and steam fitting contractor.

Section 58-297 excludes persons doing electrical contracts of various types, as well as plumbing and steam fitting from the definition of contractor, and provides that persons or firms engaged in such a business shall pay the same license as that required of contractors. Section 58-298 provides that "Every contractor, every electrical contractor and every plumber and steam fitter shall" procure a license.

Section 58-299 provides:

"When a contractor, electrical contractor or a plumbing and steam fitting contractor shall have paid the aforesaid State license and any local license required by the city, town or county in which his principal office and any branch office or offices may be located, no further license shall be required by the State or other city, town or county for conducting any such business within the confines of this State, except where the amount of business done by any such contractor in any other city, town or county exceeds the sum of twenty-five thousand dollars in any year such other city, town or county may require of such contractor a local license, and the amount of business done in such other city, town or county in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the city, town or county in which the principal office or any branch office of the contractor is located, and except further that qualification under § 32-61 may be required of contractors doing plumbing business." (Italics supplied.)

I express the view that the provisions of §§ 58-299 apply to electrical contractors and to plumbing and steam fitting contractors. The term "such contractor" as used in this section is not, in my judgment, limited to "contractor" as defined in § 58-299, but applies also to "electrical contractor" and "plumbing and steam fitting contractor," this latter term being used in the same sense as the term "conducting the business of plumbing and steam fitting" is used in § 58-297, and "every plumber and steam fitter" is used in § 58-298. It seems clear from the phrase "shall have paid the aforesaid State license" that the "electrical contractor" and "plumbing and steam fitting contractor" mentioned in § 58-299,
refer to the "electrical contractor" and "plumber and steam fitter" referred to in § 58-298 of the Code of Virginia.

LOTTERIES—Consideration—Necessary element—Attendance upon premises does not constitute consideration.

September 17, 1964

HONORABLE WADE S. COSTES
Commonwealth's Attorney for Tazewell County

This is in reply to your letter of September 15, 1964, which reads as follows:

"The enclosed card is used by a number of merchants in this area, and I believe to some extent throughout the state, as a sales promotional scheme. The person who enters the store is given one of the cards. No charge is made for the card. You will note that the card is punched in two places. One side is punched for the number of consecutive weeks that a customer enters the store, and this is done without charge whether or not a purchase is made. The other side is punched according to cash amount of all purchases. When the total amount on the card has been punched or the number of weeks indicated, whichever occurs first, the manager of the store pulls the tab in the presence of the customer and pays the customer the amount appearing under the tab. Does this constitute a lottery under our statutes?"

As you know, a lottery consists of three elements, namely, prize, consideration and chance and the existence of all three in any particular scheme is necessary to constitute a violation of the lottery laws.

Section 18.1-340.1 of the Code provides:

"In any prosecution under § 18.1-340, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith."

The holder of the card in this instance is not required to make any purchase in order to be entitled to a prize—he is merely required to visit the store for a given number of times. Under these circumstances, by reason of the provisions of the above Code section, the element of consideration is lacking. Therefore, the answer to your question is in the negative.
LOTTERIES—Forfeiture of Money—Upon conviction of violation of § 18.1-323.

HONORABLE LEROY MORAN
Commonwealth's Attorney for the City of Roanoke

This will acknowledge receipt of your letter of September 23, 1964, the first three paragraphs being as follows:

"This office has recently prosecuted a defendant charged with gambling under Title 23, Chapter 3, Sec. 7 of the Code of the City of Roanoke which parallels Sec. 18.1-316 of the State Code. A jury found the defendant guilty and imposed a fine. Two billfolds were found on the defendant, and $700.00 in $100.00 bills was in one of the billfolds. There was a conflict in the evidence as to whether or not this billfold contained any of the money used in the game. This money was seized along with all other money being used for gambling purposes.

"Query: Is it lawful for money found on the person and used for gambling to be confiscated by the Court under Section 18.1-316 of the Code of Virginia?

"Query: If such a confiscation and forfeiture is lawful may the person or persons making the seizure be allowed one-half of the money seized?"

Your questions will be answered seriatim.

Section 18.1-316 of the Code of Virginia (1950), as amended, reads as follows:

"Any person who shall bet, wager or play at any game for money or other thing of value shall be fined not exceeding one hundred dollars, or confined in jail not exceeding sixty days, or both."

The offense under this statute is simply gambling. Confiscation of the money used in such gambling is not authorized. In order to warrant confiscation of the money, the evidence must clearly show that there has been a violation of § 18.1-323 of the Code which prohibits the keeping or exhibiting of a gaming table, or bank of any name or designation, etc., and the person must be convicted under that section. The Supreme Court of Appeals of Virginia, in the case of Layne v. Commonwealth, 196 Va. 486, pointed out the difference between these statutes in the following language, on page 490, to-wit:

"The aim of § 18-284 [§ 18.1-323] is to discourage gaming in its inception and its violation depends upon whether the accused kept or exhibited any table used for the purpose of gaming. This statute provides for an offense distinct and separate from that of merely participating as a player, Code § 18-278, [§ 18.1-316] or that of knowingly permitting one's premises to be used for gaming, Code § 18-285 [§ 18.1-324]. Hence, we must determine whether the defendant kept or exhibited a table, without regard to its adaptation to any particular game, for the purpose of gaming."

The first question is, therefore, answered in the negative.

Only when there has been a conviction under § 18.1-323 of the Code can the money so seized be forfeited and half thereof paid to the person making the
seizure. I am, therefore, of the opinion that money seized in an arrest and conviction made under § 18.1-316 of the Code cannot be confiscated and one-half thereof cannot be paid to the person making the seizure.

LOTTERIES—What Constitutes.

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney for Prince William County

I have your letters of September 11 and 16, 1964, in regard to a referral sales scheme. It is my understanding from the enclosures you sent that this scheme works substantially as follows:

A salesman calls upon a prospect advising that he is promoting the advertisement for the sale of a product. If the sales contract is signed for the purchase of this article and a list given of names of people who the customer thinks might be interested in this product, the customer will be given a specified amount for each sale made to persons on such list, and in this way it might be possible that the product bought would not have to be paid for—also possibly getting money over and above the cost of the product.

The case of Maugh v. Porter, 157 Va. 415, held that the essentials of a lottery prohibited by § 18.1-340 of the Code of Virginia are consideration, prize and chance. What constitutes consideration has been modified by § 18.1-340.1. However, in this case, consideration is unquestioned as an actual sales contract for the article to be purchased is executed. The prize offered is the specified amount on each sale made to persons whose names are given by the purchaser of the product. The opportunity to obtain reimbursement in whole or in part depends on whether or not any person on the given list will actually make a purchase. This depends on the efforts and ability of the salesman making sales and not on mere chance.

The lottery statutes being criminal must be strictly construed. On the whole, therefore, although the matter is not free from doubt, I am of the opinion this does not constitute a lottery under the Virginia statutes.

MARRIAGE—Records-License issued under assumed names—May not be changed except by court order.

HONORABLE H. BRUCE GREEN
Clerk of Arlington County

This is in reply to your letter of December 2, 1964, relating to Franz Roman Oldenberg and Irmgard M. Heuschel, who were married on March 1, 1961, under a marriage license issued by your office. For the reasons shown by an affidavit in your office this marriage license was issued to these people under assumed names. They have requested you to change your records so as to show the true names of the parties. You have requested my advice as to whether or not you have authority to comply with such a request.
In my opinion, you have no such authority. There is no statute authorizing such action.

However, under § 20-96 of the Code, the circuit court of your county has jurisdiction over suits for annulling or affirming marriages. It occurs to me that it will be necessary for these parties to institute a suit stating the facts and asking the court to issue a decree affirming their marriage and requesting the court to direct the clerk to make such entry in his records as will reveal the true facts.

MARRIAGE—Records—Names which appear thereon may not be changed except by court order.

December 3, 1964

HONORABLE H. BRUCE GREEN
Clerk of Arlington County

This is in reply to your letter of December 2, 1964, relating to John Paul Grant and wife. These persons obtained a marriage license in your office under the names of John Paul Garcia and Pamela Ann Faram Garcia. By decree entered in a Florida court, certified copy of which has been furnished to you, their names were changed and they have requested you to change the records in your office accordingly and also to furnish a certificate to that effect to the Department of Vital Statistics in Richmond.

I am unable to find any statute which would authorize you to make this change based upon a decree entered in another State.

In another opinion written to you today I have referred to § 20-96 of the Code. Under this section these people could petition the court to affirm the fact they have been married under prior names and the court could request you to correct the records and make the certificate.

I return herewith the papers which you enclosed with your letter.

MENTAL HYGIENE AND HOSPITALS—Commitment Costs and Fees—Collection.

COSTS—Commitment Proceeding—How collected.

August 19, 1964

HONORABLE E. M. JONES
Clerk of Rappahannock County

This is to acknowledge receipt of your letter of August 6, 1964, in regard to the interpretation of § 37-75 of the Code of Virginia (1950), as amended. I shall answer your specific questions seriatim.

"1. Who collects these cost and when should they be collected?"

Certain statutory fees (due physicians and the attorney representing the person) and costs are imposed by various sections of Article 1, Chapter 3, Title 37, Code of Virginia (1950), as amended, when hearings are held under said
article to determine whether a person is mentally-ill, epileptic or inebriate, etc. The presiding officer (judge or justice) over the commission has specified duties. I am unable to find any statutory authority which imposes upon such an officer the duty to collect the fees and costs imposed by the statute, and I believe it would be unwise for him to do so on a voluntary basis. The report of the commission made pursuant to § 37-66 should contain a statement of the persons entitled to the fees and the amount thereof and also the costs, if any. The clerk of the court with whom the report of the commission is filed pursuant to § 37-69 should furnish the county treasurer or other county official charged with the duty of collecting debts due the county with a certificate containing the necessary data. This data is the basis of payment of the same by the county, city or State, as the case may be, and it is also the basis to charge the person found subject to commitment, his estate or the person initiating the proceedings. These costs and fees should be collected by the county, city or State official charged with the duty of collecting debts due the county, city or State. In the counties, this would be the county treasurer unless some other official is designated to perform this duty.

"2. How is the state billed when a non-resident is committed?"

The presiding official over the commitment proceedings should certify the order of commitment upon such forms as the State Comptroller may provide, whether or not such presiding officer be the judge of a court of record, a trial justice or a special justice appointed by § 37-61.2 of the Code. Criminal Form 4 now being utilized would appear to be appropriate only when the expenses are being certified pursuant to § 19.1-233 of the Code. (Opinions of the Attorney General (1961-1962), p. 157.)

"3. Is the responsibility for payment of cost in the order of the listing in the Code; i.e.—1st, the person examined; 2nd, the estate of the person examined; and 3rd, the person at whose request the proceedings were instituted?"

This question is answered in the affirmative. See, § 37-75 of the Code.

"4. At what point, if any, is the cost docketed against the responsible person in the Judgment Lien Docket and against whom shall it be charged?"

I am unable to find any statutory authority on the part of the presiding officer of such commitment proceedings to enter judgment for costs; that is, expenses incurred by the city, county or State, in connection therewith. If the treasurer or fiscal officer of the county or city fails to collect the expenses incurred by the city or county in any proceeding under Article 1, Chapter 3, Title 37, Code of Virginia, then the claim should be reduced to judgment in an appropriate proceeding. This judgment is then docketed in the Judgment Lien Docket and charged against the defendant named therein.
MENTAL HYGIENE AND HOSPITALS—Employees—May be paid salary by Virginia where jointly operated health clinic located in Tennessee.

January 4, 1965

HONORABLE HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

This is in answer to your letter of December 7, 1964. It appears that for some time the Bristol Mental Health Clinic has been housed in the Nurses' Home of the Bristol Memorial Hospital, this space being located in Virginia. It further appears that the clinic is a joint project of Tennessee and Virginia, there being agreements between the two states as to its operation. You inform us that there is now to be an expansion of the Bristol Memorial Hospital, with Hill-Burton funds, and that new spaces in the hospital can be made available for the clinic, these new spaces being physically located in Tennessee. You ask whether or not the salaries of the Virginia employees who will work in the new clinic located in Tennessee can be paid by Virginia.

We find nothing which prohibits the payment of the salaries of the Virginia employees.


INEBRIATES—Commitment to State Hospital for Treatment—How accomplished.

August 4, 1964

HONORABLE HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

This will acknowledge receipt of your letter of July 15, 1964, with which you enclosed a letter from Dr. James M. Druff, Superintendent of the Western State Hospital, making inquiry as to the legality of commitments of chronic alcoholics. I quote from Dr. Druff's letter:

"Quite frequently our chronic alcoholics who have had more than two commitments are returned to us under the commitment of the mentally ill. After they are evaluated and found to be not mentally ill with a diagnosis of Sociopathic Personality Disturbance, Alcohol Addiction, we again discharge them. The question has arisen concerning the legality of the hospital keeping a patient confined under this type of commitment with the diagnosis of alcoholism. Is it illegal to maintain an alcoholic in the hospital under regular commitment as mentally ill?

"At the present time we have such a case that the mother would like to have a longer period of hospitalization, but we are questioning whether or not we can legally retain this man in the hospital under his present commitment."

I assume the person concerned was committed as mentally ill under §§ 37-61 and 37-67.1 of the Code of Virginia, and was thereafter discharged under § 37-94 of said Code. This being the situation, he must again be committed under the procedure outlined in Article 1, Chapter 3, Title 37 (§§ 37-61, et seq.) before he may be lawfully admitted to or retained in a State institution for treatment. If he is mentally ill, he should not be committed as an inebriate.
Section 37-154 of the Code, which provided that when a person became dangerous to the public or to himself, etc., through the use of alcoholic liquors he could have been committed to a State hospital as an inebriate and treated until cured, was repealed by Chapter 640, Acts of Assembly (1964). However, this repeal does not prevent such a person being committed to a State hospital under § 37-61, *et seq.*, as an inebriate.

I am of the opinion that an alcoholic who has been committed as mentally ill cannot be retained in a State hospital solely as an inebriate, but he would have to be committed as an inebriate under § 37-61, *et seq.*, before he could receive treatment at a State hospital for his alcoholic condition.

Articles 2, 3 and 4 of Chapter 3, Title 37, are not applicable in cases such as you have presented.

MENTAL HYGIENE AND HOSPITALS—Sterilization—Procedure where inmate committed to institution.

STERILIZATION—Inmates of Institutions—Procedure to be followed.

July 23, 1964

DR. HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

This is in reply to your letter of July 21, 1964, relating to the above named patient at Western State Hospital. You attached a letter from Dr. James H. Druff, Superintendent, from which I quote as follows:

"... Inadvertently this patient was referred for consideration of sterilization prior to referral for regular commitment. Regular commitment as a mental defective was signed by the Judge on June 12, 1964. Service of the sterilization papers was made prior to June 10th for the Sterilization Board Meeting on July 10th. As soon as it was determined that this boy was not under regular commitment as a mental defective, Miss Lantz, the Statistician, was contacted and she stated it was her feeling this would be legal provided the hearing was not held prior to regular commitment, but to inform the member of the State Hospital Board and the Guardian ad litem for their opinion. Mr. Williams was given this information by telephone prior to the date of the Sterilization Board Meeting and he stated that as far as he was concerned it would be in order. At the time of the Sterilization Board Meeting on July 10th, the Guardian ad litem stated he felt for the protection of the hospital and the patient there should be a ruling by the Attorney General. The statute does not state a person must be under commitment, but that they must be an inmate and this person was an inmate. Mr. Williams ordered that sexual sterilization be performed, but the signature of the order of sterilization would be deferred until the ruling had been received by us."

As I understand Dr. Druff's letter, this patient had not been committed to the hospital at the time the petition and copy of notice was served upon him. Under § 37-234 it is mandatory that a copy of such petition and notice of the place and time of the hearing be served upon the inmate and also upon his guardian or other person mentioned in § 37-235. "Inmate" is defined in § 37-231.1 as follows:
For the purposes of this chapter the term 'inmate' shall include any person, male or female, who has been duly committed to and admitted to any of the institutions named in § 37-231, regardless of whether such person is confined within any such institution or furloughed therefrom for purposes incident to any hearing provided for under this chapter." (Italics supplied.)

In my opinion, if this patient had not been duly committed to the hospital at the time the papers were served upon him, he was not an inmate for the purposes of Chapter 9, Title 37.

Statutes of the nature under consideration here must be followed strictly. Therefore, in my opinion, before the Sterilization Board may consider the matter, service of the petition and notice should be again served upon the patient; and such service must be made not less than thirty days before the matter is presented to such Board.

MENTALLY ILL—Commitment—Arrest—How accomplished under warrant.

WARRANTS—Arrest of Mentally Ill—Authority to serve after issuance.

ARREST—Mentally Ill—Authority to make.

December 31, 1964

HONORABLE KERMIT E. ALLMAN
City Sergeant of Roanoke

This is in answer to your letter of December 17, 1964, the reply thereto being withheld until further information was secured from you in your letter of December 21. In your letter of December 17, you state in part:

"I find it necessary to ask your opinion and advice regarding questions raised in the Municipal Court for the City of Roanoke concerning jurisdiction of authority for the arrest of persons on warrants issued by a Judge of the Municipal Court pursuant to a petition for persons alleged to be mentally ill, inebriates, drug addicts, epileptics, etc."

You raise two questions which will be answered seriatim. I quote further from your letter:

"One question that we would like to resolve is whether or not we have any authority to forward this type of warrant to any law enforcement officer in any other jurisdiction of the State of Virginia if the person wanted absconds from this City before he can be apprehended. If the wanted person absconds from the City of Roanoke on, before or after the issuance of the warrant we would like to know if the wanted person can be arrested anywhere in the State, and the statutory limitation as to the length of time that the warrant could be served after issuance."

Section 37-61, Code of Virginia (1950), as amended, is as follows:

"Any circuit or corporation judge, or any justice, as defined in § 37-1.1, when any person in his county or city is alleged to be mentally ill, epileptic, mentally deficient or inebriate, upon the written complaint
and information of any responsible person, shall issue his warrant, ordering such person to be brought before him. The judge or justice may issue the warrant on his own motion."

Unless the officer to whom the warrant is directed has the authority to arrest the person suspected of being mentally-ill, etc., and bring him before the judge or justice, the section would be meaningless. Section 37-97.1 of the said Code authorizes arrest of such a person, when a warrant has been issued under the provisions of Section 37-61, by officers without having the warrant in their possession under certain circumstances. This office has held that under § 37-97.1, the sheriff of a county in which a person (who was physically in the city when the warrant was issued and leaves the city before the warrant is served) is found may take the person in custody and return him to the city in which the warrant is issued, delivering him before the judge or justice. See, opinion expressed in a letter to the Honorable Harry N. Phillips, Jr., dated October 14, 1959, (Opinions of the Attorney General (1959-1960) p. 251), a copy of which is enclosed.

I am therefore of the opinion that this type of warrant issued under the circumstances disclosed by you may be forwarded to any officer in the State authorized to make arrests for execution and the person returned to the jurisdiction in which the warrant was issued.

I know of no statutory limitation as to the length of time that the warrant could be served after issuance.

You further state in your letter:

"Another question that could be raised is that if such wanted person is arrested in another jurisdiction in the State I would like to know the authority for Deputies to be reimbursed for travel and other expenses to return such persons."

Section 37-75 of the Code, which deals with the fees and expenses in such cases, provides in part:

"The officer making the arrest and summoning the commission and witnesses shall receive the same fees as are allowed for like services in a felony case."

and

"All expenses incurred, including the fees, attendance and mileage aforesaid, shall be paid by the county or city in which the person was residing . . . ."

Sections 14.1-105(5) and 14.1-111 provide for the payment of mileage in carrying a prisoner to jail.

I am of the opinion that the officers effecting the return of the wanted person are entitled to reimbursement for travel and other expenses within the limits prescribed by law.
MENTALLY ILL—Commitment—Authority to commit in case of person charged with felony.

MENTAL HYGIENE AND HOSPITALS—Southwestern State Hospital—Designated as hospital for commitment of person charged with felony.

HONORABLE WILBUR H. RYLAND
Special Justice for the City of Richmond

March 17, 1965

This is to acknowledge receipt of your letter of March 11, 1965, in which you state in part:

"I am a special justice for the City of Richmond appointed in conformity with Sec. 37-61.2 of the Code of Virginia.

"A white man is under indictment in this city for rape, but has not yet been tried. May the judge of the court of record where the indictment was found, by his order, refer this man to me, or any other justice or judge, for the purpose of committing him to Eastern State Hospital for observation as to his mental condition?

"In any event can he be committed to any hospital for the above purpose except Southwestern State Hospital?"

In accordance with § 19.1-227, Code of Virginia (1950), as amended, after a person has been charged with a felony, only the judge of a court of record having jurisdiction to try the case has authority to commit the person suspected of being insane or feebleminded to a hospital or other institution for the mentally-ill.

Under the provisions of § 19.1-228 of said Code, at any time prior to arraignment of any person charged with crime (misdemeanor or felony), if the Court, Attorney for the Commonwealth or Counsel for the accused has reason to believe that the confinement of the accused in a hospital for the insane is necessary for proper care and observation in order to determine whether such person is mentally competent to stand trial, the Court is authorized to commit such person to the appropriate State hospital for the insane. Under the 1954 amendment to this section, courts not of record are authorized to act in such cases.

I have been unable to find any statute which would permit either the judge of a court of record or the judge of a court not of record to delegate the authority vested in them under either § 19.1-227 or § 19.1-228 to any officer, including a special justice appointed under § 37-61.2 of the Code. Therefore, the first question raised by you is answered in the negative.

Although no specific hospital is mentioned in § 19.1-228, I believe that this section and § 19.1-228 must be read together and § 19.1-228 designates the hospital.

MENTALLY ILL—Commitment—Two physicians must be licensed by State of Virginia under § 37-61.2.

HONORABLE E. SUMMERS SHEFFEY
Commonwealth's Attorney for Washington County

October 5, 1964

This is in reply to your letter of October 2, 1964, which reads as follows:
"I am writing for your opinion as to the interpretation of Section 37-103 of the Code of Virginia, as amended.

"My question is whether or not the two licensed physicians mentioned in that section must necessarily be licensed by the State of Virginia. It is my position that as long as the physicians supply an affidavit of being duly licensed in a sister state, that is substantial compliance with the statute and said certificates should be honored by the Superintendent of a Virginia State Hospital or Colony. I believe this is a reasonable interpretation, especially in view of the fact that the 1950 amendment deleted the words 'and reputable' formerly appearing before 'physicians.'"

The requirement that the certificate under § 37-103 shall be by two "licensed physicians" is the same as is contained in § 37-61.2 of the Code. On June 11, 1957, this office had occasion to pass upon the question as to whether or not the physicians must be licensed by the State of Virginia under provisions of § 37-61.2 and we held that this was necessary. You will find this opinion in Report of Attorney General (1956-57), at p. 137.

I feel that this opinion of June 11, 1957, is applicable to the provisions of § 37-103.

MENTALLY ILL—Commitment Hearings—Justice of peace—Has no authority to conduct.

JUSTICE OF PEACE—Commitment Hearings—Has no authority to conduct.

March 24, 1965

HONORABLE L. E. LUTTRELL
Justice of the Peace for Town of Kilmarnock

This will acknowledge receipt of your letter of March 22, 1965, which reads as follows:

"I am a justice of the peace for the County of Lancaster serving in this capacity since my appointment on June 21, 1961 by the Honorable Daniel Weymouth, Judge of the Circuit Court of Lancaster County. I was elected in 1963 to serve in the same capacity from January 1, 1964 to the last day of 1967.

"On January 15, 1964 I was appointed to assist the Lancaster County Court Judge in lunacy hearings as the County Court Judge is a non-resident of Lancaster County, Virginia. This appointment was made by the Honorable Daniel Weymouth, Judge of the Circuit Court of Lancaster County as per Title 37 of the Code of Virginia of 1950, as amended.

"In 1964 amendments to Title 37-61 deleted the former second paragraph, authorizing the circuit court judge in any county in which no trial justice resides to appoint a justice of the peace to assist him in carrying out his duties under this title.

"I would appreciate an opinion from your office as to my eligibility, based on my January 15, 1964 appointment, in assisting in lunacy hearings in the County of Lancaster."

Since the effective date of the amendments made to § 37-61 of the Code by Chapters 444, 483 and 640 of the Acts of 1964, a justice of the peace may not
be appointed and serve for the purpose of assisting the judge of the circuit court in carrying out the duties and powers conferred under Title 37. In my opinion, your authority under the appointment made in January, 1964, ceased upon the effective date of the amendments.

You will note that § 37-61 now provides any justice as defined in § 37-1.1 may issue warrants under this Title. By reference to § 37-1.1, it will be noted that a justice of the peace is not included in the definition.

MOTOR VEHICLES—Assessment Fee—Chargeable for violation of license ordinance of town.

CRIMINAL PROCEDURE—Assessment Fee—Chargeable upon conviction for violation of town license ordinance.

HONORABLE MARK D. WOODWARD
Police Justice of the Town of Shenandoah

September 1, 1964

This is in reply to your letter of August 26, 1964, in which you request my opinion as to whether a conviction for failure to obtain a Town of Shenandoah motor vehicle license tag is reportable to the Division of Motor Vehicles so that the additional five dollar fee is chargeable in the costs.

The five dollar fee, to which you refer, was prescribed by Chapter 289, Acts of Assembly of 1964, which is now embodied in Section 14.1-200.1, Code of Virginia (1950), as amended, the pertinent portion of which reads as follows:

"Whenever a person is convicted of a violation of any provision of a State law or local ordinance and such conviction is required to be reported to the Division of Motor Vehicles there shall be added to all other costs, penalties and fines assessed or assessable against the defendant, the sum of five dollars * * *" (Emphasis supplied)

Section 46.1-413, Code of Virginia (1950), as amended, requires the courts to report to the Division of Motor Vehicles all convictions of the charges described in Section 46.1-412, subdivision (a) or (b), Code of Virginia (1950), as amended. Subdivision (a) (2 of the latter named section includes "A violation of any ordinance of any county, city or town pertaining to the operator or operation of any motor vehicles except parking regulations." These two sections require the reporting of all convictions based on violations pertaining to the operator or operation of a motor vehicle, with the one exception of parking regulations. Considering these sections in conjunction with the requirements of Section 14.1-200.1, as quoted herein, I am of the opinion that the five dollar fee, required by the latter, is chargeable in the situation you describe and I shall answer your question in the affirmative.
In response to your letter of July 28, 1964, there is enclosed a form devised for bilateral reciprocal agreements, which, in accordance with your request, has been adapted from the Multistate Reciprocal Agreement now being used, but with certain changes, deletions and additions, among which are the following:

The headings used in the Multistate Agreement have been utilized, however, with certain omissions and rearrangement. In this respect Definitions have been placed second, to follow Purpose and Principle and precede Applicability.

In the definition of “place of business” the word “related” has been inserted to show that the employee must perform duties related to the carrier’s business. Certain deletions have been made in the definition of “base” for the purpose of making it more definite. Paragraph 2 thereunder has been omitted as it appears largely meaningless and unresponsive to practical application. Paragraphs 3 and 4 thereunder have been removed from Section III and placed in Section V, Miscellaneous Provisions, as they are not a part of the Definitions. Also, paragraph 4 has been amended to delete reference to questioning the base, as the language used seemed to weaken rather than to strengthen the position of the authorities.

The definition of “properly registered or licensed” has been changed under C, paragraph 2, to substitute the term “based at” for the language appearing in the Multistate Agreement. Paragraph 3 thereunder, which appears vague and indefinite, has been omitted. Paragraph 4 thereunder, has been revised and moved to Section V, where it is placed under Miscellaneous Provisions. Under the latter, paragraphs E, 2 and 3 have been omitted, and in addition to the paragraphs transferred thereto, as previously mentioned, new provisions have been included under F, G and H. The purpose of these additional provisions is to place upon owners and operators a clear cut responsibility of having their vehicles properly registered and licensed with the Division of Motor Vehicles as well as registered with the Corporation Commission and to give effect to recent legislation in this field.

Certain deletions and substitutions of language have been made in Section IV, General Provisions, to adapt these provisions to use in a bilateral agreement. The phrase “over a fixed route or schedule” has been deleted since it appears to indicate passenger bus service of a type not generally included under reciprocity. The provision as to passenger vehicles has been retained, in substance, and I might add that this places no limit on the operation of such vehicles.

Section VI, Exceptions, has been changed to include the requirement of registration with the State Corporation Commission and payment of motor fuel tax based on use of Virginia highways and the gross receipts road tax.

All remaining portions of the Multistate Agreement have been discarded as not applicable or appropriate for a bilateral agreement.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Blood Analysis—Implied consent—Accused has period of only 72 hours after receipt of sample by chief police officer to direct such officer to mail sample to laboratory of accused's choice.

CRIMINAL PROCEDURE—Blood Analysis—Implied consent—Accused has period of only 72 hours after receipt of sample by chief police officer to direct such officer to mail sample to laboratory of accused's choice.

HONORABLE W. BYRON KEELING
Commonwealth's Attorney for Charlotte County

March 17, 1965

I am in receipt of your letter of March 16, 1965, in which you present the following situation and inquiry arising under the amended Virginia "implied consent" law:

"Assuming that the accused in a drunk driving case submitted to the blood test but had not requested that his sample be sent to a private laboratory for a test until after the 72 hour period had passed, but afterwards requested the officer to forward the blood sample to a private laboratory. If the officer refused under these circumstances, what effect should this have upon the outcome of the case? In other words, does the fact that the accused had waited until after the 72 hour period to request a test of his blood sample affect the decision of the Trial Court?"

Pertinent to a consideration of the situation you describe are the following provisions of § 18.1-55.1(dl) and (d4) of the Virginia Code which respectively prescribe:

"(dl) . . . The officer having the second container, after delivery of the form referred to in the preceding sentence (unless at that time directed by the accused in writing on such form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so) shall deliver said second container to the chief police officer of the county, city or town in which the case will be heard, and the chief police officer who receives the same shall keep it in his possession for a period of seventy-two (72) hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer having possession of the second container to mail it to the laboratory of the accused's choice chosen from the approved list." (Italics supplied).

"(d4) If the chief police officer having possession of the second container is not directed as herein provided to mail it within seventy-two (72) hours after receiving said container then said officer shall destroy same." (Italics supplied).

I believe it is manifest that the statute under consideration contemplates that an accused shall have a period of only 72 hours after receipt by the chief police officer of the sample specified in the above-quoted provisions within which to direct such officer to mail the sample to a laboratory of the accused's choice. This view would appear to be confirmed by the language of subparagraph (d4) which directs the chief police officer to destroy the sample if no proper request is made within 72 hours of his receipt of the same. I am therefore of the opinion that the refusal of the chief police officer (of the county, city or town in which the case will be heard) to forward such sample to a private laboratory of the accused's choice in those instances in which the accused does not make a proper
request within 72 hours as specified in the statute would have no effect upon the
decision of the trial court or the outcome of the case.

MOTOR VEHICLES—Blood Analysis—Implied consent—Effects of failure to
prove sterilization of equipment.

CRIMINAL PROCEDURE—Evidence—Blood analysis—Effects of failure to
prove sterilization of equipment.

HONORABLE CATESBY GRAHAM JONES, JR.
Commonwealth's Attorney for Gloucester County

November 19, 1964

I am in receipt of your letter of November 4, 1964, in which you call atten-
tion to the recent opinion of this office, dated October 29, 1964, to the Honorable
William A. Jones, Commonwealth's Attorney for Richmond County, and present
several questions arising from a hypothetical case outlined in your communica-
tion.

In the situation you describe, an individual is charged with operating a motor
vehicle while under the influence of intoxicants after July 1, 1964—the effective
date of the new Virginia "implied consent" law embodied in § 18.1-55.1 of the
Virginia Code. The physician who withdrew the accused's blood sample testifies
that he used soap and water to cleanse the accused's arm and used instruments
sterilized in the physician's steam sterilizer. The physician also states that he did
not personally sterilize the instruments, but that the practice was for the nurse
to sterilize the instruments and leave them in the sterilizer.

Relevant to a consideration of the various questions posed in your letter are
two prior opinions of this office addressed, respectively, to the Honorable W. D.
Reams, Jr., Commonwealth's Attorney for Culpeper County (June 22, 1964),
and the previously mentioned opinion to the Honorable William A. Jones, Com-
monwealth's Attorney for Richmond County (October 29, 1964). The questions
you present will be considered seriatim in light of these opinions.

Question One: "Is the mere failure to prove sterilization so im-
portant that the result of the test could not be admitted in evidence
without positive proof of sterilization?"

No. Section 18.1-55.1(s) specifically states that even a failure to comply with
the statutory procedure for taking an accused's blood sample shall not of itself
be grounds for finding an accused not guilty, but shall go to the weight of the
evidence. See opinion of June 22, 1964, to the Honorable W. D. Reams, Jr.

Question Two: "Does failure to prove sterilization merely go to the
weight of the evidence only as set forth in 18.1-55.1(s)?"

Yes. See answer to Question One above and answer to Question III of the
opinion dated October 29, 1964, to the Honorable William A. Jones.

Question Three: "Can failure to prove sterilization be considered
by the jury at all, unless evidence is introduced to show noncompliance
and that as a result his rights were prejudiced?"

Yes. A failure by the prosecution to prove positively that the instruments used
were sterilized in accordance with the statutory procedure goes to the weight of the evidence and may be considered by the jury for this purpose, even if the defendant does not show by his own evidence that his rights were, in fact, prejudiced by noncompliance with the statute.

Question Four: "Does failure to sterilize per se prejudice his rights?"

No. See § 18.1-55.1(s) of the Virginia Code and answers to Questions One and Two above.

Question Five: "Assume there was no proof of sterilization, but that the physician, as an expert, testified that the syringe was 'chemically clean' and even if not sterilized, the result would not be affected by non-sterilization. Would an instruction on lack of sterilization be in order at all unless evidence was shown that his rights were prejudiced?"

Yes. See answer to Question Three above.

Question Six: "Assume that no physician or nurse testified at all. Could the results of the blood test be presented to the jury, and if so, could defendant offer an instruction on the weight of the evidence if he did not show by his own evidence that lack of sterilization prejudiced his rights?"

Both aspects of this question are answered in the affirmative. The admissibility of the certificate or certificates showing the results of the blood test in such a situation was expressly considered in the opinion of June 22, 1964, to the Honorable W. D. Reams, Jr., while the question of the weight of the evidence has been considered in the answers to Questions Three and Five above.

MOTOR VEHICLES—Blood Analysis—Implied consent—Fee allowed for withdrawing blood sample.

FEES—Blood Analysis—Allowed for withdrawing blood sample.

HONORABLE KENNETH P. ASBURY
Commonwealth’s Attorney for Wise County

March 15, 1965

This will reply to your letter of March 3, 1965, in which you call my attention to § 18.1-55.1(h) of the Virginia Code and inquire whether or not a court may order an allowance of $7.50 to be paid out of the appropriation for criminal charges to a person withdrawing a blood sample in accordance with the amended Virginia "implied consent" law.

In pertinent part, § 18.1-55.1(h) of the Virginia Code prescribes:

"A fee not exceeding five dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges." (Italics supplied).

In light of the language italicized above, I am of the opinion that your inquiry must be answered in the negative. Prior to the amendment of the above-quoted provision of the present Virginia "implied consent" law at the regular
session of the General Assembly in 1964, the comparable provision of §§ 18-75.1 and 18.1-55 of the Virginia Code provided that an "amount" not to exceed five dollars should be "taxed as a part of the costs of the case." As the language of these now repealed statutes did not direct the allowance of a particular fee to be paid out of the State treasury to the person withdrawing a blood sample, this office ruled that a court might allow a "reasonable amount" for such service to be paid out of the appropriation for criminal charges pursuant to § 19-291 (now 19.1-315) of the Virginia Code. See, Report of the Attorney General (1956-1957) p. 66. However, § 18.1-55.1(h) now prescribes a specific fee to be paid out of the State treasury to the person withdrawing a blood sample, and it would appear that § 19.1-315 of the Virginia Code would no longer be applicable. I am therefore of the opinion that a court may not order any amount to be paid out of the appropriation for criminal charges for the service in question in excess of the fee specifically prescribed in § 18.1-55.1(h) of the Virginia Code.

MOTOR VEHICLES—Blood Analysis—Implied consent—Use of chemically clean sterile disposable syringes in taking sample.

October 14, 1964

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney for the City of Waynesboro

I am in receipt of your letter of October 8, 1964, in which you make inquiry concerning the effect of certain provisions of § 18.1-55.1 of the Virginia Code—generally known as the amended Virginia "implied consent" law—upon the recent decision of the Supreme Court of Appeals of Virginia in Kyhl v. Commonwealth, 205 Va. 240.

In this connection, it is clear that § 18.1-55.1(d) of the Virginia Code permits the utilization of "chemically clean sterile disposable syringes" to withdraw an accused's blood sample; however, the problem (as in the Kyhl case) of proving that a pre-packaged disposable syringe was, in fact, chemically clean and sterile would remain. Notwithstanding, it is clear from the language of § 19.1-55(s) of the Virginia Code that the use of a pre-packaged disposable syringe—without accompanying proof that such syringe was chemically clean and sterile—would not of itself be ground for finding an accused not guilty but would merely go to the weight of the evidence. Of course, under the proviso contained in the concluding clause of § 18.1-55(s), the accused would be free to introduce evidence to show non-compliance with the prescribed statutory procedure and that, as a result, his rights were prejudiced.

MOTOR VEHICLES—Blood Analysis—Implied consent—When analysis of one sample admissible in evidence.

CRIMINAL PROCEDURE—Evidence—Blood analysis—When analysis of one sample admissible in evidence.

August 28, 1964

HONORABLE JOHN P. ALDERMAN
Commonwealth's Attorney for Carroll County

I am in receipt of your letter of August 21, 1964, in which you present the following situation and inquiry:
A defendant is charged with driving while under the influence of intoxicants and for the purposes of this question it is conceded that the evidence against him is sufficient for the court to determine that the accused was driving and was legally intoxicated at the time of the driving. Two blood samples were taken from the accused, and no question is raised as to the regularity of the taking of the samples. The Commonwealth's sample was sent to the medical examiner, tested and properly returned. The accused's sample was sent to a qualified laboratory which was unable to test the blood to determine its alcoholic content because 'specimen unsuitable for alcohol determination because of large clots present.'

The question raised is whether or not, based on the foregoing stipulations, the court should:

1. Admit the Commonwealth's blood test results into the evidence;
2. not admit the results of the test on the Commonwealth's sample and proceed to determine the case on the other evidence (which by stipulation would be sufficient to warrant conviction) or
3. dismiss the charge of 'drunken driving.'

Pertinent to the resolution of the question you present are certain provisions of § 18.1-55.1 of the Virginia Code, generally known as the amended Virginia "implied consent" law, particularly § 18.1-55.1(i) and (s) which respectively provide:

"(i) In any trial for a violation of § 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence . . . ."

"(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show non-compliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced." (Italics supplied).

I am of the opinion that the court should admit in evidence the certificate showing the results of the analysis of the accused's blood sample made by the Office of the Chief Medical Examiner. It is clear from the language of § 18.1-55.1(i) italicized above that the existing Virginia "implied consent" law recognizes that the results of an analysis of only one blood sample may be available at the trial of the accused. Moreover, the existing statute does not contain any provision similar to that formerly embraced in § 18.1-55(f) requiring dismissal of a prosecution for driving under the influence of intoxicants in those instances in which an accused submits to a blood test and thereafter, through no fault of his own, is unable to obtain the results of an analysis of his blood sample from a private laboratory of his choice. On the contrary, it is manifest from the language of § 18.1-55.1(s) that even a failure to comply with one or more of the steps set forth in the present statute relating to the taking, handling, identification and disposition of a
blood sample is not, per se, ground for dismissing a prosecution, but merely goes "to the weight of the evidence." Indeed, in the situation you describe it would appear that there was full compliance with all relevant provisions of the statute in question.

I am therefore of the opinion that the court should not dismiss the prosecution or exclude the certificate of the Chief Medical Examiner, but should admit such certificate as evidence of the blood alcohol content of the accused at the time of the alleged offense.

MOTOR VEHICLES—Blood Analysis—Implied consent—Where accused refuses to take blood test and later changes mind.

CRIMINAL PROCEDURE—Blood Analysis—Implied consent—Where accused refuses to take blood test and later changes mind.

HONORABLE JAMES H. JONES
Judge, Wythe County Court

March 16, 1965

I am in receipt of your letter of March 1, 1965, in which you call my attention to § 18.1-55.1 of the Virginia Code—generally known as the amended Virginia "implied consent" law—and request my opinion upon the proper disposition of a situation arising thereunder which you describe in the following manner:

"The defendant was arrested, advised as to his right to take a blood test, at a local hospital; he at first agreed to take a blood test, then decided he would not, whereupon he was taken from the hospital to the jail. Later at the jail, upon being again advised as to the law concerning the blood test, he then requested he be given a blood test which was refused him.

"All of the above took place within approximately an hour from the time of the arrest."

Pertinent in this connection are §§ 18.1-55.1(c) and (s) of the Virginia Code which respectively prescribe:

"(c) If a person after being arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this State shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of a sample of his blood for such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia (hereinafter referred to as Chief Medical Examiner), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same."
"(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show non-compliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced." (Italics supplied).

I believe it is manifest from the language of subparagraph (c) quoted above that the statute under consideration contemplates that a person arrested for operating a motor vehicle while under the influence of intoxicants shall be advised by a committing magistrate of the requirements of the Virginia "implied consent" law and the penalty for refusal before an accused's refusal to submit to a blood test becomes final for the purpose of charging him with unreasonable refusal to so submit in violation of § 18.1-55.1 of the Virginia Code as specified in subparagraph (j) of the statute. However, with respect to a charge of operating a motor vehicle while under the influence of intoxicants in violation of § 18.1-54 of the Virginia Code, or of a similar ordinance of any county, city or town, I am of the opinion that the failure of the arresting officer to afford an accused the opportunity to submit to a blood test after the accused has been properly advised by a committing magistrate would not, per se, be ground for dismissing such prosecution. Under the language of the terminal clause of subparagraph (s) of the statute it would, of course, be possible for the accused to show that such failure resulted in his being deprived of evidence which might have resulted in his acquittal and that his rights were thus prejudiced as a result of noncompliance with the prescribed statutory procedure. In this connection, I am forwarding to you a copy of a previous opinion of this office, dated October 29, 1964, to the Honorable William A. Jones, Commonwealth's Attorney for Richmond County, in which a situation substantially similar to that which you present was considered and discussed.

MOTOR VEHICLES—Convictions Based on Violation of Article 8 of Title 56—Required to be reported to Division of Motor Vehicles.

COURTS—Record of Conviction—Must be reported to Division of Motor Vehicles whenever violation pertains to the operator or operation of motor vehicle.

HONORABLE A. A. RUCKER
Commonwealth's Attorney for Bedford County

July 13, 1964

This is in reply to your letter of July 1, 1964, in which you ask my opinion as to whether or not "violations of Section 56-304 and following sections (Article 8 of Title 56) are required to be reported by the provisions of Section 46.1-413." You state that you have a copy of my letter of June 17, 1964, to Honorable Kenneth P. Asbury relating to the collection of the five dollar fee under Chapter 289, Acts of Assembly of 1964, whenever the conviction is required to be so reported. As pointed out in that letter, Sections 46.1-412 and 46.1-413, Code of Virginia (1950), as amended, require the reporting of any conviction based upon "a violation of any law of this State pertaining to the operator or operation of a motor vehicle."
Under Article 8 of Title 56, Code of Virginia (1950), as amended, Sections 56-304 and 56-304.1, require that classification plates or identification markers be obtained from the Corporation Commission before any motor vehicle is operated for compensation on any highway in this State. Section 56-304.2 requires an identification marker for certain motor vehicles operated for the transportation not for compensation of property on any such highway. These sections, once included in the Motor Vehicle Code, are now classified as related statutes, just as are the laws pertaining to driving under the influence of alcohol or any narcotic drug.

The reporting statutes (Sections 46.1-412 and 46.1-413) are by no means confined solely to violations of the motor vehicle laws found in Title 46.1, since they relate to any law of this State pertaining to the operator or operation of a motor vehicle. Any person violating Article 8 of Title 56 is subject to the punishment prescribed by Section 56-304.11. The latter section states that "any person who operates or causes to be operated" any motor vehicle without first complying with the requirements of Article 8, shall be guilty of a misdemeanor. There is no violation unless the vehicle is operated. It follows that any conviction, thereunder, must be based upon a violation of a law of this State pertaining to the operator or operation of a motor vehicle. Accordingly, it is my opinion that a conviction for a violation of Article 8 of Title 56 (Sections 56-304 et sequel) is required to be reported and I shall answer your question in the affirmative.

MOTOR VEHICLES—Costs Assessed Under § 14.1-200.1—Court has no authority to suspend.

COURTS—Costs—No authority to suspend payment.

HONORABLE DALE W. LARUE
Judge, Carroll County Court

This will acknowledge receipt of your letter of August 11, 1964, which reads as follows:

"I would appreciate your opinion as to whether or not it is lawful for the Judge of a court not of record to suspend the $5.00 fee prescribed by [Code § 14.1-200.1] Chapter 289, Acts of Assembly (1964); and if not, whether or not it is lawful for the Judge of a court not of record to suspend the imposition of such fee."

I know of no authority under which a judge of a municipal court or any other court can suspend the costs where there has been a conviction. As pointed out by Attorney General Staples in an opinion dated August 20, 1945, to the Superintendent of the State Penitentiary (published in Report of Attorney General, 1945-46, at p. 128), the cost is not a part of the punishment and is not exonerated even by a pardon from the Governor. It was held in the case of Commonwealth v. McCue, 109 Va. 302, that the cost assessable under § 4964 of the Code, now § 19.1-320, is a liability against a person convicted without any formal entry of judgment therefor.

In another opinion, dated December 19, 1944, to the Trial Justice of Clarke County (published in Report of Attorney General, 1944-45, at p. 129), Mr. Staples stated that the accused in every criminal case is liable for the costs of his conviction and that the Trial Justice has no authority to relieve a convicted per-
son of the costs or any part thereof. There have not been any statutory changes that would require a reversal of Mr. Staples' opinions.

Accordingly, both questions are answered in the negative.

MOTOR VEHICLES—Damages—While in custody of sheriff—Responsibility for.

SHERIFFS AND SERGEANTS—Liability—For motor vehicles while in their custody.

BOARDS OF SUPERVISORS—Authority—May not make appropriation to satisfy liability against sheriff.

HONORABLE JOHN F. EWELL
Commonwealth's Attorney for Warren County

June 25, 1965

This will acknowledge receipt of your letter of June 17, 1965, which reads as follows:

"Acting under the provisions of Section 46.1-351.1 police officers of the Town of Front Royal seized a motor vehicle and in turn delivered this vehicle to the Sheriff of Warren County. Although the driver was convicted of operating while his permit was revoked, the owner of the vehicle, in defense to the information which was filed against him, successfully argued that the use was without his knowledge, and the vehicle was ordered returned to the owner. While the vehicle was in the custody of the Sheriff, and parked on County property immediately adjacent to the Warren County Jail, the windshield of the vehicle was destroyed by a person or persons unknown. The owner has requested the Sheriff or the Board of Supervisors to repair the damage done.

"In view of the fact that it is very possible that this question may arise in the future, not only with respect to vandalism, as in the instant case, but theft of tire, wheels, etc., I would appreciate your advising me:

"(1) What is the liability of the Warren County Sheriff,
"(2) What is the liability of the Warren County Board of Supervisors, and
"(3) What authority would the Warren County Board of Supervisors have to make restitution, regardless of liability."

With respect to your question (1), the weight of authority seems to hold that a sheriff who has property in his custody and under his control under seizure is held to the exercise of ordinary and reasonable care in the protection of the property. The sheriff, in my opinion, occupies a position similar to a bailee and is responsible for injury occurring to the property if it is due to his negligence. You will find a discussion of this subject in 80 CJS commencing at Article 78, and also in 47 Am. Jur. commencing on page 866 at Article 59.

Section 46.1-351.1 does not contain any provision which would relieve a sheriff of his ordinary liability. What constitutes reasonable care is a matter that is not always easily determined, but it would seem that where the sheriff has parked the automobile on county property adjacent to the jail, as was done in this case, the sheriff has exercised reasonable care.

With respect to question (2), there is, of course, no personal liability upon the board of supervisors for the action of the sheriff and, under the provisions of
Section 114 of the Constitution, a county cannot be held responsible for the acts of a sheriff.

In answer to your question (3), I know of no provision authorizing a board of supervisors to make an appropriation to satisfy liability of this nature against a sheriff. It would seem that the above-numbered section of the Constitution would prohibit a board of supervisors from making an appropriation for such a purpose.

MOTOR VEHICLES—Driving After Period of Operator's License Revocation Terminated—Proof of financial responsibility.

April 2, 1965

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth's Attorney for the City of Hampton

This is in reply to your letter of March 26, 1965, which reads, in part, as follows:

"I would like to have your opinion as to the status of a motor vehicle license and the operating privileges of a person after the period of revocation has terminated when a motor vehicle license has been revoked pursuant to Title 46.1-417, 1950 Code of Virginia, as amended.

"For example, if a person's motor vehicle license is revoked for a period of one year because of a conviction of driving under the influence of intoxicating beverages and he is subsequently apprehended after this one year period while operating a motor vehicle, should he be charged with driving on revocation, driving while operator's license is suspended, or simply operating a vehicle with no operator's license? I am assuming that he has not re-applied for an operator's license after the expiration of the one year period."

Any person whose operator's or chauffeur's license or other privilege to operate motor vehicles has been revoked or suspended pursuant to the provisions of § 46.1-417, Code of Virginia (1950), as amended, is required by § 46.1-438, Code of Virginia (1950), as amended, to file proof of financial responsibility before his license may be restored. The requirement for furnishing proof of financial responsibility obtains for a period of five years after the revocation period required under § 46.1-417 has expired.

In my opinion, any person apprehended for driving during any such period, unless he has given proof of financial responsibility in the manner provided by law, should be charged with a violation under § 46.1-351, Code of Virginia (1950), as amended. This section prescribes the penalty for driving any motor vehicle in this State during any period wherein the restoration of license or privilege to drive is contingent upon the furnishing of proof of financial responsibility.

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MOTOR VEHICLES—Drunk Driving—Counties may adopt ordinances parallel-
ing State law.

COUNTIES—Ordinances—Driving under influence may parallel State law.

Honorable Joseph Motley Whitehead
Commonwealth's Attorney for Pittsylvania County

This will acknowledge receipt of your letter of March 31, 1965, which reads as follows:

"Section 15.1-132 of the Code of Virginia, 1950, as amended, in re-
gards to prohibiting driving while under the influence of intoxicating
liquor contains the following sentence: 'No such ordinance shall provide
for a lesser punishment than that prescribed by general law for a
similar offense.' Section 15.1-505 of the Code of Virginia in regards to
terms for violation of ordinances has the following sentence: 'Such
fines, however, shall in no case exceed three hundred dollars and if
imprisonment in the county jail be prescribed in any case such imprison-
ment shall not exceed thirty days.'

"Pittsylvania County has adopted a driving under the influence or-
dinance which conforms to the general law for such similar offenses. My
inquiry is whether or not our ordinance is enforceable in view of the
conflicting provisions of the two sections above enumerated?"

Section 15.1-505 of the Code relates to the general powers of boards of super-
visors of counties with respect to the passage and enforcement of ordinances.
Section 15.1-132 is an exception to the general powers and relates solely to
ordinances concerning drunk driving. The provisions of § 15.1-132 control with
respect to this particular matter.

A penalty for violation of a county ordinance for drunk driving cannot be less
than the minimum penalty prescribed in § 18.1-58. In this connection you are
referred to opinions of this office published in Report of Attorney General (1962-
63), at pp. 144, 149 and 173. A later opinion is found in the Report (1963-64),
at p. 10.

MOTOR VEHICLES—Enforcement of Traffic Laws by Local Police—Authority
does not extend to guest passenger not violating law.

Mr. H. I. Silcox
Chief of Police for Town of Clintwood

This is in reply to your letter of March 1, 1965, which reads, in part, as
follows:

"I would thank you to render to me an official opinion on persons
riding in an automobile on a public street. The driver of the auto-
mobile is stopped by me and his operator's license and registration on
the automobile is current and in proper order. In the automobile is
a person riding as a guest who is not 'apparent to observation' in-
toxicated. There is nothing about his general appearance or behavior
to indicate that he is intoxicated, as a matter of fact, he is not doing
anything. In order to determine whether this guest is drunk, do I have the right and duty as a police officer to order him out of the automobile and make him walk 'the line' so to speak, and then decide his condition. Do I have the right to force the guest to do as I order him to do, namely get out of the car and walk the line?"

One of the general provisions of the motor vehicle laws, contained in § 46.1-6 of Chapter 1, Title 46.1, Code of Virginia (1950), as amended, authorizes the enforcement of the provisions of Chapters 1 through 4 (§§ 46.1-1 through 46.1-347) of this title by the various political subdivisions of this State through the agency of any police or police officer. Any such peace officer is given the right, under § 46.1-8 of this title, to stop any motor vehicle, trailer or semitrailer, upon request or signal, for the purpose of inspecting such vehicle as to its equipment and operation or securing such other information as may be necessary. Under § 46.1-180, counties, cities and towns may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title.

The statutes to which I have referred apply to the operator or operation of a motor vehicle upon the highways, including the streets and alleys and every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State. None of these statutes, however, authorizes a police officer to order a person, not operating but merely riding as a guest, out of a motor vehicle for the purpose of undergoing a test to determine whether or not he is drunk. Neither do I find any other law which would give you the right to make or enforce such a requirement under the stated facts, which indicate he was apparently not intoxicated, and provide no basis for an arrest under § 18.1-237, Code of Virginia (1950), as amended, or a similar local ordinance against being drunk in public. Accordingly, I shall answer your question in the negative.

MOTOR VEHICLES—Flashing, Blinking Lights and Sirens—When lawful to equip vehicle and use.

June 10, 1965

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of June 2, 1965, in which you request my opinion as to whether a justice of the peace or a special officer appointed through the sheriff’s department, neither of whom are members of any voluntary fire department, would be legally entitled to equip their automobiles with red flashing lights and sirens.

Considering first the red flashing lights, § 46.1-267, Code of Virginia (1950), as amended, states in part:

"Any police vehicle, fire department vehicle, school bus, vehicle owned or operated by a member of a volunteer fire company, ambulance, any rescue vehicle whether publicly or privately owned used for emergency calls, and any vehicle used for the principal purpose of towing disabled vehicles or in constructing, maintaining and repairing public highways or utilities on or along public highways, may be equipped with flashing, blinking or alternating warning lights of a type approved by the Superintendent. The Superintendent may limit the
number of vehicles to be equipped with such warning lights owned by any one department, association or person.

* * * * *

"No motor vehicle shall be operated on any highway which is equipped with any lighting device other than lamps required or permitted in this article or required or permitted by the Superintendent."

In regard to the use of sirens, the applicable portion of § 46.1-285, Code of Virginia (1950), as amended, is as follows: "Every police vehicle and fire department vehicle and every ambulance or rescue vehicle used for emergency calls shall be equipped with a siren or exhaust whistle of a type not prohibited by the Superintendent." Further, § 46.1-284, Code of Virginia (1950), as amended, states that, "It shall be unlawful for any vehicle to be equipped with or for any person to use upon any vehicle any siren or exhaust, compression or spark plug whistle or horn except as may be authorized in this title."

Considering these and related statutes, I find no authorization for any person to so equip his automobile or use such equipment merely by virtue of his being a justice of the peace and, in my opinion, to do so is unlawful under the statutes herein cited. Where vehicles of a sheriff's department qualify as police vehicles, it is my opinion that use of the equipment in question is proper. If the vehicle does not come within any of the use purposes cited in the statutes quoted herein, however, the use of such equipment would be unlawful. The statutes cited herein authorize the Superintendent of State Police to limit the number of vehicles to be equipped with such warning lights and give him control over the type of equipment to be used for these purposes.

MOTOR VEHICLES—Forfeiture—Bond—Owner may post and obtain possession before information filed.

MOTOR VEHICLES—Forfeiture—Discussion of enforcement of §§ 46.1-351.1 and 46.1-351.2.

FORFEITURES—Motor Vehicles—Owner may post bond and obtain possession before information filed.

BOND—Forfeiture—Motor Vehicle—Owner may post and obtain possession before information filed.

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

August 4, 1964

This is in reply to your letter of July 23, 1964, in which you present seven questions for my consideration in connection with the interpretation and enforcement of §§ 46.1-351.1 and 46.1-351.2 of the Code. For clarity, I shall quote your questions which will be followed by my answer thereto.

"1. Is it lawful for the owner to post the required bond and obtain possession of his motor vehicle before the Commonwealth's Attorney has filed the information?"

While not expressly authorized in § 46.1-351.2 of the Code, I believe it would
be proper to release a motor vehicle prior to the filing of the Information by the Commonwealth's Attorney, if the vehicle is properly appraised and the required bond is posted. I recently expressed this view in a letter addressed to the Commonwealth's Attorney for Warren County, under date of July 28, 1964.

"2. If the owner has posted bond and obtained possession of his motor vehicle pending the action, and the owner eventually Loses the case and the vehicle is declared forfeited to the Commonwealth, is it in the discretion of the Court to require the owner to return the motor vehicle to the Sheriff to be sold, or to require the surety on the bond to pay the amount of the bond to the Commonwealth?"

It is questionable in my mind as to whether it is discretionary with the court to allow or demand the returning of the motor vehicle for sale after a claimant thereto has posted the required bond. The Court of Appeals indicated quite strongly in the case of Wray v. Commonwealth, 191 Va. 738, that the bond takes the place of the motor vehicle which is subject to forfeiture. Since the bond is conditioned, however, upon the claimant abiding by the order of the court in the forfeiture proceedings, I am inclined to think that the trial court does possess the discretionary power to either demand the return of the motor vehicle for sale, or proceed against the bond. It is clear that the claimant himself does not have the right to return the vehicle and obtain release on the bond.

"3. If the owner posts the required bond and obtains possession of his motor vehicle, and then the owner loses the case and the vehicle is declared forfeited to the Commonwealth, and the Judge requires the surety on the bond to pay the same into Court, what rights does an innocent lienor have, if any, in the money paid into Court by the surety on the bond?"

The rights of an innocent lienor are fully protected under the statute in question. Since the bond takes the place of the motor vehicle when it is released to the owner or lienor pursuant to subsection (b) of § 46.1-351.2 of the Code, I am of the opinion that the lienor's interest in the security would be protected to the same extent as it would be if the vehicle is not released prior to the termination of the forfeiture proceeding.

"4. Is it your opinion under Subsection (f) of Section 46.1-351.2 that in any case in which there is an innocent lienor, and its lien is established by the Court, the vehicle cannot be declared forfeited unless the owner of the seized vehicle was himself in possession of the same at the time it was seized? The language in Subsection (f) is different from the language in Subsection (g). In Subsection (f) the law says 'and if, in the same proceeding, it shall be determined that the owner of the seized property was himself in possession of the same, at the time it was seized, and that such illegal use was with his knowledge or consent, the forfeiture hereinbefore in this Section declared shall become final as to any and all interests and equity which such owner, or any other person so illegally using the same, may have in such seized property, which forfeiture shall be entered of record'. In Subsection (g) the law states that if there is no valid lien established against the property and 'it shall be determined that the owner thereof was himself using the same, at the time of the seizure, or that such illegal use was with his knowledge or consent, the property shall be completely forfeited to the Commonwealth.'"

In spite of certain minor faults in the language or composition of this section,
I think it is the clear purport to protect an innocent owner and lienor, even though the property was being illegally used by the operator. If the owner himself is innocent, the property is released from forfeiture. If the claimant be a lienor, the vehicle is, nevertheless, forfeited, with care being exercised to protect the interest which the lienor may have in the seized property. In the event that the lien exceeds the value of the vehicle, the vehicle is delivered to the lienor free of the forfeiture sale.

"5. In case a valid lien is established on behalf of an innocent lienor, is it your opinion that no such vehicle could be declared forfeited unless the owner was driving the same on a revoked or suspended operator's license, or unless the owner was riding in the vehicle at the time of the seizure?"

In so far as the innocent lienor is concerned, it is immaterial as to who was operating the vehicle at the time of seizure. This proceeding is civil in nature, proceeding in rem against the property which was being illegally used. The guilt or innocence of the operator has no bearing on the outcome of the forfeiture proceeding. While the innocence of an owner may prevent the forfeiture of the vehicle, the innocence of the lienor simply assures the lienor of recovering the extent of his lien if the sale of the vehicle results in a sufficient amount to satisfy the lien.

"6. Is it your opinion that if no valid lien is established against the seized property, then the forfeiture may be declared if the owner was himself using or driving the same at the time of the seizure, while his operator's license was revoked or suspended, or when someone was driving for him on a suspended or revoked operator's license, whether or not the owner was present in the vehicle at the time of the seizure, if the vehicle was then being driven by someone for the owner with the owner's knowledge (or consent) of the illegal use, and where such illegal use was with the connivance or consent, express or implied, of the owner, in the absence of the owner?"

I believe the answer to this inquiry is in the affirmative, as indicated in my reply to your fifth question.

"7. Does the Commonwealth's Attorney have the discretion to refuse to prosecute such an action (a) if he is satisfied from the facts that the lien on the vehicle seized is equal to or more than the fair market value of the vehicle, (b) if he is satisfied from the facts that the owner of the vehicle at the time of the seizure was ignorant of such illegal use thereof and that such illegal use was without his connivance or consent, express or implied, and (c) if he is satisfied from the facts that the operator of the motor vehicle seized had recently complied with the law governing the suspension or revocation of his operator's license, but that his operator's license was still technically revoked or suspended because the Division of Motor Vehicles had not had time to process his case and lift his suspension or revocation?"

While the Commonwealth's Attorney undoubtedly would have some discretion in determining whether or not an Information should be filed to have a vehicle forfeited under this section, I do not believe he can substitute his judgment for that of the court or jury in making a determination on the very question which is to be decided by the court or the jury. For a discussion on a similar inquiry, see my letter to Honorable Kenneth M. Covington under even date. In so far as deciding whether to institute the proceeding, the Commonwealth's Attorney
should have sufficient information by which he could allege the basis for forfeiture, and justification for praying that the vehicle be condemned and sold. Obviously, if he knows that the vehicle was stolen, he should not file the Information. On the other hand, if there is a question of fact as to whether the owner was ignorant of the illegal use, or a question of law as to whether the operator is guilty of violating §§ 46.1-350 or 46.1-351, these questions should be left for determination by the court. The fact that the vehicle has a value less than the amount of a lien should have no bearing on the institution of the forfeiture proceeding. This factor is taken into consideration in subsection (f) of the statute. The General Assembly having provided for this manner of regaining possession by the lienor, I am of the opinion that this procedure should be followed, even though it is clear to the Commonwealth's Attorney that the vehicle may be delivered to the lienor by the court, due to the value being less than the amount of the lien.

MOTOR VEHICLES—Forfeiture—Bond for release may be given by owner or lienor prior to filing of information.

FORFEITURES—Motor Vehicle—Bond may be given prior to filing of information if statutory requirements are met.

HONORABLE JOHN F. EWELL
Commonwealth’s Attorney for Warren County

July 28, 1964

This is in reply to your letter of July 14, 1964, in which you request my opinion as to whether it would be proper to allow the owner or lienor of a motor vehicle, seized under the provisions of Section 46.1-351.1 of the Code, to give bond and have the vehicle returned to him prior to the time the information is filed.

In this connection, the opening words of paragraph (b) of Section 46.1-351.2, Code of Virginia (1950), as amended, “If the owner or lienor of the seized property shall desire to obtain possession thereof before the hearing on the information filed against the same,” seem to infer that possession will be sought only after the information is filed. This language, like all of Section 46.1-351.2, except as to description of violation and time allowed for filing the information, is copied verbatim from Section 4-56, Code of Virginia (1950), as amended, relating to the seizure and forfeiture of vehicles used in violation of the alcoholic beverage control laws and a similar procedure should be followed in their application. There appears no case under the latter directly interpreting this point. In the case of Wray v. Commonwealth, 191 Va. 738, however, the bond was given and possession of the vehicle obtained prior to the filing of the information and such procedure is recorded with apparent, though subtle, approval of the court.

Except for filing of the information against the seized property, which shall be done by the attorney for the Commonwealth within sixty days, prompt action is required under the statute. The officer making the seizure shall “forthwith report” it to the attorney for the Commonwealth, who shall “forthwith notify” the Commissioner of the Division of Motor Vehicles, who, in turn, shall “promptly certify” the required information to the attorney for the Commonwealth and “forthwith notify” the registered owner and lienor in writing of the reported seizure. In my judgment, a primary reason for the requirement that these acts be performed with promptness is to assure that the owner will not be deprived of the seized property for prolonged periods of time, especially in the case of an
innocent party in interest. By judicial interpretation it has been held for many years that the law relating to forthcoming bonds was passed for the benefit of the owner, to enable him, at his risk, to have possession and use of the property taken and to avoid the expense of its safekeeping until the day of sale.

The statute under consideration contains no prohibition against the release of the seized motor vehicle upon the posting of proper bond prior to the filing of the information. Paragraph (b) of Section 46.1-351.2 provides that if the owner or lienor of a seized vehicle desires to obtain possession thereof before the hearing on the information, such vehicle shall be appraised and upon the return, "the owner or lienor may give a bond payable to the Commonwealth, in a penalty of the amount equal to the appraised value of the conveyance or vehicle plus the court costs which may accrue, with security to be approved by the clerk, and conditioned for the performance of the final judgment of the court, on the trial of the information." The bond is further so conditioned that, if upon the hearing on information, the judgment of the court be that the vehicle be forfeited, judgment may be entered against the obligors on such bond, without other proceedings against them, "to be discharged by the payment of the appraised value of the property so seized and forfeited and costs."

In consideration of the foregoing, it is my opinion that, upon fulfillment of all other statutory requirements, including those relating to appraisal and return, an owner or lienor may be allowed to give proper bond and obtain possession of the seized vehicle prior to the time the information is filed.

MOTOR VEHICLES—Forfeiture—Court procedure—Judgment in penalty of bond or for sale of vehicle.

CIVIL PROCEDURE—Forfeiture—Power of court—Judgment against bond or for sale of vehicle.

Honoradle Joseph Motley Whitehead
Commonwealth's Attorney for Pittsylvania County

August 27, 1964

This is in reply to your letter of August 14, 1964, which reads as follows:

"In a case under Section 46.1-351.1, and the following sections where A posts a bond for defendant B, after the filing of an information against B's automobile, with the bond payable to the Commonwealth in the amount equal to the appraised value of the automobile plus the court costs which may accrue, and issue upon trial of the information is found against B, then is the bond as such forfeited to the Commonwealth or is the automobile forfeited? The wording of the statute seems to indicate that judgment is to be entered against the obligors on such bond without further proceedings."

Section 46.1-351.2, Code of Virginia (1950), as amended, in providing that the owner or lienor of seized property may obtain possession thereof by giving proper bond payable to the Commonwealth in a penalty of the amount equal to the appraised value plus the court costs, further provides that such bond shall be conditioned as follows:

"if upon the hearing on information, the judgment of the court be that such property, or any part thereof, or such interest and equity as the
owner or lienor may have therein, be forfeited, judgment may thereupon be entered against the obligors on such bond for the penalty thereof, without further or other proceedings against them thereon, to be discharged by the payment of the appraised value of the property so seized and forfeited and costs, upon which judgment, execution may issue, on which the clerk shall endorse, 'no security to be taken.'” (Emphasis supplied)

In consideration of the quoted condition, there is no question that, if trial on the information should result in a judgment for forfeiture of the automobile, the court, without further proceedings, may enter judgment against the obligors on the bond, which judgment shall be discharged by payment of the amount of such bond. See, Wray v. Commonwealth, 191 Va. 738, 62 S.E. 2d 889. Since Section 46.1-351.2 also requires that any such bond shall be conditioned upon the claimant abiding by the order of the court in the forfeiture proceedings, however, I am inclined to believe that such court has the power to either demand the return of the motor vehicle for sale or proceed against the bond.

MOTOR VEHICLES—Forfeiture—Driving while license suspended under § 46.1-449—Subjects motor vehicle to seizure and forfeiture.

FORFEITURE—Motor Vehicle—Subjected to for driving while license suspended under § 46.1-449.

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

September 8, 1964

This is in reply to your letter of September 1, 1964, in which you request my opinion on the following question:

“If a person is driving a motor vehicle after his operator's license has been suspended under the provisions of Section 46.1-449 of the Code, is such a person operating a motor vehicle in violation of Sections 46.1-350 and 46.1-351 of the Code, so that such vehicle may be seized, forfeited to the Commonwealth and sold?”

Section 46.1-449, Code of Virginia (1950), as amended, requires that the Commissioner of the Division of Motor Vehicles shall forthwith suspend the operating license of any person involved in a motor vehicle accident resulting in bodily injury or death, or property damage to the extent of fifty dollars or more, unless such person complies with the financial responsibility laws of this State. The Commissioner, by issuance of his order pursuant to this section, effects the license suspension. Section 46.1-350, Code of Virginia (1950), as amended, makes it unlawful for any person whose license or permit has been suspended or revoked, by the Commissioner of the Division of Motor Vehicles or as otherwise stated therein, to operate a motor vehicle on any highway in this State until the period of such suspension or revocation has terminated. Thus, any person who operates a motor vehicle during a period in which his license is suspended under Section 46.1-449 is subject to the penalties prescribed by Section 46.1-350.

Section 46.1-351.1, Code of Virginia (1950), as amended, provides for the seizure of the motor vehicle where an officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested any person who will be subject to the penalties described by Sections 46.1-350 and
46.1-351, Code of Virginia (1950), as amended. Section 46.1-351.2, Code of Virginia (1950), as amended, provides for the forfeiture and sale of a motor vehicle so seized. It follows that the operation of a motor vehicle, by any person whose license stands suspended under the provisions of Section 46.1-449, renders such motor vehicle subject to being seized and forfeited to the Commonwealth and sold pursuant to the provisions of Sections 46.1-351.1 and 46.1-351.2.

MOTOR VEHICLES—Forfeiture—Proceeding civil in nature.

CIVIL PROCEDURE—Forfeiture of Motor Vehicles—Civil in nature.

HONORABLE ROBERT D. HUFFMAN
Clerk, Circuit Court of Page County

July 31, 1964

This is in reply to your letter of July 24, 1964, in which you ask to be advised whether court proceedings under Code Section 46.1-351.1 are criminal or civil.

This section requires the seizure of the motor vehicle where any officer charged with the enforcement of the motor vehicle laws believes that he has arrested any person who will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351. It further prescribes the preliminary procedure for ascertaining the name and address of the person in whose name such vehicle is registered and like information for any person holding a lien thereon and the amount thereof. The procedure for initiating court action in regard to the vehicle seized, however, is found in Section 46.1-351.2, Code of Virginia (1950), as amended, and the two sections should be considered together. The latter section requires that the proceeding shall be instituted by filing in the name of the Commonwealth an information against the seized property.

The court proceedings that follow are not to be confused with the criminal action which may be brought against the person for a violation of Section 46.1-350 or Section 46.1-351, which may result in a conviction on such criminal charges. Here, the proceeding is similar to that necessary to condemn and sell a motor vehicle for illegal use under the alcoholic beverage control laws, as expressed in the case of Ives v. Commonwealth, 182 Va. 17. Accordingly, it is my opinion that a proceeding under the information filed pursuant to Section 46.1-351.2, to have the motor vehicle condemned and sold because of a violation of Section 46.1-350 or Section 46.1-351, is a proceeding in rem, rather than in personam, and is a civil action against a motor vehicle and not a criminal action against a person.

MOTOR VEHICLES—Forfeiture—Seizure of vehicle where officer reasonably believes person subject to penalties prescribed by §§ 46.1-350 and 46.1-351.

FORFEITURES—Seizure of Motor Vehicle—Where officer reasonably believes person subject to penalties prescribed by §§ 46.1-350 and 46.1-351.

MR. GARY T. KEYSER
Sheriff of Warren County

March 17, 1965

This is in reply to your letter of March 8, 1965, which reads, in part, as follows:
"Your office has ruled that when a person is arrested for driving a motor vehicle while his operator's license is suspended or revoked, and the motor vehicle is seized under the provisions of Section 46.1-351.1 of the Code, that the vehicle must be taken into possession at the time of the arrest, and cannot be seized later on.

"However, if we pick up a person we believe to be operating while his license is suspended after noon on Saturday, we either have to turn the vehicle loose, or hold it until Monday morning before we can get the required information from DMV, as they do not give out this information on week ends.

"I would like your advice as to what we should do in such cases over the week end."

Section 46.1-351.1, Code of Virginia (1950), as amended, states that "where any officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested any person who will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351, he shall seize and take possession of such motor vehicle." The statutory requirement for the seizure is that the officer "reasonably believes" that he has arrested any such person. In many instances, to make a reasonable determination, information in addition to that available at the scene is needed. This may be obtained from the records of the Division of Motor Vehicles.

In specific reference to your problem, it is my understanding that the Division furnishes information regarding the operating license status, where such information is on file, to law enforcement officers on a seven day week, twenty-four hour day basis. In this connection, I enclose a copy of a bulletin dated October 17, 1963 which reflects the unlisted telephone numbers by which you may obtain such information at any time. You will note the request, contained therein, that these numbers be kept confidential.

MOTOR VEHICLES—Forfeiture—Time of filing of information.


March 9, 1965

HONORABLE CURTIS A. SUMPTER
Commonwealth's Attorney for Floyd County

This is in reply to your letter of March 4, 1965, in which you request my opinion as to whether or not an information filed by the attorney for the Commonwealth more than sixty days after receiving notice of seizure of a motor vehicle under § 46.1-351.1, or more than thirty days after receiving notice of seizure of a vehicle under § 4-56, is void or invalid.

In relation to forfeiture proceedings against a vehicle seized under "The Alcoholic Beverage Control Act," the applicable portion of subsection (d) of § 4-56, Code of Virginia (1950), as amended, is as follows:

"(d) Within thirty days after receiving notice of any such seizure, the attorney for the Commonwealth shall file, in the name of the Commonwealth, an information against the seized property, in the clerk's office of the circuit court of the county, or of the corporation court of the city, wherein the seizure was made. Should the attorney for the
Commonwealth, for any reason, fail to file such information within such time, the same may, at any time within twelve months thereafter, be filed by the Attorney General, and the proceedings thereon shall be the same as if it had been filed by the attorney for the Commonwealth.”

The statutory authority for filing the information against a motor vehicle seized pursuant to § 46.1-351.1, Code of Virginia (1950), as amended, is found in the first paragraph of § 46.1-351.2 (a), Code of Virginia (1950), as amended. The latter is essentially the same as the quoted paragraph of § 4-56, from which it was adopted, except that, thereunder, the attorney for the Commonwealth has sixty days after receiving notice of seizure, instead of thirty days after receiving such notice, in which to file the information. Each statute contains the provision, “Should the attorney for the Commonwealth, for any reason, fail to file such information within such time, the same may, at any time within twelve months thereafter, be filed by the Attorney General.” In such event, the statute refers to “the proceedings thereon,” making it clear that the proceedings shall be on the information so filed, rather than relating back to any specific time when an information should have been filed by the attorney for the Commonwealth.

There appears no authority in either statute for untimely filing of the information by the attorney for the Commonwealth. In the case of Cason v. Commonwealth, 181 Va. 297, decided under former § 4675 (38a) (d), now § 4-56 (d), such untimely filing by the attorney for the Commonwealth was held to be a nullity, the situation being “the same as if there had been no information filed.” Because of the similarity of the two sections in question, what is true of one statute in this respect is true of the other. Accordingly, it is my opinion that under either statute, an information filed by the attorney for the Commonwealth after expiration of the statutory period is a nullity, and I shall answer your question in the affirmative.

MOTOR VEHICLES—Forfeiture Proceedings under § 46.1-351.2—When appraisal is required and by whom made.

HONORABLE JOHN PAUL CAUSEY  
Commonwealth’s Attorney for King William County

This is in reply to your letter of September 12, 1964, relating to appraisal of seized motor vehicles under Section 46.1-351.2(b) of the Code of Virginia, in which you raise several questions which I shall quote and answer separately, as follows:

“A. Is the appraisal by the sheriff or city sergeant provided for in the second paragraph of this subsection required in every case of seizure, or only when the owner or lienor desires possession prior to hearing?”

Subsection (b) of Section 46.1-351.2, Code of Virginia (1950), as amended, reads, in part, as follows:

“If the owner or lienor of the seized property shall desire to obtain possession thereof before the hearing on the information filed against the same, such property shall be appraised by the clerk of the court where such information is filed.” (Emphasis Supplied).

The remaining portion of this section makes it clear that the owner or lienor
may obtain possession of the vehicle only after giving proper bond. The statute further fixes the amount of the bond at the appraised value of the vehicle plus the court costs which may accrue. Thus, the appraisal becomes a statutory necessity before possession may be obtained by the owner or lienor prior to the hearing on the information filed. A review of this and other sections of the Code relating to forfeitures, however, reveals no requirement for appraisal of seized property in all cases of seizure. It is my opinion, therefore, that while appraisal is not prohibited in other situations, the statutory requirement for appraisal applies only when the owner or lienor desires possession of the property prior to the hearing on the information.

"B. Is an appraisal required to be made by the clerk, additional to that by the sheriff or city sergeant, where possession is desired prior to hearing? Or is the intent of the first paragraph of the subsection that the clerk initiate the proceeding for appraisal by the sheriff in cases where possession is desired prior to hearing?"

While the first paragraph of Subsection (b) of Section 46.1-351.2, quoted herein, states that the property "shall be appraised by the clerk," the remaining portion of the same subsection clearly indicates that the sheriff of the county or the sergeant of the city in which the trial court is located shall inspect and appraise the property, under oath, at its fair cash value, and forthwith make return thereof in writing to the clerk. The amount of such appraisal plus the court costs, which may accrue, as added by the clerk, will determine the amount of any bond which may be given for release of the vehicle to its owner or lienor pending hearing on the information. I do not believe it was intended that the clerk make an additional appraisal, as such procedure would result in two appraisals with no indication as to which should prevail. In my interpretation, the statute contemplates that the clerk, in whose office all papers must be filed, shall initiate the proceeding for appraisal, which shall be made, however, by the sheriff of the county or the sergeant of the city in which the trial court is located.

MOTOR VEHICLES—Insured Motor Vehicle—Does not become "uninsured motor vehicle" under § 46.1-167.2 because of cancellation of carrier’s license subsequent to issuance of policy.

HONORABLE T. NELSON PARKER
Commissioner of Insurance

This is in reply to your letter of October 28, 1964, in which you request my opinion as to whether motor vehicles insured by an insurance company duly authorized and licensed to write automobile bodily injury and property damage liability insurance in this State became "uninsured motor vehicles" within the meaning of § 46.1-167.2, Code of Virginia (1950), as amended, by reason of cancellation by the Commission of this company's license under such conditions that the validity of these policies was not affected.

The term "insured motor vehicle," under § 46.1-167.2, for the purposes here under consideration, "means a motor vehicle as to which there is bodily injury liability insurance and property damage liability insurance, both in the amounts specified in § 46.1-504, issued by an insurance carrier authorized to do business in this State." The term "uninsured motor vehicle," for such purposes, "means a motor vehicle as to which there is no such bodily injury liability insurance and property damage liability insurance."
Such a policy has been issued for the motor vehicles in question "by an insurance carrier authorized to do business in this State." There is no provision in § 46.1-167.2 that such insurance carrier must continue to be authorized to do business in this State, nor is there any provision in such statute to terminate or abrogate the effectiveness of a policy by virtue of the withdrawal or cancellation of the carrier's authorization or license subsequent to the issuance of such policy. Any such policy remains in full force and effect until properly terminated under its own terms.

In consideration of the foregoing, it is my opinion that a motor vehicle so covered by a policy of bodily injury and property damage liability insurance, issued by this company in the requisite statutory amounts, remains an "insured motor vehicle" during the pendency of such policy, within the purview of § 46.1-167.2, and, accordingly, I shall answer the question presented in the negative.

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MOTOR VEHICLES—Length Limit—Wind deflectors considered in measuring for statutory compliance.

November 23, 1964

COLONEL C. W. WOODSON
Superintendent, Department of State Police

This is in reply to your letter of November 13, 1964, in which you present information concerning a road tractor equipped with wind deflectors and request my advice as to whether such deflectors should be considered in measuring the length of the vehicle.

Article 11, Chapter 4 of Title 46.1, Code of Virginia (1950), as amended, prescribes the law as to maximum size and weight of vehicles and combinations of vehicles. Thereunder, § 46.1-330 states, in part, as follows:

"Except for passenger buses, no motor vehicle exceeding a length of thirty-five feet shall be operated upon a highway of this State. No passenger bus exceeding a length of forty feet shall be operated upon a highway of this State. The actual length of any combination of vehicles coupled together including any load thereon shall not exceed a total of fifty feet; and no tolerance shall be allowed thereon." (Emphasis supplied.)

Under the same article, §§ 46.1-333 and 46.1-334 prescribe limits for extension of load to front or side of the vehicle. It will be observed from the quoted portion of § 46.1-330, however, that the stated limit of fifty feet for any combination of vehicles coupled together includes any load thereon, and that no tolerance shall be allowed. The vehicle in question, being a road tractor, which operates as a combination with a trailer or semitrailer, falls within the latter class.

In the absence of definitive information, the vehicle must be considered to include all portions thereof, and the length, in case of a combination of vehicles, would include any part and even the load thereon. In specifying width limits, § 46.1-328 excludes the outside mirrors by specific reference. No exclusion of any manner appears in § 46.1-330 prescribing the maximum length, however, and the language employed indicates that none was intended.
In consideration of the foregoing, my interpretation of the statute is that the deflectors should be considered in measuring the length of the vehicle or combination of vehicles.

MOTOR VEHICLES—Liquidated Damages for Overweight—No authority to assess and deposit in City treasury under City of Chesapeake ordinance paralleling State law.

HONORABLE MAURICE E. GRIFFIN, JR.
Justice of the Peace for the City of Chesapeake

September 11, 1964

This is in reply to your letter of August 31, 1964, which reads as follows:

"The City of Chesapeake has an ordinance which is the same as the state law on liquidation damages to highways. "What I want to know is, can the City of Chesapeake charge people with this ordinance and fine them, and then place the money into the City treasury?"

The weight of vehicles and loads permitted on the road surface of any highway is controlled by Section 46.1-339, Code of Virginia (1950), as amended. Provision for liquidated damages for violation of weight limits is contained in Section 46.1-342, Code of Virginia (1950), as amended. The latter section provides that upon conviction of any person for violation of any weight limits as provided in this chapter (Chapter 4 of Title 46.1) the court shall assess the owner, operator or other person causing the operation of such overweight vehicle liquidated damages. Such assessment shall be entered by the court as a judgment for the Commonwealth. Any sums so collected shall be for the Commonwealth and forwarded to the State Treasurer.

Section 46.1-342.1, Code of Virginia (1950), as amended, authorizes any county which has withdrawn its roads from the secondary system of State highways in accordance with Chapter 415 of the Acts of 1932, to adopt ordinances providing weight limits in accordance with Section 46.1-339 and providing further for the assessment of liquidated damages not exceeding those prescribed under Section 46.1-342. Section 46.1-342.1 applies only to certain counties and I find no similar statute with regard to cities. The city charter contained in Chapter 211, Acts of Assembly of 1962, does not give the City of Chesapeake authority to enact such ordinance and I doubt that this power is given either in Chapter 18 of Title 15.1, Code of Virginia (1950), as amended, covering powers of cities and towns or in Article 2 of Chapter 4, Title 46.1, Code of Virginia (1950), as amended, pertaining to powers of local authorities in general. Accordingly, I shall answer your question in the negative.
MOTOR VEHICLES—Local License—Anticipated move from county does not defeat tax on resident owner’s vehicle.

TAXATION—Motor Vehicles—Limited to one jurisdiction during license year.

April 29, 1965

HONORABLE G. HUGH TURNER
Treasurer of Franklin County

This is in reply to your letter of April 19, 1965, in which you pose two questions relative to the application of a county license ordinance in force in the County of Franklin for the first time this year. I shall quote the paragraphs containing these questions and consider them separately and in order.

(1) “The county ordinance states that anyone residing in the county must purchase a county license. One thing I would like to know is, if a person is moving out of the county within two or three months, should he purchase our county license?”

The authorization for counties to levy and assess taxes and charge license fees upon motor vehicles, trailers and semi-trailers is found in § 46.1-65, Code of Virginia (1950), as amended. This section must be considered in conjunction with § 46.1-66, Code of Virginia (1950), as amended, which places certain limitations upon the imposition of such taxes and fees. The effect of these sections, generally, is to predicate the imposition of license fees upon the residency of the owner of the vehicle.

The fact that a resident owner will be moving out of the county at some future date does not act to defeat the levy and assessment imposed by a proper county ordinance. In the ordinary course of events, numbers of people move from one licensing jurisdiction to another. The tax laws do not abate because of such condition. The county ordinance you describe imposes the license fees upon the motor vehicles of all persons residing in the county, as anyone residing in the county must purchase a county license. In my opinion, therefore, a resident of your county who anticipates moving out of the county within two or three months is subject to the ordinance and should purchase the county license required by it.

(2) “Then, if a person has purchased our county license and moves into another county or city, will he have to purchase county or city license from the place he moves to, or will they honor our licenses for the remainder of this year? Our ordinance does not have a provision for a refund on licenses.”

In my opinion, a person moving to another county or to a city within this State will not be required to purchase a county or city license there during the current license year. I base this upon paragraph (f) of § 46.1-65 which states, “Except as provided by paragraph (d), no vehicle shall be subject to taxation under the provisions of this section in more than one jurisdiction.” The exception found in paragraph (d) relates to the imposition of license fees and taxes by a county and a town located therein.
MOTOR VEHICLES—Local License—County may require for vehicle regularly garaged therein and owned by foreign corporation domesticated in Virginia.

June 10, 1965

HONORABLE BAXLEY T. TANKARD
Commonwealth’s Attorney for Northampton County

This is in reply to your letter of May 25, 1965, in which you relate certain facts and pose the question contained in the following quoted paragraph:

"Specifically, I am interested in the situation where A.B.C. Company, a Maryland corporation, holds title to a vehicle which is registered in Virginia. The company shows its Maryland address on the title to the vehicle and of course buys Virginia license for the vehicle. Such vehicle is used by a salesman of the company and is garaged regularly in Northampton County. My problem is whether such vehicle should be required to have a Northampton license tag pursuant to our local ordinance. If you have previously issued an opinion on a similar set of facts I will thank you to let me have a copy of same."

Through further communication you advised that the Maryland corporation is authorized to do business in Virginia and the salesman is a resident of Northampton County. Any foreign corporation authorized by the State Corporation Commission to do business in this State is deemed a resident of this State for the purposes of Title 46.1, Code of Virginia (1950), as amended. This is found in § 46.1-1, paragraph (16) (a) of this title and, accordingly, the vehicle in question is required by law to be registered and licensed in Virginia.

The facts given indicate that the last named requirement has been met by registering the vehicle in Virginia. While I find no previous opinion on the question you present, generally, with certain exceptions not here applicable, the right of a county to impose the license fee follows the right of the State to require Virginia registration. The counties derive their authorization for imposing license fees from § 46.1-65, Code of Virginia (1950), as amended, which contains certain limitations and is further subject to the limitations found in § 46.1-66, Code of Virginia (1950), as amended. I find nothing in these statutes, nor elsewhere in the Code, which would favor a foreign corporation over a Virginia corporation under the given facts and circumstances. Since the vehicle is used by a resident of Northampton County and regularly garaged there, it is my opinion that the vehicle may be required to have local license tags pursuant to the Northampton County ordinance imposing such licenses and fees.

MOTOR VEHICLES—Local License—Payment of personal property taxes on vehicle as condition precedent to issuing city license tag—When applicable.

September 14, 1964

HONORABLE HUNTER B. ANDREWS
Member, Virginia State Senate

This will acknowledge receipt of your letter of September 9, 1964, relating to Edward F. Kennedy who, as I understand from the statements contained in the exhibits which you enclosed, was on January 1, 1963, domiciled in the Town of Lexington, Rockbridge County, Virginia, and was stationed overseas in service in the Army. He returned to the United States in March, 1963, to the City of
Hampton. While he was overseas he purchased an automobile and brought this car to Hampton. He applied for a 1964 city license tag upon his automobile as required by Division 3 of the City Ordinance, commencing at § 25-294. His application for a city license tag was refused on the ground that he had not paid the personal property taxes for 1963 upon the automobile as provided in § 25-297 of the city ordinance. You enclosed with your correspondence a ruling by Hon. C. H. Morrissett, State Tax Commissioner, under date of July 10, 1964, in which he held that under the Federal Soldiers' and Sailors' Civil Relief Act and § 58-834 of the Code the automobile was assessable for tax at the situs of the owner's domicile and that the car did not have to be "physically located" in the State of Virginia in order to be subject to such personal property tax.

The provisions of subsection (c) of § 46.1-65 of the Code are as follows:

"(c) A county, incorporated city, or town may require that no motor vehicle, trailer or semi-trailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semi-trailer to be licensed have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town." (Emphasis supplied.)

Under the foregoing provision, any county, city or town, as a condition precedent to the issuance of an automobile license tag, may require evidence that the personal property tax imposed by that particular county, city or town has been paid. Inasmuch as the City of Hampton could not impose the 1963 personal property tax upon the automobile under the State law or under Judge Morrissett's ruling, it is my opinion that the owner of the car is entitled to purchase such tag for the year 1964 from the issuing officer in the City of Hampton without producing evidence of the payment of the personal property tax for 1963 upon such car. Under Judge Morrissett's ruling, if any locality in the State had a right to impose a personal property tax upon the car for the year 1963, it was the Town of Lexington and not the City of Hampton.

MOTOR VEHICLES—Local License—Taxing authority where owner resides.

TAXATION—Local License—Motor vehicles—Residence of owner determines taxing authority.

HONORABLE CHARLES A. REID
Treasurer of Greensville County

March 25, 1965

This is in reply to your letter of March 12, 1965, which reads as follows:

"I am enclosing herewith a copy of an ordinance proposed January 9, 1964, and adopted without change at the regular meeting of the Board of Supervisors of Greensville County on March 12, 1964. I am also enclosing a copy of an ordinance repealing Section 15-231 of the Code of the Town of Emporia and reenacting same. There appears to me to be a conflict between certain sections of these two ordinances. Section 1 of the Greensville County Ordinance reads in part as follows: 'This ordinance shall also apply to vehicles hereinbefore defined which are habitually kept or garaged in said
Motor vehicle license fees may be imposed by a county, incorporated city or town by appropriate ordinance under the authority of § 46.1-65, Code of Virginia (1950), as amended. This section contains certain limitations and incorporates by reference those found in § 46.1-66, Code of Virginia (1950), as amended. From which the following is quoted:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident."

From your letter, as well as the published report, it is apparent that both Section 15-231 of the Code of the Town of Emporia and Section I of the Greensville County Ordinance contain clauses requiring the purchase of license tags for vehicles owned by nonresidents under the stated conditions. Under the portion of § 46.1-66 quoted above, neither of these ordinances are enforceable against a motor vehicle owned by a resident of another county, city or town which has imposed a similar license fee. The residency of the owner of the vehicle, rather than the place of business, determines the taxing authority for imposing a license fee under § 46.1-65. This view is expressed in an opinion found in Report of the Attorney General (1963-1964), p. 197.

In reference to your specific inquiry, you failed to state the residency of the owner of the motor vehicle in question. Assuming that such owner is a resident of Greensville County, where the vehicle is "habitually" housed, it is my opinion that the Town of Emporia is prohibited from imposing the license fee, notwithstanding the fact that the motor vehicle is used in connection with the conduct of business therein, since a similar license fee is imposed by Greensville County.

MOTOR VEHICLES—Local License Tags—Nonresident of town not required to purchase.

Mr. Floyd S. Kay
Division Superintendent of Rockbridge County Schools

April 2, 1965

This is in reply to your letter of March 24, 1965, which reads as follows:

"I should like to present a question for your opinion. Mr. X a member of the US Air Force, is stationed at the Loring Air Force Base in
Maine. He has been in Service for three years. His home is in Lexington, Virginia, and he would like to have Virginia license plates for his car. "He is married, and they make their home in Caribou, Maine, however, he comes home once a year for a visit. "This question has arisen—if he purchases his Virginia license plates in Lexington must he also purchase a Town tag which is required by Lexington residents? I should like to know, if since he is in Service and only comes home for an occasional visit if he can be legally required to purchase Town tags in Lexington."

The limitations on imposition of local taxes and license fees under § 46.1-66, Code of Virginia (1950), as amended, include the following:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semi-trailer when:

* * * * *

"(2) The motor vehicle, trailer or semi-trailer is owned by a non-resident of such county, city or town and is used exclusively for pleasure or personal transportation and not for hire or for the conduct of any business or occupation other than that set forth in paragraph (3) of this subsection;"

Assuming that Mr. X, in registering his motor vehicle in Virginia, lists his home address as Caribou, Maine, in my opinion, he is not required to purchase local license plates from the Town of Lexington, under the facts shown. Under the provisions of § 46.1-1, subsection (16) (c), Code of Virginia (1950), as amended, a person "who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title." Is my interpretation, therefore, if Mr. X lists his address as Lexington, Virginia, in his application for Virginia registration, in such event, he could be required to purchase the Town license tags before operating his motor vehicle upon the streets therein.

MOTOR VEHICLES—Operation After Failure to Submit to Examination Required Under § 46.1-383—Classification of violation.

HONORABLE WESCOTT B. NORTHAM
Commonwealth’s Attorney for Accomack County

April 30, 1965

This is in reply to your letter of April 21, 1965, from which I quote the following:

"After a person’s driver’s license has been suspended or revoked, for example having been convicted for two traffic violations occurring during a period of one year, the Division writes to the person requiring him to submit to an examination within a specified time to determine his fitness to operate a motor vehicle upon the highways of this State. This letter gives him the authority to resume driving until such time of test.

"If the person fails to take or pass the test within the specified time and he is arrested for driving a motor vehicle thereafter, is he guilty
of driving a motor vehicle while his license is suspended or revoked in violation of Section 46.1-350, or is he guilty of driving a motor vehicle without an operator's license?"

The Division requires a person convicted of two traffic violations occurring during a period of one year to submit to an examination to determine his fitness to operate a motor vehicle upon the highways of this State pursuant to § 46.1-383, Code of Virginia (1950), as amended, which is mandatory. Under the given facts, issuance of the letter requiring the examination and authorizing the person to drive during a specified period prior to such examination indicates that no other disqualifying factors existed. Under the cited statute, however, refusal or neglect of the person to submit to the examination shall be grounds for suspension or revocation of his license or privilege to operate a motor vehicle in this State.

In consideration of the foregoing, it is necessary to determine whether or not, in any specific case, an order of suspension or revocation has been issued under § 46.1-383. If no such order has been issued, a person operating under the given facts is, in my opinion, guilty of operating without a license in violation of § 46.1-349, Code of Virginia (1950), as amended. If an order of suspension or revocation has been issued in pursuance of § 46.1-383, and the person is thereafter arrested for driving a motor vehicle, the person so arrested is guilty of a violation of § 46.1-350, Code of Virginia (1950), as amended, driving while license is suspended or revoked.

MOTOR VEHICLES—Operator’s License—Effect of revocation by State on U.S. mail carrier.

HONORABLE EMMORY H. CROCKETT
Commonwealth’s Attorney for Lee County

January 29, 1965

This is in reply to your letter of January 13, 1965, in which you request my opinion as to whether or not a person, whose license has been revoked for a period of one year after conviction on a charge of driving while under the influence of alcohol, is permitted under the laws of this State to operate a motor vehicle as a contract mail carrier during such revocation period.

Under § 18.1-59, Code of Virginia (1950), as amended, a judgment of conviction for a first offense under § 18.1-54 or for a similar offense under any county, city or town ordinance shall of itself operate to deprive the person so convicted of the right to drive for a period of one year. This section is self-executing. Pursuant to the requirements of § 46.1-417, Code of Virginia (1950), as amended, the Commissioner of the Division of Motor Vehicles shall forthwith revoke and not thereafter reissue during the period of one year, the license of any person so convicted. It is further provided in § 46.1-350, Code of Virginia (1950), as amended, that no person whose license to drive has been revoked under the provisions of Title 46.1 or of § 18.1-59 shall thereafter drive any motor vehicle on any highway in this State until the period of such revocation shall have terminated.

The question of whether a mail carrier qualifying as a federal employee may operate a motor vehicle in delivering the mails during a period in which his license is revoked on account of a conviction for driving while under the influence of alcohol was decided in the negative in an opinion found in Report of the Attorney General, (1961-1962), p. 179. As there stated, in reference to the reg-
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ulations contained in the U. S. Postal Manual, postal personnel are not authorized to operate motor vehicles unless they possess a valid State driver's license issued by the State wherein the postal installation is located. Furthermore, these regulations provide that the driving privileges of a postal employee shall be revoked when any such employee is convicted of operating a motor vehicle while under the influence of liquor or drugs or when the employee's State driver's license is revoked or suspended.

Since postal employees must hold a valid State license as a prerequisite of being permitted to operate motor vehicles on official business of the federal government, there appears no indication of an exception by such government for a person operating motor vehicles merely in the performance of a contractual service. The State law, previously cited herein, is mandatory and contains no such exception. Accordingly, it is my opinion that a person convicted of driving while under the influence of alcohol has no right to operate a motor vehicle as a contract mail carrier during the resultant revocation period.

MOTOR VEHICLES—Operator's License—Revocation for conviction under § 18.1-54—After termination of revocation period and compliance with Safety Responsibility Act—Driving without obtaining license violates § 46.1-349.

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

This is in reply to your letter of September 2, 1964, in which you request my opinion in regard to the facts and questions, which quote as follows:

"Facts:
"Assume that A was convicted for violation of § 18.1-54, Code of Virginia, 1950; that his license to operate a motor vehicle was revoked in accordance with § 46.1-417; that A did not drive any motor vehicle during the one year period of revocation; that thereafter A complied with the provisions of Chapter 6 (Motor Vehicle Safety Responsibility Act) of the Code of Virginia, 1950, as amended and was given authority to undergo examination for an operator's license; that prior to issuance of license A is arrested and charged with driving under revocation.

"Question:
"Would A be in violation of § 46.1-349, which statute prohibits driving without license or,
"Would he be in violation of § 46.1-350 and subject to the provisions of § 46.1-351.1?

"Does the statute contemplate seizure of vehicle after the period of revocation has expired if A drives before securing operator's license?"

Section 46.1-350, Code of Virginia (1950), as amended, makes it unlawful for any person whose license has been suspended or revoked, to drive any motor vehicle on any highway in this State unless and until the period of such suspension or revocation shall have terminated. Under the given facts, the one year period of revocation has terminated and, therefore, in my judgment, "A" would not be in violation of Section 46.1-350.

Section 46.1-351, Code of Virginia (1950), as amended, makes it unlawful for any person, whose license has been suspended or revoked, to drive any motor ve-
Vehicle in this State during any period wherein the restoration of license or privilege is contingent upon furnishing proof of financial responsibility, unless he has given proof of financial responsibility in the manner provided in Article 6 (§ 46.1-467 et seq.) of Chapter 6, Title 46.1, Code of Virginia (1950), as amended. Since "A" has complied with these financial responsibility requirements and has been given authority to undergo examination for an operator's license, in my opinion, he would not be in violation of Section 46.1-351.

Section 46.1-351.1, Code of Virginia (1950), as amended, provides for seizure of the motor vehicle where an officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested a person who will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351. While, technically, the statute does not contemplate seizure of the vehicle used by "A," as he is not subject to the penalties prescribed in § 46.1-350 or § 46.1-351, it is conceivable that this initial step may be taken as to the vehicle operated by him, since the officer making the arrest acts under this section when he reasonably believes the person arrested will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351. Section 46.1-351.2, Code of Virginia (1950), as amended, however, provides that the judgment of the court shall be to entirely relieve the property from forfeiture upon a finding by the court or jury in favor of any person claiming to be the owner or to hold a lien thereon, who denies that he was, or should be convicted as provided in § 46.1-350 or § 46.1-351.

Section 46.1-349, Code of Virginia (1950), as amended, prohibits any person, except those expressly exempted by law, from driving a motor vehicle until such person has passed the required examination and obtained an operator's or chauffeur's license. Since "A" was convicted of violating Section 18.1-54, Code of Virginia (1950), as amended, which requires revocation of the license of the person so convicted, after termination of such revocation period he must obtain a new license in order to qualify under the law to drive a motor vehicle. As the related facts indicate that no license has been issued to him following his revocation period, and already having expressed my belief that Sections 46.1-350 and 46.1-351 are not applicable, it is my opinion that his driving should be charged as a violation of Section 46.1-349.

MOTOR VEHICLES—Proceedings under Title 46.1—When fees taxed for service of Commonwealth's Attorney.

COMMONWEALTH ATTORNEYS—Fees in Misdemeanor Prosecution Under Title 46.1—When assessable.

FEES—Commonwealth Attorneys—Assessable for prosecutions under Title 46.1.

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

August 5, 1964

This is in reply to your letter of July 27, 1964, from which I quote the following:

"As you know, the Virginia Code provides that the Commonwealth Attorney's fee may be imposed as costs in criminal cases where the statute requires him to prosecute, and where he actually does appear for the prosecution. There are numerous cases such as the Alcoholic Beverage Control law where the statute specifically provides that the
Commonwealth Attorney must prosecute. I believe the Motor Vehicle Title of the Code also requires the Commonwealth Attorney to prosecute certain violations. However, the new index is somewhat confusing in setting forth these specific violations wherein the Commonwealth Attorney must appear. Also in revising Title 46 (dealing with motor vehicles) and Title 14 (dealing with fees) there is considerable confusion upon the subject.

"If I am not imposing upon your office too much, I would appreciate an opinion as to what misdemeanor violations (especially Motor Vehicle Sections) require the Commonwealth Attorney to appear thus making a fee assessable as part of the costs."

By Chapter 386, Acts of Assembly 1964, Title 14 of the Code of Virginia was repealed and the Code was amended by adding thereto, in lieu of the repealed title, a new title numbered 14.1 relating to costs, fees, salaries and allowances. In regard to fees for attorneys for the Commonwealth in misdemeanor cases. Section 14.1-121, Code of Virginia (1950), as amended, reads, in part, as follows:

"The fees of attorneys for the Commonwealth in all felony and misdemeanor cases in which there is a conviction and sentence not set aside on appeal or a judgment for costs against the prosecutor, and for expenditures made in the discharge of his duties shall be as follows:

* * * * *

"For each person tried for a misdemeanor in his circuit or corporation court, five dollars, and for each person prosecuted by him before any court of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, five dollars, and in every misdemeanor case so prosecuted the court or judge shall tax in the costs and enter judgment for such misdemeanor fee.

"No attorney for the Commonwealth shall receive a fee for appearing in misdemeanor cases before a court not of record, except in those particular violations of the law when he is expressly required to appear by statutory enactment and provision is made for the taxing of his fees in the costs."

Under Section 14.1-88, Code of Virginia (1950), as amended, (former Section 14-99), no costs or fees may be taxed for an attorney for the Commonwealth unless he, or his duly authorized assistant, actually appears and prosecutes the proceedings before the court. Considering this section in conjunction with the quoted portion of Section 14.1-121, the import is that for each person tried and convicted of a misdemeanor in his circuit or corporation court, providing the Commonwealth's attorney actually appeared and prosecuted the proceedings before the court, a fee of five dollars is assessable. For appearing in misdemeanor cases before a court not of record, however, no fee is taxed for the attorney for the Commonwealth except in those particular violations of the law when he is expressly required to appear by statutory enactment. A comparison of Section 14.1-121 with former Section 14-130 reveals no change in regard to the question of when a fee is assessable for the services of an attorney for the Commonwealth in misdemeanor cases.

You state that you find the new Index somewhat confusing in setting forth the violations in which the Commonwealth attorney must appear. In this relation, the "1963 Replacement Volume," of course, must be used along with the "1964 Supplement." By referring to Volume 10, Page 328, "Commonwealth's Attorney,"
subtitle "Alcoholic Beverages," you will find "Appearance and representation of Commonwealth, § 4-92." Section 4-92 provides that the attorneys for the Commonwealth are directed to appear and represent the Commonwealth in the trial of certain offenses under "The Alcoholic Beverage Control Act." Again, on Page 530 of the same volume, under "Dentists," you will note the subtitle "Prosecuting violations, § 54-200." That section, in turn, states: "It shall be the duty of the Commonwealth's attorneys to prosecute every violation of this chapter." Following through under the general heading, "Commonwealth's Attorney," you will find reference to the other statutes requiring the attorney for the Commonwealth to prosecute, under various key words, however, such as "Appearance," "Duty," "Prosecution" and "Enforcing."

In regard to the motor vehicle laws, I find no section in Title 46.1, Code of Virginia (1950), as amended, which specifically requires an attorney for the Commonwealth to appear in a misdemeanor case. The proceedings for forfeiture of a seized motor vehicle, as prescribed in Sections 46.1-351.1 and 46.1-351.2, constitute a civil action against the vehicle and are not to be confused with trial of the misdemeanor which rendered the vehicle subject to seizure. Consequently, it is my opinion that the fee prescribed in Section 14.1-121 is assessable in misdemeanor cases involving violations of the motor vehicle laws which you prosecute in the circuit court, but in such cases prosecuted by you in the county court, in the absence of specific statutory requirement, this fee may not be assessed.

MOTOR VEHICLES—Radar—Checking of speed with electrical devices—Placing of signs—Effects of certificate of Highway Commissioner as to placing.

HONORABLE E. CARTER NETTLES, JR.
Commonwealth's Attorney for Sussex County

January 28, 1965

This is in reply to your letter of January 14, 1965, in which you draw my attention to portions of § 46.1-198 (c), Code of Virginia (1950), as amended, and request my opinion on certain facts and related questions which quote as follows:

"Route 258, in the primary highway system runs through Southampton County into North Carolina; Route 258 does not run into Sussex County; Route 35 in the primary highway system, runs through Sussex County and intersects Route 258; a motorist traveling from North Carolina along Route 258 is arrested in Sussex County on Route 35 on the 15th day of the month; the certificate of the State Highway Commissioner as to the placing of signs is dated the 1st day of the month."

"Can a person be properly arrested and convicted where the defendant's uncontroverted evidence is that the required sign was not in place on the primary highway system on the date of the arrest when the primary highway does not run into the county in which the arrest was made? Further, would a certificate by the State Highway Commissioner as to the placing of such sign dated fifteen days before the date of the offense create a presumption sufficient to sustain a conviction for speeding where the motor vehicle was checked by the use of radio micro-waves?"

Paragraph (c) of § 46.1-198, Code of Virginia (1950), as amended, to which you refer, reads as follows:

"No operator of a motor vehicle may be arrested under this section
unless signs have been placed at the State line on the primary highway system and outside cities and towns having over 3500 population, on the primary highways to indicate the legal rate of speed and that the speed of motor vehicles may be measured by radio microwaves or other electrical devices. There shall be a prima facie presumption that such signs were in place at the time of the commission of the offense of exceeding the legal rate of speed, and a certificate by the State Highway Commissioner as to the placing of such signs shall be admissible in evidence to support or rebut the presumption. Such legal rate of speed and notice of measurement of speed by radio microwaves or other electrical devices may be posted on different signs and need not be posted on the same sign."

In reference to your first question, it will be seen that § 46.1-198 (c) contains no requirement for placing the signs other than at the State line and outside cities and towns of 3500 population on the primary highways. Hence, the fact that the primary highway does not run into the county in which the arrest was made would not affect an arrest or conviction under this section. As to "defendant's uncontroverted evidence," the determination of sufficiency of the evidence is a prerogative of the trial court. As I interpret the statute under consideration, the certificate of the State Highway Commissioner as to the placing of the signs, as required by this section, is entitled to great weight and will control unless the contrary be proven by clear and convincing evidence.

Regarding your second question, the quoted paragraph of § 46.1-198 provides for a prima facie presumption that the signs were in place when the offense was committed, and further states that a certificate of the State Highway Commissioner shall be admissible in evidence to support or rebut the presumption. The question of whether such certificate dated fifteen days before the date of the offense would be sufficient to sustain a conviction would depend upon the weight of the evidence to the contrary. In the absence of strong evidence to the contrary, in my opinion, a certificate in support of the presumption would suffice to sustain a conviction. Because of the lapse of fifteen days between the date of the certificate and the offense date, it is conceivable that the sign was not in place at the time of the offense. The burden of going forward with evidence sufficient to overcome the presumption, supported by the certificate, however, would be upon the defendant.

MOTOR VEHICLES—Radar—Checking on speed with electrical devices—Placing of signs to show.

HONORABLE JOHN R. SNODDY, JR.
Commonwealth's Attorney for Buckingham County

January 27, 1965

This is in reply to your letter of January 8, 1965, in which you request my opinion as to whether a person should be convicted of speeding under § 46.1-198, Code of Virginia (1950), as amended, on the following facts:

"This person was operating a motor vehicle and entered the State of Virginia from Maryland across the Woodrow Wilson Bridge on U. S. Interstate Highway #495 and proceeded South on that highway until it entered Interstate Highway #95 and continued thereon to a point between Ashland and Richmond near the Atlee Interchange where the radar mechanism was set up. At no point along this route are there
any signs that the speed of motor vehicles may be checked by radar or other electrical devices."

Although it is apparent from Article 2.1 of Chapter 1, Title 33, Code of Virginia (1950), as amended, that the Interstate System is not included within the term, primary system of State highways, I believe it proper to consider § 46.1-198 applicable in connection with the posting of signs to indicate the legal rate of speed and the use of radio microwaves or other electrical devices for measuring the speed of vehicles using such highways. While the Interstate System is comparatively new to this State, having been authorized by Chapter 589, Acts of Assembly of 1958, I am advised that the Highway Department has applied the requirements of § 46.1-198 to such highways. This interpretation is supported not only by the nature and use of the highways included in the Interstate System, and the rule of strict construction of a criminal statute against the Commonwealth but, also, by the implication found in § 33-36.2, Code of Virginia (1950), as amended, which states that the State Highway Commission may regulate the use of the Interstate System in the same manner in which it is authorized to regulate the use of the primary system State highways. Paragraph (c) of § 46.1-198 reads as follows:

"No operator of a motor vehicle may be arrested under this section unless signs have been placed at the State line on the primary highway system, and outside cities and towns having over 3500 population, on the primary highways to indicate the legal rate of speed and that the speed of motor vehicles may be measured by radio microwaves or other electrical devices. There shall be prima facie presumption that such signs were in place at the time of the commission of the offense of exceeding the legal rate of speed, and a certificate by the State Highway Commissioner as to the placing of such signs shall be admissible in evidence to support or rebut the presumption. Such legal rate of speed and notice of measurement of speed by radio microwaves or other electrical devices may be posted on different signs and need not be posted on the same sign."

The requirements of the quoted paragraph are that the signs must be placed at the State line and outside cities and towns having over 3500 population, on the primary highways. There is a prima facie presumption that the signs were in place at the time of the commission of the offense and a certificate by the State Highway Commissioner as to the placing of the signs shall be admissible in evidence to support or rebut the presumption. The attorney for the Commonwealth should request such a certificate whenever a case is contingent upon the point of whether such signs were placed as required by the statute. I am informally advised by the State Department of Highways that the records of the Department in Richmond show that the required signs have been placed on the primary highway system and on the Interstate Highways, including Interstate 95 and 495, referred to in the given facts, at the Maryland and District of Columbia lines and outside the City of Alexandria, as well as outside the City of Richmond at the entrance to Interstate 95. Since the latter highway touches no other cities or towns having over 3500 population between the two named cities, no signs are required elsewhere along the route in order to comply with § 46.1-198, Paragraph (c).

In consideration of the foregoing, if the last sentence in the quoted facts means that there were no signs between those placed at the outer limits of the cities of Alexandria and Richmond, I find nothing to prevent a conviction under § 46.1-198. If, however, the words, "at no point along this route" mean that at the time of the offense, the signs were not in place at the State line (where Interstate 495
enters Virginia from Maryland) or outside the City of Alexandria, in my opinion, the person should not be convicted under this section.

MOTOR VEHICLES—Reckless Driving Charged Under § 46.1-189—Element of endangering persons or property essential.

CRIMES—Reckless Driving—Prosecution under § 46.1-189 necessitates element of endangering persons or property.

HONORABLE JAMES T. ADAMS
Commonwealth's Attorney for the City of Buena Vista

This is in reply to your letter of August 12, 1964, in which you request my opinion as to the interpretation of the statute in relation to the following question:

"In a prosecution wherein the accused is charged generally under 46.1-189, is it essential for the prosecution to show that under a bare charge of reckless driving, that someone or something was endangered by said conduct?"

The pertinent portion of Section 46.1-189, Code of Virginia (1950), as amended, is as follows:

"Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving; * * *"

The wording of this section, in my interpretation, indicates that the phrase "to endanger life, limb or property of any person" is an essential element to be established in any prosecution thereunder. Accordingly, I shall answer your question in the affirmative. No particular degree of endangerment seems necessary, however, and each such charge must be considered in relation to the facts offered in support of it. No such limitation is imposed in regard to the violations specifically enumerated in Sections 46.1-190 and 46.1-191, Code of Virginia (1950), as amended, each of which, in itself, constitutes reckless driving.

MOTOR VEHICLES—Registered Member Virginia National Guard—Not exempt from town license fee under Soldiers' and Sailors' Civil Relief Act.

TAXATION—Motor Vehicles—Town license fee—Member Virginia National Guard not exempt under Soldiers' and Sailors' Civil Relief Act.

HONORABLE JOSEPH MOTLEY WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of March 17, 1965, in which you present the facts and pose the question contained in the following quoted paragraph:

"Assuming a situation where "A" resides in an incorporated town
and "A" is a registered member of the Virginia National Guard on active duty therewith, is "A" thereby exempted from purchasing town automobile license tags by virtue of the Soldiers' and Sailors' Civil Relief Act?"

The Soldiers' and Sailors' Civil Relief Act provides that no person shall be deemed to have lost or to have acquired a residence or domicile solely by reason of compliance with military or naval orders. The purpose of the Act was to eliminate multiple taxation of military personnel assigned to posts of duty outside of their respective home states.

The Virginia National Guard, under § 44-2, Code of Virginia (1950), as amended, "shall consist of the regularly enlisted militia and of commissioned and warrant officers, who shall be residents of the Commonwealth of Virginia." Accordingly, in my opinion, the situation of "A" does not come under the Soldiers' and Sailors' Civil Relief Act and, therefore, I shall answer your question in the negative.

MOTOR VEHICLES—Registration—Exemptions—Transportation of livestock to market not included.

January 4, 1965

HONORABLE RUSSELL W. YOWELL
Judge, Madison County Court

This is in reply to your letter of December 15, 1964, which reads, in part, as follows:

"Would you advise whether or not in your opinion the exemption from annual registration and license plates on a farm truck under Code Section 46.1-45 (a) for a vehicle used by the owner thereof for the purpose of moving livestock from his farm along a public highway for a distance of not more than 10 miles to a storage house or packing plant would enable him to carry livestock on an unlicensed farm truck to a livestock market for a distance not to exceed 10 miles."

The provisions of § 46.1-45, Code of Virginia (1950), as amended, have been enlarged by the Legislature from time to time to provide for additional exemptions. Such exemptions must be specifically stated in the statute because of the rule that any exemption from the tax laws of this State will be strictly construed against the taxpayer. The provision which you cite provides for moving farm produce and livestock to a storage house or packing plant, within the stated limitations, but does not refer to transporting such items to market.

In consideration of the general rule of strict construction of exemption statutes, which, incidentally, has been reiterated by this office in several previous interpretations, I am of the opinion that the transportation of livestock to market is not included within the scope of this section.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Registration—Public use vehicles—Buses owned and operated by city included.

MOTOR VEHICLES—Licenses—Public use vehicles—Buses owned and operated by city included.

TAXATION—Exemptions—Gasoline used in public use vehicles.

HONORABLE GEORGE M. WARREN, JR.
Member, Virginia State Senate

March 17, 1965

This is in reply to your letter of March 15, 1965, which reads as follows:

"Prior to January 1, 1965, the adjoining cities of Bristol, Virginia and Bristol, Tennessee were served by Yellow Coach Lines, Inc., a public utilities corporation licensed and authorized to operate a bus system in both cities. In the fall of 1964 this corporation gave notice to both cities that it would surrender its franchise and cease its operations.

"This action was caused by substantial operational losses suffered continuously for a number of years. Both cities had endeavored to help the corporation by relieving it of any payment for its franchise and by granting increases in fares.

"The two cities were unable to obtain any bus service by private enterprise without substantial subsidization. In order to preserve essential transportation facilities for their citizens, many of whom live in one city and shop or work in the other, the two cities entered into an agreement for the joint purchase and operation of 25 buses owned by Yellow Coach Lines, Inc. A copy of the agreement between the two cities is attached hereto.

"A copy of that part of the charter of the City of Bristol, Virginia authorizing such a joint undertaking with the City of Bristol, Tennessee is attached hereto. The City of Bristol, Tennessee has a similar power in its charter.

"All buses jointly owned are kept at night, when not in operation, and serviced in Bristol, Virginia. A terminal for all the buses is located in Bristol, Virginia. The aggregate mileage operated in each of the two cities is approximately equal. Efficient operation requires the majority of the buses to be operated to some extent in both cities.

"The State of Tennessee has issued its public use registration tags for all buses titled jointly to the two cities in Tennessee and has agreed to issue such tags for all buses so titled in Virginia.

"The office of the Attorney General of Tennessee has issued an opinion granting tax exemption to the jointly owned and operated bus system. A copy of this opinion is attached hereto.


"Your opinion is respectfully requested on the following questions:

"1. Can Virginia public use license tags be issued for the buses jointly owned and operated by the two cities as set forth above?

"2. Are the two cities exempt from the Virginia gasoline tax in the joint operation of the buses as set forth above?"

Under the power granted to the city of Bristol, Virginia, in Section 42 of its
charter (Acts of 1920, Chapter 309), the city of Bristol, Virginia, entered into a contract with the city of Bristol, Tennessee, for the operation of a jointly owned public transportation system. I do not deem it necessary to set forth in this opinion the details of the agreement. Section 46.1-49 of the Code of Virginia is as follows:

"Motor vehicles, trailers and semitrailers owned by the State and counties, cities and towns thereof and used purely for State, county and municipal purposes shall be required to be registered and no fee shall be collected for such license plates and registration, but all such license plates issued for such purposes, for which no fee is collected and paid, except such plates as are issued to be used on cars devoted solely to police work and those for use on the car of the Governor, shall have conspicuously inscribed, stamped or printed thereon so as to be easily seen and read the words 'Public Use' and any other or additional license plates whether paid for or not shall not be used on cars for which public use plates have been issued except in the case of cars used solely for police work. Counties, municipalities and the agencies of the federal government shall certify to the Commissioner of Motor Vehicles the cars to be used solely for police work."

In my opinion, under this section the city of Bristol, Virginia, is entitled to have registered with the Division of Motor Vehicles the titles to the motor vehicle equipment owned by the two cities jointly in the name of the two cities and the Division of Motor Vehicles has the power under this section to issue "Public Use" license plates for such motor vehicles without the collection of any fee therefor. The obvious purpose of § 46.1-49 is to require the State through its agency, the Division of Motor Vehicles, to cooperate with the political subdivisions of the State which own and operate motor vehicles for municipal purposes. The fact that the city of Bristol, Virginia, is the owner of an undivided interest in the equipment and that the city of Bristol, Tennessee, is the owner of the other undivided interest in the equipment should not be used—under the circumstances here existing—as a means for defeating the obvious intention of the statute. Under the state of facts presented in your letter and as is apparent from the terms of the contract between the two cities, the method adopted by the cities of Bristol, Virginia, and Bristol, Tennessee, for the ownership and operation of a public service facility of this nature is made necessary by the fact that the two cities are in reality one municipality separated by a State line but having the same business and financial interests as one unit to the same extent as would occur if the entire city should be located is this State. For the purposes here under consideration it has been rendered so by the provisions of its charter referred to herein.

It is clear that under the terms of this statute if the public facility was owned by the city of Richmond, Roanoke, Lynchburg or Danville, or any other city located wholly within the confines of this State, the registration would be permitted and the "Public Use" license plates issued. The statute under consideration is a remedial statute designed for the purpose of exempting the State and the counties, cities and towns thereof from the taxes and license fees required of individuals and corporations operating a public service facility of this nature. The same principle is involved with respect to exemption from the license plate fee as was presented in the case of Hanover County v. Trustees, 203 Va. 613, relating to exemption from taxation where the Court stated:

"[1] In construing § 183 of the Constitution we have said that as a general rule provisions exempting property of individuals or corporations from taxation must be strictly construed, taxation being the rule rather than the exception. But since it has always been the policy of this
State to exempt property of the character mentioned in the several clauses of § 183 of the Constitution, it should not be construed with the same degree of strictness that applies to the provisions exempting property of individuals or private corporations, and as to such property exemption is the rule and taxation the exception."

In my opinion, the statute must be construed to carry out the obvious purpose for which it is intended and, therefore, the Division of Motor Vehicles is authorized under this section of the Code to register and issue public use license plates in this instance.

With respect to your question (2), the tax upon the gasoline used in the operation of such motor vehicles is exempt under § 58-712 of the Code. Moreover, the collection of a tax upon the sale of gasoline used in the motor vehicles in question is prohibited by Section 183(a) of the Constitution of Virginia. This is true even though revenue may be derived from the operation of such public facility. This question was settled in the case of Commonwealth v. City of Richmond, 116 Va. 69. Also, see Hanover County v. Trustees, supra.

MOTOR VEHICLES—Registration and Licensing—Private passenger cars owned by nonresident students may be operated in State under reciprocity not exceeding six months.

MOTOR VEHICLES—Reciprocity—When applicable.

HONORABLE TOM FROST
Member, House of Delegates

July 30, 1964

This is in response to your letter of July 27, 1964, in which you ask my opinion as to whether students at the Warrenton Training Center, a branch of the Department of Defense, are required to register their motor vehicles in Virginia. You, of course, have reference to nonresident students who use private passenger cars which are duly licensed in their home states, as indicated in the letter of Captain William M. Gause, Commanding Officer at the Training Center, copy of which letter you enclosed.

There is no exception in the laws of Virginia for the registration of motor vehicles used by students. Such vehicles are subject to the same registration laws as any other motor vehicle. In regard to the temporary operation of a motor vehicle by a nonresident without registration in this State, however, Section 46.1-132, Code of Virginia (1950), as amended, is as follows:

"A nonresident owner, except as otherwise provided in this article, owning any passenger car which has been duly registered for the current calendar year in the state or country of which the owner is a resident and which at all times when operated in this State has displayed upon it the license plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such passenger car within or partly within this State for a period of six months without registering such passenger car or paying any fees to this State. But if at the expiration of such six months such passenger car is still in this State, such owner shall procure registration and license and shall pay for such license from the time operation of such vehicle in this State commenced."
This section must be considered in conjunction with other related statutes. Section 46.1-131, Code of Virginia (1950), as amended, limits the privileges extended under Section 46.1-132 to nonresident owners who are residents of states which grant the same privileges to residents of this State operating motor vehicles in the State wherein such nonresident owners are residents. This should present no problem in the instant case, as it is my understanding that this State has entered into either formal or informal reciprocal agreements, pursuant to Sections 46.1-20 or 46.1-137, Code of Virginia (1950), as amended, with all other states in this regard. Your attention is directed, however, to Section 46.1-1, Code of Virginia (1950), as amended, paragraph (16), which reads, in part, as follows:

"(b) A person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days, shall be deemed a resident for the purposes of this title.

"(c) A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title."

From the statutes herein quoted and the reciprocal agreements referred to, it will be seen that a nonresident student or other nonresident sojourner, who is not gainfully employed and who has not registered a motor vehicle, listing an address within this State, may operate his private passenger car, which has been duly registered for the current calendar year in the state of which he is a resident, for a period not exceeding six months without registering such passenger car in this State. The information furnished discloses none of the situations included in Section 46.1-1, Subsection (16), (b) or (c), quoted supra, but indicates that the persons concerned are nonresident students and that the longest period any of them remain in the State of Virginia is six months. On the basis of such facts, it is my opinion that they may operate their private passenger cars on their home state registration and licenses, without registering them in this State.

MOTOR VEHICLES—Registration of Uninsured Motor Vehicle—Fee not required for replacement vehicle.

MOTOR VEHICLES—Registration of Uninsured Motor Vehicle—Responsibility for payment of fee.

Honorable James H. Joines
Judge, Wythe County Court

March 12, 1965

This is in reply to your letter of March 5, 1965, in which you request my opinion as to the proper interpretation of § 46.1-167.1, Code of Virginia (1950), as amended, in relation to two questions which I shall quote and consider separately and in the order presented, as follows:

"If a person pays the fee of $20.00 on an automobile at the beginning of a licensing period, and trades automobiles in that same period, is he required to pay another $20.00, or would the original $20.00 fee extend to the second purchase?"

A person who sells or transfers a registered motor vehicle, trailer or semitrailer
may, under the provisions of § 46.1-95, Code of Virginia (1950), as amended, have the license plates and the registration number thereon assigned to another vehicle titled in his name upon application to the Division of Motor Vehicles accompanied by a fee of one dollar. If this procedure is followed, the twenty dollar uninsured motor vehicle fee paid at the beginning of the licensing period upon the automobile sold or transferred will extend to another automobile titled in his name during the same license year, and such person is not required to pay an additional twenty dollar fee under § 46.1-167.1. A similar view was expressed in Report of the Attorney General (1957-1958), p. 206.

"I would also like to know if there is any responsibility of the automobile dealer assisting the purchaser in making application for a new registration to see that the fee of $20.00 is paid?"

Pursuant to § 46.1-167.1, payment of the twenty dollar uninsured motor vehicle fee is required of any person registering an uninsured motor vehicle. Registration will not be issued for a motor vehicle not declared to be insured unless payment of such fee is received. The statute places the responsibility for payment of the fee upon the person registering the uninsured motor vehicle and, accordingly, I shall answer this question in the negative.

MOTOR VEHICLES—Reports to Commissioner of Conditions of Persons Affecting Their Ability to Operate—When and by whom made.

MOTOR VEHICLES—Licenses—Revocation—Duty of Commissioner upon receipt of reports concerning incompetency of persons to operate.

HONORABLE G. GARLAND WILSON
City Attorney for City of Radford

July 21, 1964

This is to acknowledge receipt of your letter of July 16, 1964, in which you request my opinion on several questions which will be answered seriatim. I quote from your letter:

"I would like your opinion whether or not a person who voluntarily enters a private psychiatric hospital (which is licensed by the State Hospital Board) for treatment of inebriety or drug addiction, without any legal commitment to such institution, or without any adjudication, and is thereafter discharged by said institution, and the authorities thereof are of the opinion that such person is not competent because of inebriety or drug addiction to operate a motor vehicle, are [the said authorities] required to make a report of such opinion to the Commissioner?"

Section 46.1-429, Code of Virginia (1950), as amended by Chapter 230, Acts of 1964, among other things requires the superintendent or chief medical officer of any institution licensed by the State Hospital Board (under Chapter 11, Title 37, of the Code) upon the release of any person whose mental condition is brought about by inebriety or drug addiction prevents him from being competent to operate a motor vehicle with safety, to report to the Commissioner of Motor Vehicles the date of release together with a statement concerning his [the patient’s] ability to operate a motor vehicle. Before this section was amended in 1964, such reports were required to be made by the person in charge of such
private institution of the admission of the patient rather than the release of such patient. It does not matter under what method or circumstances the patient is admitted to the private hospital. He may be committed under the provisions of § 37-61 et seq. of the Code or he may enter the private hospital voluntarily. I am therefore of the opinion that the question should be answered in the affirmative.

Again quoting from your letter:

"Does Sections 46.1-427 and 46.1-429 of the 1964 Supplement to the Code of Virginia apply to persons released from private institutions for inebriety or drug addiction, without any legal commitment, or adjudication of such fact; or, do said statutes mean that private institutions are to be governed by these requirements only as to patients transferred thereto for treatment of inebriety or drug addiction, who have been previously committed to an institution, or adjudicated such, by a competent court of law?"

The pertinent portion of § 46.1-427 of the Code as amended is as follows:

"(a) The Commissioner, upon receipt of notice that any person has been legally adjudged to be insane or feebleminded, in accordance with § 37-136.1 or that a person released from an institution operated or licensed by the State Hospital Board or transferred to an institution not licensed or operated by such Board is, in the opinion of the authorities of such institution, not competent because of mental illness, mental deficiency, epilepsy, inebriety or drug addiction to operate a motor vehicle with safety to persons or property shall forthwith suspend his license; but he shall not suspend the license if the person has been adjudged competent by judicial order or decree." (Italics supplied)

From the wording of this statute, the same is applicable to a person released from such institution as well as persons who are transferred to a private institution from an institution to which they have been committed. I do not believe that being committed under § 37-61 et seq. or an adjudication is necessary to make these statutes operative. Upon the receipt of such information from the institution, the Commissioner of Motor Vehicles must suspend the driving license of the person concerned. Such is his mandatory duty. However, the aggrieved person may appeal from the order or act of said Commissioner suspending his driving license under the provisions of § 46.1-437 of the Code as amended. In such a proceeding, the competency of the person to drive a motor vehicle with safety is determined by the court. I believe that this right of appeal to a court meets the constitutional objection suggested by you. In this connection, see the case of Butler v. Commonwealth, 189 Va. 411, at page 419.

I am therefore of the opinion that §§ 46.1-427 and 46.1-429 of the Code of Virginia apply to persons released from private institutions for inebriety or drug addiction without any legal commitment or adjudication.

Quoting further from your letter:

"Further, would the release of any such information by a private institution violate the confidential and professional relationship between physician and patient, which is of a privileged nature?"

This question is answered in the negative. The purpose of this statute is to pro-
Mote safety on the highways by denying the use thereof to persons who are incompetent to operate a motor vehicle with safety to persons or property. The right of the person to confidential relationship with his physician is subordinate to the public interest. Furthermore, the contents of medical reports are not privileged, as otherwise might be true in the physician-patient relationship, because Code § 8-289.1 removes the privilege when the physical or mental condition of the patient is at issue, in any action, suit or proceeding. See, City of Portsmouth v. Cilumbrello, 204 Va. 11, 15.

MOTOR VEHICLES—School Buses—Equipment must comply with State Board of Education regulations.

CITIES—School Buses—Equipment must comply with regulations of State Board of Education.

HONORABLE GEORGE M. COCHRAN
Member, House of Delegates

July 1, 1964

This is in reply to your letter of June 23, 1964, which reads as follows:

"The City of Staunton operates a municipal bus system for the benefit of its citizens. During the public school year each morning and afternoon of each day that school is in session several of these busses are used exclusively to transport pupils to and from school at a reduced bus fare.

"The City desires to equip these busses with signs, revolving signal lights and other warning devices to be used only when transporting school children, and to adopt a local ordinance providing penalties for motorists who fail to stop for such busses when required. The busses will not be painted the same color as county school busses and will be used to transport regular passengers except when transporting school children.

"I would appreciate your advising me whether, in your opinion, under its police power, the City of Staunton can equip its busses in the manner desired and pass an ordinance imposing penalties upon those who fail to stop for such busses when school children are being transported therein."

The matter of equipping school busses with safety warning devices and making them otherwise more readily identifiable, for the protection of school children being taken on, transported or discharged, has been placed, by statutory authority, under the control of the State Board of Education, with inspection and enforcement by the Department of State Police. Section 46.1-267, Code of Virginia (1950), as amended, states that any school bus "may be equipped with flashing, blinking or alternating warning lights of a type approved by the Superintendent." Section 46.1-287, Code of Virginia (1950), as amended, requires that "Every bus used for the principal purpose of transporting school children shall be equipped with a warning device of such type as may be prescribed by the State Board after consultation with the Superintendent of State Police." Section 22-276, Code of Virginia (1950), as amended, is as follows:

"The State Board may make all needful rules and regulations not inconsistent with law relating to the construction, design, operation, equipment, and color of school busses, and shall have the authority to issue an order prohibiting the operation on public streets and highways
of any school bus which does not comply with such regulations, and any such order shall be enforced by the Department of State Police."

Pursuant to this statute, the State Board of Education has prescribed rules and regulations covering the construction, equipping and operation of school buses for the purpose of assuring the safe, economical and comfortable transportation of children to the public schools. Under State Board of Education Regulations, Standards and Specifications Pertaining To Pupil Transportation, paragraph 16, at page A-4, states as follows:

"All publicly owned, part publicly owned or contract school buses, transporting pupils to and from the public schools, shall be painted a uniform color, National School Bus Chrome, and shall be identified and equipped as outlined in the Standards and Specifications."

The "Specifications," to which reference is made in the quoted regulation, require that the school bus body, including the "hood, cowl, and fenders shall be painted uniform color, national school bus chrome yellow." This is specified as one of the minimum requirements for a school bus body. The warning lights for school buses will not be approved for a vehicle of any other color. It is clear that only a bus meeting these statutes and regulatory requirements would qualify as a public school bus. Insofar as the color yellow, prescribed in the regulations, is concerned, I am advised by the Department of Education and the Department of State Police that it has been determined to be the color most readily discernible in all types of weather, and its adoption is undoubtedly attributable to the increased safety factor.

As to the regulation of traffic in relation to a school bus, Section 46.1-190, paragraph (f), Code of Virginia (1950), as amended, states that the act of failing to stop for a school bus, which is stopped on the highway for the purpose of taking on or discharging school children, shall constitute reckless driving. As you know, this section has heretofore contained a provision that such regulation shall apply only to school buses "marked or identified as provided in the regulations of the State Board of Education." Amendments to this section, found in Chapter 266, Acts of Assembly 1964, enlarged it to include school buses "stopped on the roadway of a school," public or private, as well as on a highway, and changed the wording of the proviso, in part, to read "provided, however that this shall apply only to school buses which are painted yellow with the words 'School Bus, Stop, State Law' printed in black letters six inches high on the front and rear thereof." While this language does not change the substance, since the same requirements were already included and remain in the regulations of the State Board of Education, to which the statute referred, it makes it readily intelligible, without reference to such regulations, that the school bus must be painted yellow and display the other markings specified in this section or there is no violation.

Considering the foregoing, in conjunction with related statutes and regulations, it is my opinion that compliance therewith is a requisite for equipping a vehicle with such school bus warning signals and regulating other traffic in regard thereto, and, accordingly, I shall answer your question in the negative.
MOTOR VEHICLES—Seizure—Must be made at time of arrest of operator.

CIVIL PROCEDURE—Seizure of Motor Vehicle—Must be accomplished at time of arrest of operator.

HONORABLE DABNEY W. WATTS
Commonwealth's Attorney for the City of Winchester

August 3, 1964

This is in reply to your letter of July 17, 1964, in which you request my opinion as to whether a police officer may pursue an operator beyond his own jurisdiction or seize a motor vehicle pursuant to § 46.1-351.1 of the Code when the officer has arrested the operator and released him and then subsequently determines that the operator should have been charged with operating such vehicle after license suspension or revocation.

Paragraph (a) of the section in question reads as follows:

“(a) Where any officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested any person who will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351, he shall seize and take possession of such motor vehicle, and deliver the same to the sheriff of the county or the sergeant of the city in which such arrest was made, taking his receipt therefor in duplicate. The officer making such seizure shall also forthwith report in writing, of such arrest and seizure to the attorney for the Commonwealth for the county or city in which such arrest and seizure was made.”

This paragraph does not in specific language draw a distinction between the situation in which the arresting officer reasonably believes the arrested person is operating in violation of § 46.1-350 or 46.1-351 immediately at the time of arrest and a situation in which he discovers information at a later time. As read in their entirety, §§ 46.1-351.1 and 46.1-351.2 indicate quite strongly that the seizure must be co-incidental with the illegal use of the vehicle, and that the arrest and seizure are to be in the same county or city, and the seizure is to be made by the same officer who makes the initial arrest.

In view of the foregoing, I am of the opinion that the arresting officer must seize the vehicle at the time of the arrest of the operator in order to effect the forfeiture as contemplated in § 46.1-351.2 of the Code.

MOTOR VEHICLES—Seizure—Town officer authorized to make.

CIVIL PROCEDURE—Filing of Information—May be patterned after those filed under § 4-56.

HONORABLE CHARLES H. WILSON
Commonwealth's Attorney for Nottoway County

August 28, 1964

This is in reply to your letter of August 20, 1964, in which you make certain inquiries relative to seizing a motor vehicle under Section 46.1-351.1 of the Code of Virginia and the proper form for filing the information in the event of such seizure.
In reference to the procedure required for forfeiture of a motor vehicle, Section 46.1-351.2, Code of Virginia (1950), as amended, follows very closely the requirements prescribed in Section 4-56, Code of Virginia (1950), as amended, relating to the forfeiture of a motor vehicle under the Alcoholic Beverage Control laws. The statutory requirements for filing the information under Sections 4-56 and 46.1-351.2 are identical, each being contained in a paragraph which reads as follows:

"Such information shall allege the seizure, and set forth in general terms the grounds of forfeiture of the seized property, and shall pray that the same be condemned and sold and the proceeds disposed of according to law, and that all persons concerned or interested be cited to appear and show cause why such property should not be condemned and sold to enforce the forfeiture."

Since the ABC laws have had general application for many years, and because of the similar requirements of the two statutes, it is suggested that the information be in similar form. With respect to the seizure of a vehicle, you ask the following question, which I quote:

"Assuming that a town has not adopted an ordinance similar to Section 46.1-351.1 of the Code of Virginia, is there any question of the authority of a town police officer seizing a vehicle under Section 46.1-351.1 of the Code of Virginia?"

Section 46.1-351.1, Code of Virginia (1950), as amended, contains the following pertinent language:

"Where any officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested any person who will be subject to the penalties prescribed in §§ 46.1-350 and 46.1-351, he shall seize and take possession of such motor vehicle, and deliver the same to the sheriff of the county or the sergeant of the city in which such arrest was made, taking his receipt therefor in duplicate." (Emphasis supplied).

The emphasized words leave no room for doubt that a motor vehicle may be seized, under the stated conditions, by any officer charged with the enforcement of the motor vehicle laws of this State. Section 46.1-6, Code of Virginia (1950), as amended, identifies the officers so charged, in the following language:

"Every county, city, town or other political subdivision of the State, as well as the State authorities and law enforcement officers, shall enforce the provisions of chapters 1 through 4 (§§ 46.1-1 through 46.1-347) of this title through the agency of any peace or police officer, sheriff or deputy; provided, that such officer shall be uniformed at the time of such enforcement or shall display his badge or other sign of authority, and provided further, that all officers making arrests incident to the enforcement of this title shall be paid fixed and determined salaries for their services and shall have no interest in, nor be permitted by law to accept the benefit of, any fine or fee resulting from the arrest or conviction of an offender against any provision of this title."

This section requires the enforcement of the motor vehicle laws of this State by any peace or police officer, sheriff or deputy of any county, city, town or other political subdivision of this State. When this is considered in conjunction with the
quoted portion of Section 46.1-351.1, which requires any officer charged with the enforcement of the motor vehicle laws to seize the motor vehicle where he "reasonably believes" he has arrested any person under the stated conditions, it is apparent that such authority extends to local police officers. Assuming that you have reference to a town police officer who qualifies under the provisions of Section 46.1-6, in my interpretation, there is no question of the authority of such officer to seize a motor vehicle under the requirements of Section 46.1-351.1. Incidentally, I am not of the opinion that enactment of local ordinances similar to these statutes was contemplated, especially, in view of the requirements of Section 46.1-351.2 that such forfeiture shall be to the Commonwealth and that any residue of proceeds shall be paid into the Literary Fund.

MOTOR VEHICLES—Seizure and Forfeiture—Applicable to "tractor trucks" but not to "trailers."

September 28, 1964

HONORABLE E. CARTER NETTLES, JR.
Commonwealth's Attorney for Sussex County

This is in reply to your letter of September 15, 1964, in which you pose the following question:

"Should the Commonwealth's Attorney file an information for the sale of both a 'tractor truck' (Section 46.1-1(32)) and a 'trailer' (Section 46.1-1(33)) seized under Section 46.1-351.1? This is another way of asking is a 'trailer' a motor vehicle as contemplated under Section 46.1-351.1?"

Under the provisions of § 46.1-351.1, Code of Virginia (1950), as amended, when any officer charged with the enforcement of the motor vehicle laws believes he has arrested a person who will be subject to the penalties prescribed in §§ 46.1-350 and 46.1-351, Code of Virginia (1950), as amended, "he shall seize and take possession of such motor vehicle." (Emphasis supplied) The purpose of this statute is to deter those who might otherwise make a mockery of the license laws from driving a motor vehicle during the period of suspension or revocation or while such license is contingent upon compliance with the financial responsibility laws.

The motor vehicle so driven in violation of § 46.1-350 or § 46.1-351 is the instrument of offense which has made possible the particular violation. Section 46.1-351.1 provides for seizure of such motor vehicle. There is no provision for seizure of any other vehicle or other property drawn by or transported upon such motor vehicle. While the proceeding for forfeiture of a motor vehicle so seized is a civil action against a motor vehicle, rather than a criminal action against a person, the seizure itself, which is effected under § 46.1-351.1, is a measure which may be taken only under authority of the statute and such statute should be strictly construed as to subject matter. Section 4-56, paragraph (a), Code of Virginia (1950), as amended, after which § 46.1-351.1 was patterned, refers to "any conveyance or vehicle of any kind." It is significant that in writing § 46.1-351.1, this language was abandoned in favor of the term "motor vehicle." Even though paragraph (b) of § 46.1-351.2, prescribing the procedure for appraisal, employs the words "conveyance or vehicle," this section can rise no higher than the express language of § 46.1-351.1, under the terms of which any forfeited property must first be seized.
There are numerous statutes throughout the motor vehicle laws which make distinct reference to motor vehicles, trailers and semitrailers. Section 46.1-351.1, however, refers only to a motor vehicle and contains no reference to a trailer or a semitrailer and §§ 46.1-350 and 46.1-351, upon the violation of which seizure and forfeiture under §§ 46.1-351.1 and 46.1-351.2 must be predicated, make it unlawful to drive "any motor vehicle" and, in the case of § 46.1-350, "any self-propelled machinery or equipment." (Emphasis supplied). As these sections are included in Chapter 5, Title 46.1, Code of Virginia (1950), as amended, rather than in Chapter 6, for the particular purposes of which Section 46.1-389 extends the definition of "motor vehicle" to include vehicles drawn by motor vehicles, there is no incorporation by reference and the general definition found in § 46.1-1 (15), Code of Virginia (1950), as amended, defining a "motor vehicle" as a vehicle "which is self-propelled or designed for self-propulsion" should apply.

In consideration of the foregoing, it is my opinion that a "trailer" is not a motor vehicle as contemplated under §§ 46.1-351.1 and 46.1-351.2 and you should file the information for the condemnation and sale of the "tractor truck" but not for the "trailer."

MOTOR VEHICLES—Seizure and Forfeiture—Owner's presence in vehicle not required.

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This is in reply to your letter of August 5, 1964, which followed my letter to you under date of August 4, 1964, relating to the forfeiture of motor vehicles pursuant to §§ 46.1-351.1 and 46.1-351.2 of the Code. Your letter reads in part as follows:

"I have one more question concerning this matter, on which I will appreciate your opinion, as follows: What is the effect of the language in Subsection (f) of Section 46.1-351.2 which reads 'And if, in the same proceeding, it shall be determined that the owner of the seized property was himself in possession of the same at the time it was seized and that such illegal use was with his knowledge or consent'? Does this language mean that under the provisions of Subsection (f) a vehicle cannot be declared forfeited unless the owner was driving the same on a revoked or suspended operator's license, or unless the owner was riding in the vehicle at the time of the seizure, in actual possession thereof?"

Your question is answered in the negative.

Subsections (c), (d), (e) and (f) provide the machinery for determining the rights of any claimant to a seized vehicle. Subsection (e) provides the owner with the opportunity to satisfy the court or jury that his vehicle was not being operated by one whose license had been revoked or suspended, or that he was ignorant of any illegal use of his vehicle. In such event the vehicle is relieved from forfeiture.

The language which causes you some concern is in subsection (f), which is designed to protect the interest of an innocent lien holder in a vehicle that is to be forfeited. The innocence of the lien holder has no relevancy to the question of whether the vehicle is to be forfeited. The issue before the court under this
subsection is whether the lien has been perfected and, if so, whether the lien should be preserved. In this same proceeding, the court alone determines whether the owner's interest should be protected. If the court concludes that the owner was in possession at the time of the seizure and that the illegal use was with his knowledge or consent, the forfeiture becomes final as to the owner's interest or that of any other person so illegally using the vehicle.

Subsection (g) provides for the complete forfeiture, free of any encumberances when no valid lien is established, if it is determined that the owner was himself using the vehicle at the time of seizure or that such illegal use was with his knowledge or consent.

MOTOR VEHICLES—Seizure and Forfeiture—Procedure discussed.
CIVIL PROCEDURE—Forfeiture—Motor vehicles.

August 4, 1964

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for Henry County

This is in reply to your letter of July 17, 1964, in which you present several questions for my consideration which are raised in connection with the seizure and forfeiture of motor vehicles pursuant to §§ 46.1-351.1 and 46.1-351.2 of the Code of Virginia (1950), as amended.

Briefly stated, the purpose of the two sections here involved is to provide for the confiscation and forfeiture of motor vehicles which are being operated by a person whose operator's license has been suspended or revoked and would be subject to the penalties provided in §§ 46.1-350 and 46.1-351 of the Code. Except for the type of violation involved and the time allowed for the filing of the necessary proceeding to forfeit such vehicles, § 46.1-351.2 is similar to § 4-56 of the Code of Virginia providing for the forfeiture of vehicles used in violation of the Alcoholic Beverage Control laws. Accordingly, most of the inquiries presented in your letter can be answered by reference to the court decisions relating to the forfeiture of motor vehicles under § 4-56 of the Code.

Specifically, your questions and my reply thereto appear as follows:

"(1) Is the burden upon the Commonwealth to prove that the owner of the vehicle knew of the illegal use thereof or that such illegal use was with his connivance or consent?"

No. This is not a criminal proceeding, it being in the nature of a civil action. Ives v. Commonwealth, 182 Va. 17. The burden of proof is upon the claimant to show to the satisfaction of the court that he was ignorant of the illegal use of the motor vehicle when it was seized. See, Bandy v. Commonwealth, 185 Va. 1044, and Wray v. Commonwealth, 191 Va. 738.

Your second and third inquiries read as follows:

"(2) That even though it may not be the burden of the Commonwealth to prove that the owner knew of the illegal use of the vehicle, where the evidence from the investigation indicates that the owner in fact had no knowledge of the illegal use of the vehicle, is it mandatory
that the forfeiture proceeding be instituted and the resulting cost therefrom incurred?"

"(3) Where it is known to the investigating officer or the evidence indicates at the time of seizure that the vehicle was stolen, is it mandatory that the forfeiture proceeding be instituted and the resulting cost therefrom incurred?"

I am of the opinion that it is not mandatory for the Commonwealth's Attorney to file an Information to have the motor vehicle forfeited when it is apparent to him that the vehicle was stolen or that the owner had no knowledge of the illegal use of the vehicle at the time of the seizure. Section 46.1-351.2(a) contemplates the Commonwealth's Attorney filing the Information in which he must set forth in general terms the grounds of forfeiture and pray that the same be condemned and sold according to law. Manifestly, if the Commonwealth's Attorney knows from his investigation that no grounds exist for forfeiting the vehicle, it would be a vain act to institute the proceedings. The law does not require the doing of a vain act.

Your fourth inquiry reads as follows:

"(4) My next concern under Title 46.1-351.2 relates to the interpretation of Paragraph (d) and (e). Is the trial by jury or the court as set forth in Paragraph (d) the trial of the defendant on the warrant for his violation of Title 46.1-350 or 46.1-351, or is this a separate trial on this issue in conjunction with the forfeiture proceeding? If the trial set forth in Paragraph (d) is on the warrant against the operator of the vehicle for violating 46.1-350 or 351, then must the forfeiture proceeding be held in abeyance pending a finding of guilt or innocence against the accused operator? If the trial set forth in Paragraph (d) is not contemplated by this statute to be the trial on the warrant against the accused operator but a trial in conjunction with the forfeiture procedure and if it be concluded that the forfeiture procedure does not have to be held in abeyance pending a finding of guilt or innocence against the accused operator, then what would the effect be in the case where the forfeiture procedure is successfully concluded and there is a subsequent finding of not guilty against the accused operator which would be in effect a finding that the vehicle on the occasion in question had not been illegally used?"

The trial by jury contemplated in subsections (d) and (e) of § 46.1-351.2 is for the purpose of determining whether or not a claimant was, or should be, convicted under the provisions of § 46.1-350 or § 46.1-351 of the Code, or to determine his knowledge of the illegal use of the vehicle. The proceedings under statutes of this nature are proceedings in rem against the property, and the guilt or innocence of the owner has nothing to do with the liability of the property to forfeiture. The exception in cases of this nature is when the property used in violation of the law is stolen or is being used without consent, or without knowledge of the illegal use. In short, the property, in order to be found guilty of illegal use, must come lawfully into the hands of the person who puts it to the illegal use. Consequently, it makes little difference to the outcome of this civil proceeding whether or not the operator is actually convicted before the forfeiture proceeding or a subsequent proceeding under §§ 46.1-350 and 46.1-351 of the Code. The jury in the civil proceeding determines only the issue presented by the claimant when he denies that he was, or should be, convicted as provided in the aforementioned sections, or that he had knowledge of the illegal use.
REPORT OF THE ATTORNEY GENERAL

In view of the foregoing, I am of the opinion that it is not necessary to hold the forfeiture proceeding in abeyance pending a finding of guilt or innocence against the accused operator in the criminal proceeding. While the statute does not so demand, good practice would dictate holding the civil proceeding in abeyance until the guilt or innocence of the accused operator is determined. Otherwise, it could well develop that the civil jury would determine the issue against the owner and then a jury in a subsequent criminal proceeding would decide that the operator was not operating the vehicle illegally, thus destroying the true basis for forfeiting the property in the first instance.

MOTOR VEHICLES—Seizure and Forfeiture—Proper court for hearing charges.

COURTS NOT OF RECORD—Jurisdiction of Hearings under §§ 46.1-350 and 46.1-351.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth's Attorney for Essex County

October 29, 1964

This is in reply to your letter of October 15, 1964, in which you request clarification of § 46.1-351.2, Code of Virginia (1950), as amended, and ask my opinion in relation to several questions, which I shall quote and discuss separately and in the order you present them, as follows:

"1. Must an information be filed in the Circuit Court against the seized vehicle before the owner or lienor can post bond to obtain possession?"

In my opinion, it is not necessary that the information be filed before possession of the motor vehicle may be so obtained by the owner or lienor, provided all statutory requirements as to appraisal and posting of proper bond are fulfilled. In my letter of July 28, 1964, to the Commonwealth's Attorney for Warren County, I expressed a similar view and my reasons for such conclusion.

"2. With reference to sub-section (d), assuming a defendant is tried and convicted in the County Court, and a ten day period has elapsed, does such defendant under this section still have the right to have his case re-tried before a jury of five on the merits? Does this mean that a lienor or owner, if other than the driver, could demand such re-trial?"

Under the provisions of § 46.1-351.2, paragraphs (c) and (d), Code of Virginia (1950), as amended, any person claiming to be the owner or a lienor may appear at any time before final judgment and be made a party defendant to the information filed and, if such claimant denies that he was, or should be, convicted as provided in § 46.1-350 or § 46.1-351, he may demand a trial by jury of the issue thus made. In my opinion, the statutory right to such trial inures to any owner or lienor whether or not he was the driver of the seized motor vehicle and whether or not he has been convicted on the criminal charges or the ten day period allowed for appeal of such conviction has elapsed. This is not a retrial of the criminal charges against the person, however, but a civil proceeding to determine whether the seized motor vehicle shall be relieved from forfeiture. The burden is upon the claimant, who demands such trial, to establish proof of his claim.
3. Could the original hearing on the merits for violation of § 46.1-350 or 46.1-351 be in the Circuit Court?

In my opinion, the proper court for hearing such violations is the county court or municipal court having jurisdiction over traffic cases. Under §§ 16.1-123 and 16.1-124, Code of Virginia (1950), as amended, the county courts and municipal courts have "exclusive original jurisdiction" over misdemeanors arising within the respective jurisdictions for which these courts were created, except as otherwise provided by law. An exception is found in § 16.1-126, Code of Virginia (1950), as amended, which confers jurisdiction, as to misdemeanors for which a presentment or an indictment is brought, upon the circuit court of any county or the corporation court of any city having criminal jurisdiction.

4. In the event a vehicle is seized and sold, by what method would the title be actually transferred, assuming, first, that the owner or lienor produces the title certificate in court and, second, assuming that such title certificate is not produced in court?

Section 46.1-351.2 provides that the information filed shall pray for the condemnation and sale of the vehicle. Insofar as this section and § 46.1-351.1 do not cover certain phases of the enforcement of forfeitures, such phases will be controlled by the law found in Chapter 15, Title 19.1, Code of Virginia (1950), as amended. Thereunder, § 19.1-368 provides that, if the forfeiture be established, the judgment shall be that the property be condemned as forfeited to the Commonwealth and that the same be sold. Sale of the property, under § 19.1-369, "shall vest in the purchaser a clear and absolute title to the property sold." The judgment of the court shall be that the motor vehicle is forfeited to the Commonwealth, and through sale by the Commonwealth, for cash according to law, absolute title vests in the purchaser. The vesting of title in such purchaser is effected whether or not the owner or lienor produces the title certificate in court, although production of the title certificate and registration card may be required by the court, if these are obtainable. The transferee forwards the certificate and registration card, if available, along with a copy of the court order and bill of sale, in making his application for a certificate of title to the Division of Motor Vehicles under § 46.1-93, Code of Virginia (1950), as amended. Thereupon, the Division cancels the registration of the motor vehicle and issues a new certificate of title to the person entitled thereto.

5. If it develops that the vehicle is worth less than a lien against it, or if the vehicle is worth less than the towing and storing charges against the same would be, would it be proper for seizure proceedings to be dismissed before the filing of an information, and if so, by what method would the cost in such a situation be paid?

Section 46.1-351.2, paragraph (f), specifically provides that where the owner was in possession when the illegal use occurred, or consented to such use, the vehicle shall be delivered to an innocent lienor, if such lienor is the claimant under paragraph (c) of the same section, when the lien established is equal to or more than the value of the vehicle. Neither this section nor § 46.1-351.1, however, makes provision for dismissing the seizure proceedings before filing an information on the basis of the fact that the value of the vehicle is less than the lien against it or less than the towing and storing charges. I shall, therefore, answer this question in the negative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Seizure and Forfeiture Pursuant to §§ 46.1-351.1 and 46.1-351.2.

October 30, 1964

HONORABLE ALFRED W. WHITHEURST
Commonwealth's Attorney for the City of Norfolk

This is in reply to your letter of October 16, 1964, in which you present several situations and related questions, concerning the seizure and forfeiture of vehicles under § 46.1-351.1 and § 46.1-351.2, which I shall quote and consider separately, as follows:

"1. Can motor vehicles be forfeited under § 46.1-351.1 when that section grants no authority to forfeit any vehicle? The following section § 46.1-351.2 does mention forfeiture in 'F' and 'G'. Therefore the question presents itself is this section merely procedural and the authority to forfeit must be contained in § 46.1-351.1."

Sections 46.1-351.1 and 46.1-351.2, Code of Virginia (1950), as amended, must be read together in respect to the overall procedure. Section 46.1-351.1 authorizes seizure of the motor vehicle where any officer charged with the enforcement of the motor vehicle laws reasonably believes that he has arrested any person who will be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351. The authority for forfeiture proceedings regarding any motor vehicle so seized under § 46.1-351.1 is found in § 46.1-351.2. The first sentence of the latter requires that the attorney for the Commonwealth shall file an information against the property seized under § 46.1-351.1.

"2. What are the grounds of forfeiture? Nowhere in the section does it list any grounds for forfeiture. It does state that 'when an officer reasonably believes he has arrested any person who will be subject to the penalties subscribed by § 46.1-350 and § 46.1-351, he shall seize and take possession.'"

The language of §§ 46.1-351.1 and 46.1-351.2 follows very closely that used in § 4-56, Code of Virginia (1950), as amended, relating to seizure and forfeiture because of the illegal transportation of alcoholic beverages. That section, however, goes one step further and requires that the vehicle be searched under a search warrant and thereafter seized if the vehicle is actually found to be engaged in such illegal transportation. Contrary to this, the arresting officer seizes and takes possession of the vehicle under § 46.1-351.1 when he believes the person arrested will be subject to the penalties prescribed in §§ 46.1-350 and 46.1-351. He is not required to verify the violation before he acts. Under § 46.1-351.2 the attorney for the Commonwealth must file the information within sixty days after receiving notice of seizure. Therein, he must state in general terms the grounds for forfeiture. In my judgment, these grounds would be the arresting officer's written report furnished the attorney for the Commonwealth, stating that the officer had arrested a person operating the motor vehicle under such circumstances that the officer reasonably believed that such person would be subject to the penalties prescribed by §§ 46.1-350 and 46.1-351 and that he had seized the vehicle pursuant to § 46.1-351. If additional facts become available to the attorney for the Commonwealth prior to his filing the information, these may be considered by him in connection with such filing.

"3. Are the grounds for seizure intended to be the grounds of forfeiture? If this is true does it mean that the State must prove that the
driver's license were both suspended or revoked and that the driver was waiting to furnish financial responsibility. The law makes no mention as to grounds of forfeiture but the vehicle that may be seized is where the person will be subject to the penalties prescribed by both sections. Since the only statement in the law uses 'and' in reference to the two statutes and the word penalties is plural do we not have to prove that the driver will be subject to both sections?

Section 46.1-350 makes it unlawful for any person, resident or nonresident, whose operator's or chauffeur's license or permit has been suspended or revoked or who has been forbidden by certain authorities of this State to operate a motor vehicle, to thereafter drive a motor vehicle on any highway in this State until the period of such suspension or revocation has terminated. Section 46.1-351 makes it unlawful to drive while the restoration of license or privilege to drive is contingent upon the furnishing of proof of financial responsibility. It is impossible for the restoration of a license to be contingent upon the filing of proof of financial responsibility and simultaneously be otherwise suspended or revoked. For while it otherwise stands suspended or revoked, it may not be restored upon filing proof and, therefore, restoration is not contingent upon filing proof during any such period of suspension or revocation. It follows that no person could be subject to the penalties of both statutes because of one violation. The law does not require the enforcement officers to do a vain act. Accordingly, it is my opinion that the intent under § 46.1-351.1 is that the motor vehicle shall be seized where the arresting officer reasonably believes that the person arrested will be subject to the penalties prescribed by either §§ 46.1-350 or 46.1-351.

"4. Does the vehicle have to be seized at the time the officer originally makes the arrest? The question is that if an officer finds out the following morning that a person he had arrested for No Operator's Permit actually was driving under a revoked permit can the officer at this later time seize the vehicle?"

Section 46.1-351.1 authorizes the arresting officer to seize the motor vehicle where he makes an arrest under the stated circumstances. While the language of § 46.1-351.1 does not contain definite words of immediacy, a reading of this section in conjunction with § 46.1-351.2 and related statutes leads me to the conclusion that any such seizure should be effected when the arrest is made. In my opinion, therefore, it would not be proper for an officer who released the vehicle when the arrest was made, and received information of a violation of § 46.1-350 or § 46.1-351 the following day, to seize the vehicle at such later time.

MOTOR VEHICLES—Seizure under § 46.1-351.1—Payment of costs when returned to innocent lienor.

COSTS—When Seized Automobile Returned to Innocent Lienor—How paid.

HONORABLE C. P. MILLER, JR.
Assistant Comptroller

January 6, 1965

This is in reply to your letter of December 16, 1964, in which you request an opinion on the underscored portion of Clerk V. Elwood Mason's letter of December 14, 1964, where the costs of the proceedings prescribed in §§ 46.1-351.1
and 46.1-351.2, Code of Virginia (1950), as amended, are to be paid by the Commonwealth. The pertinent portion of Mr. Mason's letter is as follows:

"The costs would include the order of publication, storage of automobile, postage, clerk's fee, sheriff's fee and Commonwealth Attorney fee.

"Are all of these costs allowable? If these costs are allowable, I would also like to know if the fees should be based on charges for a felony or a misdemeanor."

The specific statutory provision with which the inquiry is concerned is paragraph (f) of § 46.1-351.2, where the forfeiture becomes final as to the owner because he was in possession when the illegal use occurred or such illegal use was with his knowledge or consent. The applicable words of the statute are as follows:

"In the last mentioned event, if the lien established is equal to or more than the value of the conveyance or vehicle, such conveyance or vehicle shall be delivered to the lienor, and the costs of the proceedings shall be paid by the Commonwealth as now provided by law; * * * *"

In relation to the question of fees, § 14.1-87, Code of Virginia (1950), as amended, provides that, "No clerk, sheriff, sergeant or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute." Likewise, § 19.1-316 states that, "No fee to an attorney for the Commonwealth shall be payable out of the State treasury, unless it be expressly so provided." Inasmuch as neither § 46.1-351.1 nor § 46.1-351.2 provides for payment of any fee to the clerk, the sheriff or the attorney for the Commonwealth, I am of the opinion that no such fee is allowable.

In regard to the order of publication, storage of the automobile and postage, such items represent actual costs incurred in carrying out the mandates of the statute. This office, on several previous occasions, has expressed the opinion that it is appropriate to pay such costs from the moneys appropriated for criminal expense. A similar opinion may be found at Page 3, of Report of the Attorney General (1955-1956), in reference to expenses incurred in connection with confiscation proceedings under § 4-56, Code of Virginia (1950), as amended. In this respect, § 19.1-315, Code of Virginia (1950), as amended, provides that "When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service." Accordingly, it is my opinion that these are allowable as costs and under the stated circumstances they should be paid by the Commonwealth upon proper application to the Comptroller, as provided is §§ 19.1-315 and 19.1-317, Code of Virginia (1950), as amended.
MOTOR VEHICLES—Suspension or Revocation of Driver’s License—Construing §§ 46.1-350 and 46.1-351—Words “any court” refer to Virginia courts.

MOTOR VEHICLES—Seizure—Responsibility of officer under § 46.1-351.1—Does not extend to suspension or revocation by courts of other states.

HONORABLE ROBERT I. ASPURY
Commonwealth’s Attorney for Smyth County

January 8, 1965

This is in reply to your letter of December 17, 1964, in which you request my opinion as to whether the words “any court,” as used in §§ 46.1-350 and 46.1-351, Code of Virginia (1950), as amended, refer to courts of states other than the Commonwealth of Virginia. You express particular interest in the responsibility of enforcement officers under § 46.1-351.1, Code of Virginia (1950), as amended, where persons operating motor vehicles upon the highways of this State have had their licenses to operate suspended or revoked by the courts of sister states.

The portion of § 46.1-350, to which you refer, reads as follows:

“(a) Except as otherwise provided in § 46.1-352.1, no person resident or nonresident whose operator’s or chauffeur’s license or instruction permit has been suspended or revoked by any court or by the Commissioner or by operation of law pursuant to the provisions of this title or of § 18.1-59 or who has been forbidden as prescribed by law by the Commissioner, the State Corporation Commission, the State Highway Commissioner, or the Superintendent of State Police, to operate a motor vehicle in this State shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in this State unless and until the period of such suspension or revocation shall have terminated.”

The language used in § 46.1-351 is similar except that it has reference to “any period wherein the restoration of license or privilege is contingent upon the furnishing of proof of financial responsibility.” These sections are found in Chapter 5 of Title 46.1, Code of Virginia (1950), as amended, by § 46.1-348, “may be cited as the Virginia Operators’ and Chauffeurs’ License Act.” The granting of a license or privilege to drive upon the highways of this State is subject to the statutory authority of this State. Likewise, the suspension or revocation of a license or privilege to drive upon the highways of this State may be effected only under the laws of this State. The criteria for suspending or revoking a license in another state may not necessarily coincide with those of this State and a person whose license is so suspended or revoked elsewhere may in some instances qualify to drive in this State and vice versa. Suspension or revocation of a person’s license or privilege to drive in another state, by any agent of such state, would not, of itself, suspend or revoke any valid license or privilege to drive granted such person under the laws of this State. Section 46.1-466, Code of Virginia (1950), as amended, provides for appropriate action under the motor vehicle laws of this State to effect a suspension or revocation of license based upon convictions in other states. There is no provision, however, for an automatic suspension or revocation based solely upon a suspension or revocation in another state.

A reading of §§ 46.1-350 and 46.1-351 leaves no room for doubt that statutory reference to a suspension or revocation or being forbidden to drive by the Commissioner, the State Corporation Commission, the State Highway Commissioner or the Superintendent of State Police or by operation of law means only the named
officers of this State and under the laws of this State. The majority of license suspensions and revocations in this State are effected under the laws administered by the Division of Motor Vehicles, with a lesser number being ordered by the courts and the other named statutory agents. The same is largely true of other states, in general. This fact, alone, rather strongly indicates that it was not the legislative intent to include suspensions and revocations of the courts of other states, while excluding the larger number of suspensions and revocations otherwise ordered by other agents of those same states. Considered in context, the logical assumption is that the term “any court” means any court of competent jurisdiction acting pursuant to Virginia law.

These sections prescribe the penalties for driving a motor vehicle on any highway in this State during a period of suspension or revocation or while forbidden by any of the named authorities to drive. Being penal statutes, they should be strictly construed against the Commonwealth.

In consideration of the foregoing, it is my opinion that the words “any court,” as used is §§ 46.1-350 and 46.1-351, mean any court of competent jurisdiction in this Commonwealth but do not include the courts of sister states. Since the responsibility of an officer to seize a motor vehicle under § 46.1-351.1 rests upon his reasonably believing that the person arrested will be subject to the penalties prescribed in §§ 46.1-330 and 46.1-351, it follows that he should not seize the vehicle on the basis of a suspension or revocation of a license by a court of a sister state unless this State has also acted pursuant to the prescribed laws, to suspend or revoke the license or privilege or to forbid such person to drive.

MOTOR VEHICLES—Torts—Immunity—State not liable where agents acting legally within scope of authority.

TORTS—Immunity—State not liable where agents acting legally within scope of authority.

December 18, 1964

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth’s Attorney for Hanover County

This is in reply to your letter of December 7, 1964, in which you request my opinion as to whether liability rests on the Commonwealth or any of the officers acting pursuant to § 46.1-351.1, Code of Virginia (1950), as amended, where the motor of a seized vehicle froze, causing the block to burst, during the time it was held by the Commonwealth pending the confiscation hearing.

There is nothing under § 46.1-351.1 to cover any such situation and your questions must be considered in light of the general rules of law. To enforce liability for damages to a vehicle under the stated circumstances would require an action for tort and there is no statute which gives the right to anyone to sue the State for tort. The rule is that the State can be guilty of no wrong and accordingly, in my opinion, no liability rests upon the State for any damages sustained.

The rule as to State agents and employees is that the immunity of this State from action for tort extends to State agents and employees where they are acting legally and within the scope of their employment. If, however, they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity. The information given in your letter
indicates that the officers responsible for seizing and holding the vehicle acted pursuant to the law. If this be true, in my opinion, no liability rests upon them for the damage occurring during lawful detention of the vehicle.

MOTOR VEHICLES—Traffic Controls—Controlling devices at intersections of feeder roads paralleling Virginia Beach Boulevard.

HONORABLE ROBERT F. BALDWIN
Member, Virginia State Senate

This is in reply to your letter of December 22, 1964, with respect to the control of traffic at intersections where there are feeder lanes paralleling the Virginia Beach Boulevard. You describe a situation in which there is an electric traffic signal at the intersection of Virginia Beach Boulevard and the intersecting highway and a stop sign on the feeder lane where it intersects the latter.

Under § 46.1-173, Code of Virginia (1950), as amended, the driver of a motor vehicle is required to obey the road signs and markings erected by the State Highway Commission or local authorities in cities and towns pursuant to law. Failure to do so shall constitute a misdemeanor. The same statute requires that such system of marking and signing shall correlate with and so far as possible conform to the system adopted in other states.

Since the feeder lane is marked with a stop sign, it is my opinion that this should control feeder lane traffic entering the intersecting highway from such lane. Further control of such traffic would depend upon the direction in which it proceeds after entering the intersection. If it proceeds straight ahead on the extension of the feeder lane, or turns away from Virginia Beach Boulevard, after entering the intersecting highway, the stop sign would be the only traffic control in the situation you describe. If, after entering the intersecting highway, however, such traffic is to turn left or right, as the case may be, to proceed across or along Virginia Beach Boulevard, in my judgment, it is then required to observe the electric traffic signals located on the Boulevard intersection.


MOTOR VEHICLES—Local License—Taxing authority where owner resides.

TAXATION—Motor Vehicles—Local License—Limitations placed on authorities by § 46.1-66 of the Code.

HONORABLE SOL GOODMAN
Commonwealth's Attorney for the City of Hopewell

This is in reply to your letter of May 14, 1965, in which you request my opinion on the questions posed relative to two given situations. I shall quote these and consider them separately and in the order given.

"A resident of the City of Hopewell has been found guilty of driving his automobile without 'city tags.' Is this the type of traffic offense which
is required to be reported to the Director of Motor Vehicles? Does the motorist pay an additional $5.00 to the State Treasury as a 'new source of revenue' for highway purposes in accordance with Section 14.1-200.1 of the Code of Virginia as amended?"

The requirements of § 46.1-412, Code of Virginia (1950), as amended, are that the courts "shall keep a full record of every case in which: (a) A person is charged with (1) A violation of any law of this State pertaining to the operator or operation of a motor vehicle; (2) A violation of any ordinance of any county, city or town pertaining to the operator or operation of any motor vehicles except parking regulations; * * * *. This section must be considered along with §46.1-413, Code of Virginia (1950), as amended, which reads, in part, as follows:

"In the event a person is convicted of a charge described in subdivision (a) or (b) of § 46.1-412 * * * every county or municipal court or clerk of a court of record shall forward an abstract of the record to the Commissioner within fifteen days * * * after such conviction * * * has become final without appeal or has become final by affirmance on appeal."

Inasmuch as driving without "city tags" is a violation pertaining to the operator or operation of a motor vehicle and does not come within the exception as to parking regulations, contained in § 46.1-412, cited herein, I am of the opinion that a conviction of such offense is required to be reported to the Commissioner of the Division of Motor Vehicles. Under § 14.1-200.1, Code of Virginia (1950), as amended, whenever the conviction is required to be reported to the Division of Motor Vehicles, the sum of five dollars must be added to all other costs, penalties and fines assessed or assessable against the defendant. Accordingly, I shall answer both of your questions, quoted above, in the affirmative. A similar view is expressed in an opinion found in Report of the Attorney General (1963-1964), p. 213.

"A merchant doing business in the City of Hopewell resides in the County of Prince George. His truck, which he uses in his business, is kept in the County of Prince George except during business hours. Must this resident obtain 'city tags' in the City of Hopewell?"

In an opinion found in Report of the Attorney General (1963-1964), p. 197, I expressed the opinion that the residence of the owner of the vehicle, rather than the place of business, determines the taxing authority for issuing local license tags. Assuming for the purposes of this letter that the County of Prince George, of which the owner is a resident, imposes the license tax or fee upon motor vehicles, the City of Hopewell is prohibited from doing so by subsection (a) (1) of § 46.1-66, Code of Virginia (1950), as amended. This section provides that no county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when a similar tax or license fee is imposed by the county, city or town of which the owner is a resident. I shall, therefore, answer your last question in the negative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Trial of Traffic Offenses—When prior record may be considered—When evidence of speedometer calibration may be introduced.

CRIMINAL PROCEDURE—Trial of Traffic Offenses—When prior record may be considered—When evidence of speedometer calibration in radar offenses may be introduced.

September 30, 1964

HONORABLE JOSEPH MOTLEY WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of September 11, 1964, which reads as follows:

"Section 46.1-198 makes provisions as to the checking of the speed of motor vehicles with radar. In radar offenses dated after July 1, 1964, whereby the courts are operating under the new procedure as to having a jury first make a finding of guilty or not guilty and then returning to the courtroom to hear evidence of prior offenses, when is it proper for the defendant to introduce tests showing the calibration of the speedometer of his motor vehicle under the new procedure, i.e., before the finding of guilty, assuming such, or after said finding to be used as evidence in mitigation for the defendant? Also, would the purpose of the defendant introducing results of the calibration of his speedometer to show accuracy or to show that the speedometer was reading fast or slow have any effect on the admissibility and time of introduction of such results?"

The procedure to which you refer, obviously, is that authorized by Chapter 238, Acts of Assembly of 1964, and found in § 19.1-186.2, Code of Virginia (1950), as amended, which reads as follows:

"When any person is found guilty of a traffic offense, the court or jury trying the case may consider the prior traffic record of the defendant before imposing sentence as provided by law. After the prior traffic record of the defendant has been introduced, the defendant shall be afforded an opportunity to present evidence limited to showing the nature of his prior convictions, suspensions and revocations."

The purpose of this statute is to permit consideration of the defendant’s prior traffic record by the court or jury, after a finding of guilty, as an aid in fixing an appropriate penalty. Making the prior record available after, rather than before a finding of guilty, removes the possibility of a prejudicial finding, in the case being tried, based on such record. After such prior record has been introduced, the defendant is then entitled to present evidence limited to showing the nature of his prior convictions, suspensions and revocations. If I correctly interpret your questions, they refer to evidence relative to the offense for which the defendant is being tried, rather than to his prior offenses. The admissibility of evidence, of course, remains under the control of the trial court and, if the calibration of the speedometer of the defendant’s motor vehicle is held admissible under the circumstances, it would be of a probative nature, in my opinion, and should be introduced before a finding of guilty. In my judgment, this would hold true whether the defendant introduced the results of the calibration of his speedometer to show accuracy or to show that the speedometer was registering fast or slow.
NEWSPAPERS—Legal Advertisement—Notice of sale under mortgage or deed of trust—Method prescribed must be followed strictly.

December 14, 1964

HONORABLE PAUL W. MANNS
Member, House of Delegates

This is in reply to your letter of December 11, 1964, which reads as follows:

“As the publisher of several weekly newspapers and a member of the Legislative Committee of the Virginia Press Association, I have been interested in legislation that would clarify existing laws in regard to newspaper publication of legal matters.

“In the 1962 session of the General Assembly legislation was adopted that would take care of publication in newspapers not having a Sunday edition. A copy of Section 55-63 of the Code is attached.

“Now it seems that some attorneys have held that a daily newspaper publishing five weekdays and having a Sunday edition, but not publishing on Saturday, is not covered by this law and, therefore, cannot handle certain legal advertising because non-publication on Saturday is construed as a break in the required number of successive insertions.

“If revision of this section of the Code is necessary to take care of such a situation, I intend to sponsor such a bill in the next session of the General Assembly. However, I would think that the interpretation mentioned above is in the extreme and a ruling by you to the effect that existing law does cover all situations wherein newspapers insert legal advertising for the required number of insertions in all of their regularly constituted issues would make further corrective legislation unnecessary.”

In my opinion, the statute must be construed to apply to newspapers published daily, or daily except Sunday, and that a publication of a notice (where the deed of trust requires the giving of notice of sale for a specified number of days) in a newspaper published daily except Saturday would not be in conformity with the statute. There are numerous decisions by the courts holding that the method prescribed for advertising notice of a sale to be made under a mortgage or deed of trust must be followed strictly. See, Everett v. Woodward, 162 Va. 419; Michie's Jurisprudence, Vol. 13, p. 263.

NOTARY PUBLIC—Commission—Expiration date.

June 10, 1965

HONORABLE ARNOLD MOTLEY
Clerk of the Circuit Court of Essex County

This is in reply to your letter of June 8, 1965, which reads as follows:

“I would like your opinion on the expiration date for a Notary Public.

“As you know, they are appointed and commissioned ‘for a term of four years from the date hereof.’ If a person is appointed on June 8, 1965, does his commission expire on June 7, 8 or 9, 1969?

“In other words, I want to know at what date and hour is he legally
entitled to take acknowledgements to legal instruments before his com-
mission expires?"

In my opinion, the four-year period would end at the expiration of June 7.

I have conferred with the Secretary of the Commonwealth with regard to this
matter and am advised by that office that this has been their interpretation also
of the provisions of § 47.1-(1) of the Code.

ORDINANCES—Amendment or Repeal—Action required to accomplish.

HONORABLE L. J.HAMMACK, JR.
Commonwealth's Attorney for Brunswick County

September 22, 1964

This is in reply to your letter of September 18, 1964, which reads, in part, as
follows:

"Suppose that the governing body of a county proposes to amend an
existing ordinance. Is it necessary that the proposed amendment be ad-
vertised in the manner prescribed by § 15.1-504 of the Code, or, if such
advertisement is not necessary, what procedure should be followed?

"I have these specific problems: Brunswick County has an ordinance
prohibiting the conduct specified in § 18.1-237 of the Code, and it is
desired that this ordinance be amended, so as to prescribe the increased
penalties provided by the 1964 amendment to this section of the Code.
Also, Brunswick County has an ordinance adopted under § 22-115.36 of
the Code, which concerns the appropriation of funds for educational pur-
poses, and it may be desired to amend this ordinance so as to make a
slight change in the classification of the schools for attendance at which
such appropriations may be made.

"I should also like to know whether the governing body of a county
may repeal an existing ordinance without advertising notice of the
proposal that this be done."

With respect to the first two paragraphs of your letter, you are advised that, in
my opinion, the procedure prescribed in § 15.1-504 must be followed in order for
valid amendments to be enacted to the ordinances mentioned by you. Inasmuch
as these ordinances do not come within any of the classifications set out in the
fifth paragraph of § 15.1-504, the provisions of (a), (b) and (c) are not ap-
licable.

With respect to the third paragraph of your letter, an ordinance that contains
no provision for termination of its duration can be repealed only by a subsequent
ordinance (in the absence of a State statute nullifying the ordinance) and such
ordinance may only be enacted by following the statutory procedure for passing
any ordinance. It would seem that it will be necessary for such an ordinance
to be first advertised as required by statute for the adoption of any other ordinance.
ORDINANCES—Assessment for Law Library—Localities authorized to adopt.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your letter of September 21, 1964, which reads as follows:

"At the last session of the General Assembly, House Bill 338 was enacted. It is cited as Chapter 439 of the Acts of Assembly of 1964 and amends Title 42-19.4.

"An amendment offered to this bill before the Senate Committee intended, I believe, and did change the language to read: ‘The imposition of such assessment shall be by ordinance of the governing body, which ordinance may provide for different sums in courts of record and courts not of record, and the assessment shall be collected by the clerk of the court in which the action is filed. . . .’

"We intended, but neglected, to also amend the provision in an earlier part of that statute which reads: that certain localities . . . may, through its governing body, assess as part of the costs, incident to each civil action filed in the courts of record located within its boundaries a sum not in excess of $1.00.'

"I would like to request an Attorney General's opinion as to whether or not the City of Alexandria, which is included in the localities covered under this bill, may assess the $1.00 for a court not of record as the amendment intended to do but did only partially. We will need your opinion in order to present an appropriate ordinance to the City Council so that they may enact the provision allowing our court not of record to charge the additional $1.00. I would appreciate it if you could let us have your opinion at a very early date."

The legislation (Code § 42-19.4) provides that any county or city (qualifying under that section as to population) in this State "may, through its governing body, assess as part of the costs, incident to each civil action filed in the courts of record located within its boundaries a sum not in excess of one dollar." This section further provides that the ordinance under which such assessment is made "may provide for different sums in courts of record and courts not of record . . ." This latter provision, insofar as it applies to courts not of record, is not consistent with the authority expressly granted in the preceding sentence and for the purpose of construing this statute must be treated as surplusage. The statute under consideration is a grant of power to the qualifying localities to impose a tax for a special purpose and statutes of this nature are subject to strict interpretation. Although it may have been the intent of the proponents of the legislation to make it apply to courts not of record, it is clear that such intent was not specifically expressed in the language of the act. I see no escape from the conclusion that any provision in an ordinance imposing an assessment of one dollar in suits filed in courts not of record would be beyond the scope of the authority granted in the statute.
ORDINANCES—City of Roanoke—Pertaining to city reservoir located more than one mile beyond city—How enforced.

October 2, 1964

Honorable James H. Fulghum, Jr.
Assistant Commonwealth's Attorney for the City of Roanoke

This is in reply to your letter of September 22, 1964, which reads in part as follows:

"This office has recently been faced with the problem of enforcing city ordinances at the city reservoir, which lies more than a mile beyond the city limits.

"In reviewing the statutory authority we find that the State of Virginia has given to the City of Roanoke the power to police, regulate by ordinance, and set penalties for violations of said ordinances, but nowhere in the Code does the State give the power of judicial enforcement to the City (Section 15.1-142). In fact, the City charter, Section 57, provides that the jurisdiction shall be exclusively in '... the Circuit Court of the county in which such property is located ...'.

"We are in question about the section of the City Charter insofar as it refers to the Circuit Court of the county in which the property is located, and our inquiry is as follows:

"Does this mean that misdemeanors are taken directly to the Circuit Court without the usual procedure of being heard in a county court and having the right of appeal de-novo, or is it the intent of the law that it be carried through those inferior courts which have appellate jurisdiction to the Circuit Court?"

Section 57 of the charter of the City of Roanoke (1952 Acts of Assembly, Ch. 215) reads as follows:

"§ 57. Courts, et cetera.
"All courts of record of said city as now constituted and established by law shall be continued with the same jurisdiction as heretofore.

"Whenever power is conferred upon said city by this charter to make rules and regulations, and impose and enforce penalties for the protection of any property owned by said city, but situated more than one mile beyond the corporate limits thereof, the circuit court of the county in which such property is located shall have exclusive jurisdiction of all offenses committed in such county against ordinances of said city prescribing such rules and regulations, and imposing such penalties; and jurisdiction of injunction suits for the protection of any such property shall be as is now, or may hereafter be, provided by general law."

It is noted that the city ordinances you have reference to may have been passed pursuant to § 2(9) of the City charter. It is also noted that § 15.1-142 of the Code of Virginia (1950), as amended, gives cities of not less than 85,000 nor more than 100,000 inhabitants the power to prescribe rules and regulations over certain municipal lands located beyond their corporate limits, and under §§ 15.1-837 to 15.1-840, inclusive, and §§ 15.1-873 and 15.1-875, when read together, a like power seems to have been conferred on cities of the first class (among others). It is also observed that § 15.1-887 confers jurisdiction upon county courts in some instances over violation of municipal ordinances passed pursuant to these statutes. Thus, it would appear that there now may be instances in which it would be proper to proceed in either the county court or the circuit
court with respect to violations of ordinances of the City of Roanoke pertaining to the City reservoir located more than one mile beyond the City. This matter, however, is not entirely free from doubt. The charter provision refers to "exclusive jurisdiction," and if it should ultimately be determined that there is any conflict between this language and that of the general statutes, the charter provision must prevail.

ORDINANCES—County Ordinances Applicable within Town.

COUNTIES, CITIES AND TOWNS—Ordinance—When county ordinance applicable within town.

HONORABLE MYRON C. SMITH
Assistant Commonwealth's Attorney for Fairfax County

October 26, 1964

This will acknowledge receipt of your letter of October 23, 1964, in which you have requested my opinion as to whether or not the Housing Hygiene Code of Fairfax County may be enforced within the corporate limits of the Town of Herndon.

In this letter you refer to an opinion of this office dated July 6, 1949, to Hon. Littleton H. Mears, Commonwealth's Attorney for Northampton County, published in Report of Attorney General (1949-50), at p. 76. In that opinion it was held that a county ordinance relating to the installation and inspection of septic tanks could be enforced within the corporate limits of the Town of Exmore, even though that town had subsequently been incorporated.

On March 26, 1963, we issued an opinion to Hon. A. D. Johnson, Commonwealth's Attorney of Isle of Wight County, which is similar to the opinion referred to above, except that at the time the ordinance was enacted in Isle of Wight the towns referred to therein were already incorporated. I enclose a copy of this opinion, which is published in Report of Attorney General (1962-63), at p. 200. Both of these opinions are applicable to the question presented by you.

ORDINANCES—Fairs—Cities and counties may adopt ordinances exempting eating places at fairs.

COUNTIES, CITIES AND TOWNS—May Adopt Ordinances Exempting Eating Places at Fairs.

HEALTH—Restaurants and Eating Places at Fairs—May be exempted from provisions of Chapter 3, Title 35.

DR. MACK I. SHANHOLTZ
State Health Commissioner

August 21, 1964

This will acknowledge your letter of August 19, 1964, relating to § 35-38.1 of the Code of Virginia. You enclose an ordinance enacted by the Board of Supervisors of Chesterfield County pursuant to the authority given under this section and present the following question:
“In view of this action by the Board of Supervisors of Chesterfield County, what are the legal responsibilities of the Virginia State Department of Health in enforcing rules and regulations adopted by the State Board of Health under Section 35-28 of the Code? Is the Board of Supervisors of Chesterfield County, by Section 35-38.1, empowered to prescribe the rules and regulations adopted by the State Board of Health under Section 35-28 of the Code? What are the legal responsibilities of the Health Officer of Chesterfield County for the enforcement of the referenced ordinance enacted by the Board of Supervisors of Chesterfield County?”

The Code section to which you refer reads as follows:

“§ 35-38.1.—The governing body of any city or county may, by ordinance, provide that this chapter shall not apply to fairs, when such fairs are promoted or sponsored by any political subdivision of the State or by any charitable nonprofit organization or group thereof. In connection therewith, such ordinance shall provide that the health officer of the county or city in which such fair is held, or a qualified person designated by him, shall exercise such supervision of the sale of food as the ordinance may prescribe.”

The board of supervisors is given authority under this Code section to adopt an ordinance suspending the operation of Chapter 3, Title 35, with respect to fairs promoted or sponsored by the county or by any charitable nonprofit organization or group thereof. I assume that the Chesterfield County Fair Association qualifies under § 35-38.1 of the Code. This section requires the board of supervisors to provide in such ordinance for such supervision of the sale of food as the ordinance may prescribe, such supervision to be under the county health officer, or some qualified person designated by him. Therefore, paragraphs 1, 2 and 3 of the ordinance are within the scope of § 35-38.1.

With respect to paragraph 4, it provides that “the rules and regulations of the State Board of Health regulating Itinerant Restaurants are incorporated herein by reference, and shall apply to the sale, preparation, serving, transporting and handling of food at such fairs and the supervision thereof, by the County Health Officer, or his representative, except as modified herein.”

Whether or not this provision is valid depends upon whether the ordinance was properly adopted in conformity with the provisions of § 15.1-504. In my opinion, this section requires the incorporation in the ordinance of the rules and regulations which are referred to by reference, so that a copy of the full text thereof can be filed in the clerk’s office of the circuit court. The publication of the informative summary would have to include a statement that the full text is on file in such clerk’s office.

The enactment of an ordinance is a legislative function and the members of the legislative body must have access to the full text of the provisions of an ordinance, which does not occur when portions thereof are adopted by reference.

Failure of paragraph 4 to be enforceable for lack of proper adoption would not, in my opinion, invalidate the three preceding paragraphs.

In conversation with Mr. Ernest Gates, I find that he construes paragraph 4 as leaving authority in your Department to supervise restaurant service not included in paragraph 3. I do not so construe the ordinance. Under the statute and para-
graph 1 of the ordinance your authority under Chapter 3, Title 35 of the Code is taken away during the life of the ordinance. Section 35-38.1 cannot be construed any other way. This section does not give the locality the power to deprive your Department of only a part of its duties under that chapter.

With respect to your question regarding the legal responsibilities of the county health officer, these responsibilities are to see to it that paragraph 3, and also paragraph 4, if properly enacted, are enforced.

ORDINANCES—Hunting of Bear and Deer—Counties authorized to adopt the provisions of Chapter 420, Acts of Assembly (1962), restricted to the provisions of the Act.

COUNTIES—Ordinances—Hunting bear and deer—Counties authorized to adopt the provisions of Chapter 420, Acts of Assembly (1962), restricted by the provisions of the Act.

HONORABLE ARTHUR B. CRUSH, JR.
Commonwealth's Attorney for Craig County

July 9, 1964

This will acknowledge receipt of your letter of July 1, 1964, in which you enclosed copy of an ordinance passed by the Board of Supervisors of Craig County on the 4th day of June, 1962, relating to special stamps required to hunt bear and deer. You request my advice as to whether or not Section 5 of the ordinance is invalid due to the fact that there is no restriction as to whom damages are payable, although Chapter 420 of the Acts of the General Assembly (1962), under which the ordinance purports to have been passed, provides that damages may not be paid to a landowner whose land was posted.

In my opinion, the ordinance is completely void—not necessarily for the reason suggested by you, but because of the fact that the Act in question does not authorize the counties designated therein to pass an ordinance of this nature. Section 2 of Chapter 420 of the Acts of 1962 establishes the law with respect to those counties that under Section 1 "may by appropriate ordinance enact and adopt for such county the provisions of this Act." This section 1 of this Chapter expressly provides that "this act shall not be effective in any county unless and until such an ordinance is passed."

The only ordinance, therefore, that could have been passed by the board of supervisors under authority of this act would have been to adopt the provisions of said act.

As stated, the ordinance which was enacted does not comply with the statutory authority and, therefore, it is unenforceable.
ORDINANCES—Land Subdivision and Development—Isle of Wight County ordinance not effective within two miles of incorporated limits of Smithfield.

SUBDIVISIONS—Ordinances—Plats involving real estate within two miles of Smithfield must be submitted to and approved by town council only.

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

February 24, 1965

This is in reply to your letter of February 22, 1965, in which you state that in April, 1963, the town of Smithfield adopted a land subdivision and development ordinance under Article 7, Chapter 11, Title 15.1 of the Code. The town notified the Board of Supervisors of Isle of Wight County of its intention to adopt the ordinance, but the board of supervisors did not approve or disapprove of the ordinance within the time prescribed in § 15.1-467 of the Code. Assuming that the action of the town was in every respect in accordance with the provisions of the statute, it would seem that the ordinance adopted by the town would be effective within a distance of two miles from the corporate limits of the town.

Subsequently, in April, 1964, the county adopted an ordinance under the same article and chapter of Title 15.1, and the ordinance provides that it shall be effective to all subdivisions within the unincorporated territory of Isle of Wight County. The county did not notify the town in writing of its intention to adopt such ordinance. You have requested my opinion as to whether or not the plats filed under § 15.1-475 of the Code by the owner or proprietor of a tract of land being subdivided must be submitted to and approved by (1) the council of the town only, or (2) both the council of the town and the Board of Supervisors of Isle of Wight County.

Section 15.1-468 provides that the ordinance adopted by the county shall apply to all of the unincorporated territory of the county subject to the proviso, however, that no such ordinance intended to be in the area subject to the municipal jurisdiction shall be finally adopted by the county until the governing body of the municipality shall have been notified in writing of such proposed ordinance, and requested to review and approve or disapprove of the same, and if the municipality fails to notify such governing body of the county of its disapproval of such ordinance within forty-five days after the giving of such notice, the same shall be considered approved. In my opinion, inasmuch as the county failed to notify the town in writing of its proposed ordinance, there was no obligation upon the town to notify the county within the forty-five day period of its approval or disapproval of such ordinance. Therefore, in my opinion, the county ordinance is not effective within a distance of two miles from the corporate limits of the town, and the plats involving real estate embraced within the two-mile limitation should be submitted to and approved by the council of the town only.

I believe we furnished you an opinion with respect to a related matter on February 18, 1964 (Report of Attorney General, 1963-64, at p. 227).

Your attention is called to the following opinions:


ORDINANCES—Licenses—Journeymen and master electricians—Extent of authority of counties to issue.

COUNTIES—Licenses—Journeymen and master electricians—Extent of authority to issue.

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

October 8, 1964

This is in reply to your letter of September 29, 1964, in which you refer to an opinion of this office dated July 16, 1964, to Honorable Stirling M. Harrison, Commonwealth's Attorney for Loudoun County, relating to the power of a county under § 54-145.2 of the Code to prescribe and enforce standards and qualifying examinations for Journeymen and Master Electricians, acting pursuant to the provisions of § 54-145.2 of the Code of Virginia. We held that this section does not grant such authority.

You have requested my opinion with respect to the following questions:

"1. Does the County of Fairfax have the power under the provisions of § 15.1-510 to regulate the examination and licensing of those employees of contractors registered under the provisions of Chapter 7 of Title 54?

"2. If a contractor is not registered under the provisions of Chapter 7 of Title 54 and the job is less than $20,000, the County of Fairfax will examine and license him under the provisions of § 19-45 of the Fairfax County Code. Does the County of Fairfax have the power to regulate by examination and registration employees of such contractors?"

In my opinion, both of these questions must be answered in the negative for the reasons stated in my opinion to Mr. Harrison.

Section 15.1-510 (formerly § 15-10) does not apply. The General Assembly has by the enactment of the provisions of Chapter 7, Title 54 of the Code, established the law and the procedure applicable to licensing contractors as defined therein, including in § 54-145.2 the extent of the authority which may be exercised by the counties, cities and towns.

ORDINANCES—Licenses—Tax—Town of Windsor—Authority to impose on distributors of oil and petroleum products.

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

August 17, 1964

This is in reply to your letter of August 5, 1964, in which you enclosed a copy of an ordinance of the Town of Windsor, the body of which ordinance reads as follows:

"The license tax on every person, firm or corporation operating, conducting or engaging in the business of selling, distributing, furnishing or supplying gasoline, fuels, petroleum, petroleum products, motor fuel, oil, greases, lubricants, kerosene, fuel oil, and heating and cooking gases,
either at retail or wholesale, whose principal office or regular place of business is located outside of the Town of Windsor, Virginia, and who accept, solicit or engage in such business or who sell, distribute, furnish or supply, either at retail or wholesale, the above mentioned commodities and products of such business to any person, firm or corporation in said Town by any means or in any manner, either in person or by agent, shall be $15.00 annually; provided, however, that the above license tax shall not apply to any person, firm or corporation who sells, distributes, delivers, furnishes or supplies the above mentioned commodities and products as a wholesale dealer exclusively at wholesale to a retail dealer who is licensed to sell such commodities and products at his regular place of business in said Town. The term 'retail dealer', as used in this ordinance, means every person, firm or corporation who sells to others at retail only and not for resale. The term 'wholesale dealer', as used in this ordinance, means every person, firm or corporation who sells to others for resale only."

You state the following factual situation:

"Several firms and companies in this area are engaged in the business covered by the aforesaid ordinance in that they sell, distribute, furnish and supply oil and other petroleum products mentioned in said ordinance at wholesale and retail directly to consumer customers, not only in the County, City and Town where their principal offices or regular places of business are located, but also in other counties, cities and towns, including the Town of Windsor which is an incorporated Town with a population of between 600 and 700 people and is located in Isle of Wight County, Virginia.

"The principal places of business of such firms are, respectively, in the City of Franklin, Virginia, and in the counties of Nansemond and Southampton, Virginia, where each respectively pays both State and city or State and county, as the case may be, wholesale and retail licenses. The consumer customers in the Town of Windsor of these out-of-town respective firms may have made the initial contact with these firms and placed their original orders for oil at the principal offices or regular places of business of such firms by telephone or in person some years ago when they became regular customers of such firms, but since that time these firms have, at the request of such consumer customers, placed them on their regular list of customers whose oil tanks have been for sometime and are regularly and automatically checked, serviced and filled by truck service of such firms without any further request by such consumer customers. Such sales and deliveries are made directly by such firms by tank trucks directly to such consumer customers in the Town of Windsor who are later billed for such sales and deliveries.

"Some of these firms have raised a question as to whether or not the aforesaid ordinance is valid and enforceable against them and whether or not the Town of Windsor may require them, under the above facts, to obtain a license in said Town for the privilege of selling oil and other petroleum products directly to consumer customers in said Town. It is understood that a nearby City and Town require similar licenses and that some of the firms affected by the Windsor ordinance have paid the license taxes to and required by such other City and Town."
"... I will, therefore, appreciate your opinion as to whether or not the aforesaid ordinance is valid and enforceable and whether or not the Town of Windsor may require such firms, under the above facts, to obtain a license for the privilege of selling the above mentioned oil and petroleum products directly to consumer customers in said Town."

Section 15 of the Town Charter is as follows:

"In all cases in which the State may require a license to be taken out by any person engaged in any business, trade, occupation, or calling, or for any other purpose, the said Council shall have power to require a license to be taken out in all such cases for the benefit of said Town before such person shall be permitted to pursue such business, trade, or calling within the corporate limits of said Town, and may require taxes to be paid thereon, and subject the same to such regulations as they may deem proper."

Section 58-266.1 of the Code of Virginia (1950), as amended, in pertinent part reads as follows:

"The council of any city or town, and the governing body of any county, may levy and provide for the assessment and collection of city, town or county license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the city, town or county, whether any license tax be imposed thereon by the State or not, subject to the following limitations:"

None of the limitations expressly set forth in § 58-266.1 seem to prohibit the tax.

The operation you have described does not seem to be peddling, and on the other hand, the continuous distribution to regular customers seems to fall within the definition of "engaging in business" in the Town as described in Young v. Town of Vienna, 203 Va. 265. In short, the authority of the Town to impose such a tax seems clear, and I am not aware of any statute that limits or prohibits this tax, or exempts distributors of petroleum products under the circumstances you have outlined. Whether taxes of this nature may invite retaliatory taxes from other communities, or unduly restrict trade among the communities, would seem to be matters of policy for the Town Council to decide.

ORDINANCES—Local—Prohibiting loitering and soliciting—Not enforceable in Federal post office building.

HONORABLE W. D. THOMAS
Chief of Police for Town of Chatham

January 12, 1965

This is in reply to your letter of January 8, 1965, which reads as follows:

"The following sign is posted in the local United States Post Office:

"'Loitering and Soliciting in This Building Prohibited'

"'Could an ordinance of the Town of Chatham prohibiting loitering
Section 7-20 of the Code of Virginia reads as follows:

"The unconditional consent of the Commonwealth of Virginia is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any lands in Virginia, from any individual, firm, association or body corporate, for sites for post offices, or for services incidental to postal work; provided, however, there is hereby expressly reserved in the Commonwealth the jurisdiction and power to serve criminal and civil process on such lands.

"Whenever the United States shall cease to use any of such lands so acquired for any one or more of the purposes hereinabove set forth, the jurisdiction and powers herein ceded shall as to the same cease and determine, and shall revert to the Commonwealth."

You will observe that the jurisdiction of the Commonwealth is limited to the service of criminal and civil process on such property. The jurisdiction of a municipal corporation may not exceed that of the State. Therefore, in my opinion, an ordinance of the nature suggested in your letter could not be enforced.

ORDINANCES—Localities May Not Exempt Persons over 65 from Payment of Personal Property Tax.

TAXATION—Personal Property—Localities may not exempt persons over 65 from payment.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

October 27, 1964

This is in reply to your letter of October 20, 1964, which reads as follows:

"I would like to have an official Attorney General's ruling as to whether or not a locality could exempt persons over 65 years of age from the payment of tangible personal property.

"I am enclosing the information which was forwarded to me in the hope that this might be of some help to your office. I would appreciate it if you would return same when you are through with it."

We have examined the proposed ordinance and in our opinion an ordinance of this nature would be in violation of the provisions of Section 168 of the Constitution which requires that all taxes upon property, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.
ORDINANCES—Regulation of Pedestrians—Authorization for municipalities to enact.

January 21, 1965

HONORABLE EDWARD E. WILLEY
Member, Virginia State Senate

This is in reply to your letter of January 7, 1965, in which you request an opinion as to whether towns and cities of Virginia, other than those of the first class, are forbidden to pass and enforce pedestrian ordinances.

It is generally held that the municipality has only such powers to regulate the use of the streets as are delegated to it. Such power is subject to constitutional or statutory restrictions. Within these limitations, the municipality, under its police power, may subject to reasonable regulation the right of the pedestrian to use the streets for travel. Chapter 4 of Title 46.1, Code of Virginia (1950), as amended, prescribes the State laws regarding the regulation of traffic. Article 2, thereunder, § 46.1-180 et sequel, states the powers of local authorities in general to adopt ordinances to regulate the operation of vehicles on the highways of such political subdivisions. Article 5 of the same chapter prescribes the State laws in regard to the protection of pedestrians. Under the latter article, Paragraph (a) of § 46.1-230 states that, when crossing highways or streets, pedestrians “shall cross wherever possible only at intersections” and “shall cross only at right angles.” Paragraph (b) of the same section is as follows:

“(b) The governing body of an incorporated town or city or the governing body of a county authorized by law to regulate traffic may by ordinance permit pedestrians to cross an intersection diagonally when all traffic entering the intersection has been halted by lights, semaphores, or signals by a peace or police officer.”

Beyond the last quoted section, this article makes only one further reference to municipalities being authorized to enact ordinances to regulate pedestrian traffic. This is found in § 46.1-241, which reads as follows:

“The councils of cities of the first class may enact ordinances requiring pedestrians to obey signs and signals erected on highways or streets therein for the direction and control of travel and traffic and to obey the orders of police officers engaged in directing travel and traffic on such highways or streets and may provide penalties for violating such ordinances by fines not exceeding five dollars for each offense.” (Emphasis supplied).

This statute has remained unchanged since the 1950 amendment substituted the words, “of the first class” for the words, “containing more than sixty-five thousand population”, and, doubtless, is the basis for the idea that towns and cities other than those of the first class are forbidden to enact pedestrian ordinances. Indeed, this section, when considered alone, seems to infer the exclusion of other cities and towns from the right to adopt such ordinances. Chapter 328, Acts of Assembly of 1958, however, added to former Title 15 of the Code of Virginia, Chapter 5.1, relating to the powers of cities and towns. When Title 15 was revised, rearranged, amended and recodified by Chapter 623, Acts of Assembly of 1962, this was included in Chapter 18 of Title 15.1, Code of Virginia (1950), as amended. This chapter relates to the words, “municipal corporation”, which, under § 15.1-837 thereof, “include cities of the first class and cities of the second class and incorporated towns.” Under § 15.1-838, “A municipal corporation shall have and
may exercise any or all powers set forth in this chapter when such powers are specifically conferred upon the municipal corporation as provided in or pursuant to the provisions of this chapter." By referring to Article 6 thereunder, it will be seen that the right to control pedestrian travel is included in the regulation of traffic, under § 15.1-891 which reads as follows:

"A municipal corporation may regulate and control the operation of motor and other vehicles and the movement of vehicular and pedestrian travel and traffic on streets, highways, roads, alleys, bridges, viaducts, subways, underpasses and other public ways and places, provided such regulations shall not be inconsistent with the provisions of article 2 (§ 46.1-180 et seq.) of chapter 4 of Title 46.1 of this Code, or any amendment or revision thereof or provisions of law which are successor thereto."

This section is subject to § 15.1-896, which excludes the application of Chapter 18 from "any highway, road, street or other public way which constitutes a part of any of the State Highway Systems." From examination of these and the related provisions of this chapter, especially Article 1 relating to general powers and Article 10 concerning the granting or amending of charters, it is apparent that those municipal corporations not previously authorized by charter or statute to regulate pedestrians must be granted either a new or amended charter or power by the General Assembly under the provisions of this chapter before they may do so. In this connection § 15.1-910, under the last named article, is as follows:

"No charter shall be granted to a municipal corporation and no charter of a municipal corporation shall be amended with respect to the powers provided for municipal corporations by this chapter, nor shall any such power be granted to a municipal corporation except as provided in this article." (Emphasis supplied).

In consideration of the foregoing, and related statutes, I am of the opinion that any city or incorporated town, if authorized by the General Assembly, by charter granted or amended, pursuant to the provisions of Chapter 18, Title 15.1, Code of Virginia (1950), as amended, may enact and enforce pedestrian ordinances. Where no such authorization is contained in the charter or its amendments, however, with the exception of § 46.1-230, paragraph (b), previously quoted herein, I find no statutory authority upon which cities and incorporated towns, other than cities of the first class, may enact and enforce pedestrian ordinances.

ORDINANCES—Subdivisions—Procedure by county where incorporated towns within county disapprove.

COUNTIES—Ordinances—Procedure by county where incorporated towns within county disapprove.

March 8, 1965

HONORABLE E. GARNETT MERCER, JR.
Commonwealth’s Attorney for Lancaster County

This will acknowledge receipt of your letter of February 22, 1965, which reads as follows:

"The Board of Supervisors of Lancaster County are now considering
the adoption of a subdivision ordinance for the County, making the same effective in all the unincorporated territory of the County, including the area of municipal jurisdiction of any incorporated town.

“The date for a public hearing before the Board of Supervisors on the proposed ordinance has been set and the incorporated towns within the County have been duly notified pursuant to Section 15.1-468 of the Code. One of the incorporated towns has approved the ordinance as proposed, the other two incorporated towns have disapproved the ordinance. Neither of the towns have any subdivision regulations and it is felt that the objections are merely for purposes of delaying the final adoption of an ordinance for the County and in any event to water the ordinance down. However, the situation presents several questions which I shall thank your office to give me an expression of your opinion.

“1. Will the public hearing upon the proposed ordinance have to be delayed until after the objections made by the towns to the ordinance have been explored and an effort made to reconcile and settle the differences and failing this, the entry of an order by the Circuit Court, pursuant to Section 15.1-469?

“2. If any substantial change is made in the ordinance, either by agreement between the objecting towns and the County or by an order of the Circuit Court, will it then be necessary to readvertise the ordinance as changed for public hearing and again submit the same for approval or disapproval to the one town which approved the ordinance as originally proposed?

“3. Could the County at this stage go forward with the public hearing now scheduled and thereafter adopt the ordinance by amending the same so as to exclude the area of the County within the municipal jurisdiction of the two objecting towns, but being made effective within the jurisdiction of the town approving the ordinance?

“4. Since the Board of Supervisors desire to make the proposed subdivision ordinance effective within the County without delay could the Board of Supervisors abandon the proposed ordinance in its entirety and thereafter propose a new subdivision ordinance excluding the proposal to make the same effective within the unincorporated portions of the County under the municipal jurisdiction of any incorporated town?”

Question (1) is answered in the negative. The statute is silent, but I feel that the court proceedings under § 15.1-469 of the Code should be had only after every other effort has been made to prepare an ordinance agreeable to the county and the municipalities affected. It is conceivable that a public hearing might result in the removal of all objections being raised by the municipalities.

Question (2) is also answered in the negative. Section 15.1-431 relates to the advertisements and notices necessary in connection with the adoption of an ordinance under Chapter 11, Title 15.1. The last paragraph of this section is as follows:

“After enactment of any such plan, ordinance or amendment further publication thereof shall not be required.”

Question (3) is answered in the affirmative. I can see no reason why this procedure would in any way conflict with any of the provisions of the statute.

With respect to question (4), in my opinion, the board of supervisors could amend the pending ordinance so as to exclude that portion making the ordinance effective within the two mile limit of any incorporated town. This would seem
to be preferable to abandoning the ordinance entirely. Should it be abandoned entirely, the provisions with respect to notice and publication would apply.

ORDINANCES—When County Ordinances Applicable Within Town.

COUNTIES, CITIES AND TOWNS — Ordinance — When county ordinance applicable in town.

HONORABLE DONALD C. CROUNSE
Assistant Commonwealth's Attorney for Fairfax County

This is in reply to your letter of November 18, 1964, in which you request my opinion with respect to the following:

"Pursuant to the Acts of Assembly of 1938 and 1964, Chapters 186 and 250 respectively, the legislature issued a charter to the Town of Clifton within the County of Fairfax. The Town of Clifton desires to utilize the building, fire protection, and five prevention codes adopted by the County of Fairfax and desires that county officials enforce them within the town. The County of Fairfax, pursuant to Section 27-5.1 of the Code of Virginia, has adopted by reference the Boca Basic Building Code and the Fire Prevention Code as recommended by the National Board of Fire Underwriters.

"It is my understanding that the town council has not adopted any of the aforementioned codes though they appear to have the authority to do so pursuant to the applicable sections of Article 4, Chapter 15.1 of the Code of Virginia. My specific question is:

"1. Do the county building code and fire prevention ordinances apply within the limits of the Town of Clifton and can county officials enforce said ordinances within the town?

"2. If the answer to the above question is in the negative, then if the Town of Clifton adopts the county ordinances mentioned above, can the county officials enforce the town's ordinances within the town by virtue of authority granted through a resolution of the town council?"

In answer to your first question, I am of the opinion that until such time as the town adopts an ordinance similar to the ordinance adopted by the county, the county may enforce the ordinance within the corporate limits of the town. In this connection I enclose herewith copy of an opinion of this office dated July 6, 1949, and furnished Hon. Littleton H. Mears, Commonwealth's Attorney for Northampton County (See, Report of Attorney General, 1949-50, at p. 76). I also refer you to an opinion dated March 26, 1963, and furnished to Hon. A. D. Johnson, Commonwealth's Attorney (See, Report of Attorney General, 1962-63, at p. 200).

In your letter you have made reference to Article 4, Chapter 15.1 of the Code of Virginia. You did not designate the title to which you refer and I am unable to locate the particular statute you had in mind. However, under § 27-5.1 of the Code, a town may adopt a fire prevention ordinance such as has been adopted by the county.

Although I answered your first question in the affirmative, I shall comment upon your second question. In my opinion, if the town of Clifton adopts an or-
PILOTS—Maritime—When § 54-544 applicable.

HONORABLE J. WARREN WHITE, JR.
Member, House of Delegates

October 8, 1964

This is to acknowledge receipt of your letter of October 6, 1964, in which you state in part:

"Does this statute [§ 54-544 Code of Virginia (1950)], in your opinion, apply to United States vessels under register and foreign flag vessels for trips from Hampton Roads to Baltimore or from Baltimore to Hampton Roads when the vessels in question move strictly through inland waters and have cleared customs from their inbound foreign voyage and have not cleared customs for their next outbound foreign voyage. In other words, would an American flag vessel that enters Hampton Roads from foreign be subject to this statute for a trip thereafter from Norfolk to Baltimore, which voyage would be strictly on inland waters, the trip in question, as aforestated, occurring after the vessel had entered and cleared customs at Norfolk but before she cleared customs for another outbound foreign voyage."

The pertinent portion of said statute (§ 54-544, Code of Virginia (1950)) is as follows:

"The master of . . . any such vessel [other than vessels exclusively engaged in coastwide trade] outward bound . . . shall take the first Virginia pilot that offers his services at the port, point or place of departure or sailing, and any master refusing to do so shall immediately pay such pilot . . . "

The purpose of this statute, it would seem, is to assure the safety of vessels operated by masters who are not familiar with navigation conditions in or near local harbors. The vessel, the movements of which you describe, is not engaged exclusively in coastwide trade. The reason, no doubt, for this exclusion is that the masters who operate vessels engaged in coastwide trade are familiar with local navigation hazards, etc., whereas the masters of foreign vessels are not. It seems to me that this vessel is outward bound when she leaves Norfolk for Baltimore and would therefore come within the purview of the statute as quoted above, although the voyage from Norfolk to Baltimore would be strictly on inland waters.

Therefore, it is my opinion that § 54-544, Code of Virginia (1950), is applicable to the situation above described and which is set forth in your said letter.
PINE TREE SEED LAW—Violations—Owner of land at time trees are cut
offending party.

August 31, 1964

HONORABLE ROBERT L. RHEA
Commonwealth's Attorney for Augusta County

This is in reply to your letter of August 28, 1964, which reads as follows:

"I have been requested to write and ask your opinion regarding possible violation of the seed tree laws covered in Title 10—Article 6 of the Code of Virginia.

"Specifically, if an owner of real estate has cut seed trees with the intention of developing pasture which would exclude him from requirements in this article, and subsequently sells the property prior to completion of the requirement of converting it to pasture, would the original true owner or the seller be responsible for complying with this law, or would it be incumbent upon the purchaser to go forward with the pasture exclusion in the Code?"

The Honorable J. Lindsay Almond, Jr., while Attorney General, had occasion to express an opinion on the question you have presented. In a letter addressed to the State Forester under date of August 21, 1952, Attorney General Almond expressed the view that the owner of the land at the time the trees are cut in violation of § 10-82 of the Code is the offending party rather than the successor in title who fails to develop the land which was ostensibly cleared for agricultural purposes. That opinion appears in Report of Attorney General (1952-53), at p. 176. I concur in the view expressed in that opinion.

PLANNING COMMISSION—Comprehensive Plan—How enforced.

BOARDS OF SUPERVISORS—Comprehensive Plan of Planning Commission—Control over.

July 15, 1964

HONORABLE J. C. KNIBB
Commonwealth's Attorney for Goochland County

This is in reply to your letter of July 13, 1964, which reads as follows:

"In 1956, Goochland County created a Planning Commission to plan for the orderly growth of its county. Studies, reports and maps have been made from a comprehensive plan for the development of Goochland County. A public hearing has been held by the Commission on the comprehensive plan in accordance with § 15.1-448 of the 1950 Code as amended. The Planning Commission has been informed of the provisions of § 15.1-456; however, there remains some doubt as to the binding effect of the comprehensive plan once it has been approved and adopted by the Board of Supervisors. Therefore, I shall appreciate it if you would give me your opinion as to whether this comprehensive plan will be binding and enforceable against persons locating public businesses in conflict with the General Plan and, if so, to what extent.

"I shall also appreciate it if you will give me your opinion as to the definition of the term 'public place' as it is used in this section. I am
specifically interested to know if it would apply to a service station, store, etc. . . . 

Any comprehensive plan adopted under the provisions of Article 4, Chapter 11, Title 15.1 of the Code constitutes a guide or master pattern for the future development of the area included therein. Under § 15.1-456, the local Planning Commission may enforce the prohibitions stated therein, subject to being overruled by the board of supervisors. The plan, of course, is binding and enforceable as to the construction and establishment of the facilities mentioned therein—that is, the general location, character and extent thereof must be approved by the Commission, subject to review by the Board of Supervisors if the Commission has not approved the same.

Section 15.1-457 requires State agencies responsible for the construction, operation and maintenance of any public facility of the State within the territory to be included in the comprehensive plan, if requested by the Commission, to collaborate and cooperate with such Commission and furnish it any reasonable information requested relative to the plans of the State agency. Nothing, however, contained therein shall in any way abridge the authority of any State agency regarding the facilities now or hereafter coming under its jurisdiction.

In the second paragraph of your letter you request my opinion as to the definition of the term "public place" as used in § 15.1-456. I do not find that this term is used in this section; however, the term "public area" is used. The term "public area" is used in conjunction with streets and parks and, therefore, I think that the term comes within that category.

The word "public" is used in many instances in connection with apartments, hotels, etc., and, no doubt, filling stations and stores are in one category of public facilities. I do not feel, however, that this section relates to the control of the location of businesses of this nature. In my opinion, the authority of a county to exercise control over the location of ordinary business concerns of this nature is found in the zoning statutes which are set forth in Article 8, Chapter 11, Title 15.1, commencing at § 15.1-486.

PRACTICE OF LAW—Filling Out a Suggestion for Summons in Garnishment—Not practicing law.

Honorable W. Carrington Thompson
Member, House of Delegates

December 21, 1964

I acknowledge receipt of your letter of December 18, 1964, in which you request my opinion as to whether a Justice of the Peace who furnishes assistance to a judgment creditor in filling out a suggestion for Summons in Garnishment, and takes his affidavit, is engaging in the practice of law. You refer to the Rules for Integration of the Virginia State Bar wherein it is provided that—

"Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill."
"Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—

*       *       *

"(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business."

The form which you enclosed is a copy of paragraphs (1) through (6) of Section 8-441 of the Code which contain the various allegations (at least one being necessary to exist) upon which a garnishment proceeding may be instituted. The paper must be sworn to before an officer who is qualified to administer oaths—such as a notary public, justice of the peace, clerk of a court, commissioner in chancery, etc. The taking of the affidavit is certainly a proper service of any such officer. The aid given by such an officer in filling in the blank spaces shown on the form—which does not in my judgment require any legal knowledge or skill—would not seem to constitute a preparation of a legal instrument within the meaning of the term as used in paragraph (2) quoted above. The filling in of the blank spaces is nothing more than information for the officer to whom the paper is delivered so that the style of the case and the names of the necessary parties will be available to such officer.

In my opinion such service by a justice of the peace, notary public or other person would not constitute the practice of law.

PRACTICE OF LAW—Use of Notice Simulating Legal Process Constitutes Unauthorized Practice.

February 23, 1965

HONORABLE MARVIN M. MURCHISON
Commonwealth's Attorney for the City of Newport News

This is in answer to your letter of January 18, 1965.

Enclosed with your letter was the following resume which you indicated was submitted to you by the Chairman of the First District Committee of the Virginia State Bar. That resume reads as follows:

"A Virginia collection agency is engaged by businesses in Virginia to collect due accounts from creditors. The agency has a demand notice mailed to the Virginia creditor from Washington, D. C., in a brown window envelope similar to that used by governmental agencies. On the envelope there is printed 'The Form Enclosed is Confidential. No One Else May Open'. In the upper left hand corner of the envelope there is stated 'Postmaster, after 5 days return to 748 Washington Bldg., Washington 5, D. C.'.

"The enclosed notice has writing on both front and back. On the front, the debtor's name and address appears in a rectangular shaped box so that it shows through the window in the envelope which is covered by Cellophane. Also, on the front of the notice there is printed 'Mailed from: PAYMENT DEMAND, WASHINGTON 5, D.C.'; 'BRING THIS FORM WITH YOU. IF UNABLE TO APPEAR,'
SEND AMOUNT PAST DUE BY MAIL TO CREDITORS OFFICE; 'DO NOT PIN, FOLD OR STAPLE'; and 'SEE REVERSE SIDE'.

"On the back of the notice there is printed the following:

'You have 10 days to pay the amount of $___________ on the claim of _____________,

You are scheduled to appear in the CREDITORS OFFICE, located at _____________ in the city of _____________ State of _____________ on or before two o'clock in the afternoon of the day of _____________, 19________ to pay the balance requested or give satisfactory reasons in PERSON why the AMOUNT has not been paid.

'IF MAILING PAYMENT TO CREDITOR REFER TO FILE NO. _____________.

'This Demand is made to give you a last opportunity to pay before action is taken on said claim.

'NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND.

'Subject to the Laws of the State of Virginia.

'A creditor may request an Attorney-at-Law to attach after Judgment Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary.

'We would like to have your opinion as to whether or not the above notice simulates legal process, or gives the creditor the erroneous impression that the United States Government is supporting the claim, and in any event, if such practice on the part of the collection agency is tantamount to the unauthorized practice of law.'

It is my opinion that the Notice quoted in the resume simulates legal process and is designed to intimidate an alleged debtor. It is also my opinion that the Notice threatens the debtor with legal proceedings. This is done in the sentence which reads "This demand is made to give you a last opportunity to pay before action is taken on said claim." While this may not be a direct threat of suit because the term "legal action" or "suit" is not actually used, nevertheless, it is my opinion that the clear implication of this statement, in conjunction with the rest of the Notice, is that legal action will be forthcoming.

Threatening debtors with legal proceedings, including the use of instruments simulating legal process to intimidate debtors into compliance, is generally held to constitute the unauthorized practice of law.

The Unauthorized Practice of Law Committee of the Virginia State Bar has opined that for a collection agency, in their own name, to threaten debtors with legal proceedings and to employ instruments simulating forms of legal notice in dealing with debtors, especially in threatening the commencement of legal proceedings, constitutes the illegal practice of law (see Opinion No. 27, dated February 8, 1955, of the Committee on the Unauthorized Practice of Law, Virginia State Bar). In support of its opinion that a collection agency may not in its own name threaten debtors with legal proceedings, the committee cited the following cases: In re Lyon, 301 Mass. 30, 16 N.E. (2d) 74 (1938); State v. C. S. Dudley & Co., 340 Mo. 852, 102 S. W. (2d) 895 (1937); Berk v. State, 225 Ala. 324, 142 So. 832 (1932); In re Ripley, 109 Vt. 83, 191 Atl. 918 (1937); In re Shoe Mfrs. Protective Assoc., 295 Mass. 369, 3 N. E. (2d) 746 (1936); Annotation: 157 A.L.R. 522, 526.
In support of its conclusion that a collection agency may not employ instruments which simulate legal process, the committee noted a statement of principles which should govern collection agencies issued by the American Bar Association Committee on Unauthorized Practice of Law on May 4, 1937. These principles were approved on July 26, 1937 by a committee of representatives of the New York State Bar Association and the New York State Association of Collection Agencies, and were thereafter approved by the Commercial Law League of America in convention at Cleveland, Ohio, on August 16, 1937. One of these principles is set out in Opinion 27 as follows:

"It is improper for a collection agency: (4) In dealing with debtors to employ instruments simulating forms of Judicial process, or forms of notice pertaining to judicial proceedings, or to threaten the commencement of such proceedings."

In 15 Am. Jur. 2d., Collection and Credit Agencies § 9, it is stated that to threaten debtors with legal proceedings, including the use of notices simulating legal process to intimidate alleged debtors into compliance with demands made on them, is to engage in the unauthorized practice of law (citing many of the cases supra; as noted these cases hold that threatening debtors with legal proceedings constitutes the unauthorized practice of law). Cases which condemn the use of notices simulating legal process to intimidate debtors are: Bumps v. Barnett, 235 Iowa 308, 16 N.W. 2d 579 (1944) and State Bar of Oklahoma v. Retail Credit Association, 170 Okla. 246, 37 P. 2d 954 (1934) (see, 15 Am. Jur. 2d, Collection and Credit Agencies § 9, fn. 16, p. 560).

Therefore, it is my opinion that the use of the Notice involved in your inquiry constitutes the unauthorized practice of law.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Accountancy—Extent of authority over examinations given to certified public accountant candidates.

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

May 19, 1965

This will reply to your letter of May 14, 1965, in which you present the following situation and inquiry:

"All State Boards of Accountancy in the United States use a common examination prepared by a committee of the American Institute of Certified Public Accountants. This examination is divided into four sections, namely: Practice, Theory, Auditing, and Law. In order for a candidate to receive a certificate in Virginia, such candidate must pass all four sections of the Examination in three attempts within a period of 25 months, whichever consumes the least time.

"Section 54-89 of the Code sets forth who may become certified as a Certified Public Accountant. In this Section of the Code, under subsection 6, the candidate is required to pass an examination in theory of accounts, in practical accounting, auditing and commercial law and such other related subjects as the Board may deem advisable. To date, the Board has not deemed it advisable to add to its present examination.

* * *
"The Virginia State Board of Accountancy desires to know whether or not it has the authority under the provisions of Chapter 5 of Title 54, Code of Virginia, to allow a candidate for a CPA Certificate credit for passing a part or parts of the common examination while sitting as a candidate in another state."

As you point out in your communication, § 54-92 of the Virginia Code authorizes the State Board of Accountancy to "make all needful rules and regulations regarding the conduct and scope of the examination, the method and time of filing application for examination and all other rules and regulations necessary to carry into effect the purpose of this chapter." Moreover, § 54-92-5 of the rules and regulations of the Board provides, inter alia, for the allowance of credits for each individual subject passed on an examination, which credits may be used "as part requirement for the passing of either of the next two examinations taken by the candidate . . ." I am of the opinion that the language of § 54-92 of the Virginia Code italicized above is sufficiently comprehensive to authorize adoption by the Board of a regulation allowing a candidate credit for having passed a part or parts of the common examination while sitting as a candidate in another State, provided the scope of the examination and the requirements for passing the examination in such other State are equivalent to those prescribed by the Virginia State Board of Accountancy.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Registered Professional Hairdressers—Reciprocity.

HONORABLE LEROY S. BENDHEIM
Member, Virginia State Senate

January 5, 1965

This will acknowledge receipt of your letter of December 29, 1964, relating to our interpretation of the first paragraph of § 54-112.16 of the Code, which section reads as follows:

"(a) Any person who has been duly licensed to practice as a cosmetologist or hairdresser, in any state in the United States which has a standard of qualifications and examinations for such practice as high as that provided for in Virginia by this chapter, or who has been principally engaged in such practice pursuant to such license, for a period of not less than two years preceding may, upon proper application to the Board and upon the payment of the sum of fifteen dollars, in lieu of examination and registration fees, be issued a certificate of registration without examination and shall thereupon be authorized to practice as a 'registered professional hairdresser,' in this State, provided, however, the same privilege be granted to citizens of this State." (Italics supplied)

In order to apply the statute according to its obvious intent, we felt it was necessary to construe the word "or" as "and"—a practice the courts have not hesitated to follow when necessary to arrive at the evident intent of a statute. See, Words and Phrases, Vol. 30, page 33, et seq. Beginning at page 43 of this volume there are numerous citations of cases holding that in civil statutes the word "or" will be construed as "and" where, by so doing, effect in harmony with legislative intent may be given a statute.

As we construe the statute it provides for reciprocity to a person who—
is licensed to practice in another State which has a standard of qualifications and examinations as high as provided for in this State; and,

who has been principally engaged in such practice pursuant to such license for a period of not less than two years.

It is unfortunate that the word "or" was used in the Act, but without considering it to mean "and" it would still be necessary to interpret the words "or who has been principally engaged in such practice pursuant to such license" to mean that during the two-year period preceding the time a person applies for the license in this State he must have practiced his profession as the holder of a license issued by a State which has a standard of qualifications and examinations as high as is required by this State.

I regret that I am unable to construe the statute in the manner suggested by Mr. Bernfeld, as stated in his letters to you and Mrs. Stone, copies of which you furnished to me.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Board of Registered Professional Hairdressers—Reciprocity—Refund of application fee.

May 20, 1965

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

I am in receipt of your letter of May 13, 1965, in which you call my attention to §§ 54-112.12, 54-112.16 and 54-112.20 of the Virginia Code and inquire whether or not the Virginia State Board of Registered Professional Hairdressers has the authority to refund a fee of $15.00 submitted by an applicant for a certificate of registration as a "registered professional hairdresser" pursuant to § 54-112.16 of the Virginia Code when such applicant does not meet the qualifications prescribed in the latter statute.

In pertinent part, the provisions of law to which you refer provide:

"§ 54-112.12.—Upon filing timely application with the Department of Professional and Occupational Registration, upon forms approved by the Board and upon payment of an examination fee of fifteen dollars, which fee shall be nonrefundable, any person desiring to qualify for licensing as a ‘registered professional hairdresser,’ shall be permitted to take such an examination . . ." (Italics supplied).

"§ 54-112.16.—(a) Any person who has been duly licensed to practice as a cosmetologist or hairdresser, in any state in the United States which has a standard of qualifications and examinations for such practice as high as that provided for in Virginia by this chapter, or who has been principally engaged in such practice pursuant to such license, for a period of not less than two years preceding may, upon proper application to the Board and upon the payment of the sum of fifteen dollars, in lieu of examination and registration fees, be issued a certificate of registration without examination and shall thereupon be authorized to practice as a ‘registered professional hairdresser,’ in this State, provided, however, the same privilege be granted to citizens of this State." (Italics supplied).

"§ 54-112.20.—All fees payable under this chapter shall be collected
by the secretary-treasurer of the Commission and paid by him to the
general fund of the State treasury. All money so collected during the
biennium beginning July one, nineteen hundred sixty-two, is hereby ap-
propriated to the Department of Professional and Occupational Regis-
tration for expenditure in carrying out the provisions of this chapter."

It is clear from the language of § 54-112.12 italicized above that this provision
of the Virginia Code relates to eligibility for the examination to qualify as a
"registered professional hairdresser" and that the fee therein prescribed is an
"examination fee" which is specifically declared to be nonrefundable. By con-
trast, § 54-112.16 of the Virginia Code relates to the issuance of certificates of
registration, without examination, to nonresident licensed cosmetologists or hair-
dressers, the fee therein prescribed is "in lieu of examination and registration
fees" and such fee is not declared nonrefundable. Since the examination fee spec-
ified in § 54-112.12 is the only fee expressly made nonrefundable by statute, and
the fee specified in § 54-112.16 is not an examination fee and is not expressly
made non-refundable, I am of the opinion that the Board is authorized to refund
the latter fee in those instances in which a nonresident applicant for a certificate
of registration does not meet the standards prescribed by the latter provision of
the Virginia Code.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Hairdressers—
Instructors—Board may establish minimum requirements for instructors in
approved schools.

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

September 2, 1964

I have your letter of August 31, 1964, which is, in part, as follows:

"The Board [of Registered Professional Hairdressers] has under con-
sideration the promulgation of the following rules which shall be appli-
cable only to teachers or instructors in approved schools as provided
in subsection (5) B of § 54-112.12:

"Qualifications for teachers in approved schools—

1. High school education, or pass the General Educational Devel-
opment Test.

2. Every two years all teachers must have 30 hours of technical
training, technical education, NACS Courses.

3. Not less than 2,000 hours of actual shop experience after
graduating from approved school before teaching.

"In your opinion, does the Board of Registered Professional Hair-
dressers have the authority to promulgate the above rules and regula-
tions which have for their purpose the establishment of minimum re-
quirements for instructors or teachers in approved schools?"

As you state in your letter, Section 54-112.6 of the Code of Virginia of 1950.
as amended, permits the Virginia State Board of Registered Professional Hair-
dressers to make such rules and regulations, not inconsistent with law, as may be
necessary for the performance of its duties. And, as you state, Section 54-112.12
provides for an examination to be given by the Board to those who have, among
other things, completed the required course in cosmetology which has been ap-
proved by the State Department of Education at a school approved by the Board.
This means, of course, that the State Board of Education approves the courses in cosmetology and the school is approved by the Board of Registered Professional Hairdressers.

I am of the opinion that the Board may make reasonable rules and regulations as to the qualifications of instructors or teachers in the schools approved by the Board for teaching cosmetology.

Whether or not the three proposed qualifications for instructors or teachers are reasonable is for factual determination, and I do not believe that I am qualified to state categorically as to whether or not these proposed qualifications are reasonable. The affirmative determination of the Board would have great weight in this regard.

I call your attention to a letter dated June 15, 1964, to you, which is similar to the opinion stated above.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Hairdressers—
Requirements for licensed nonresident.

December 9, 1964

HONORABLE LEROY S. BENDHEIM
Member, Virginia State Senate

This is in reply to your letter of December 2, 1964, in which you present the following questions relating to § 54-112.16 of the Code of Virginia:

"We should like to be advised whether a person holding a non-resident certificate from a state having the same or substantially similar qualifications as Virginia, may be issued a certificate to practice in Virginia upon presentation to the Board of his non-resident certificate without further requirements; that is to say that if the non-resident should have at least an eighth grade education and requires examination for licensing, should not our Board, upon the presentation of a certificate from that state, forthwith license the applicant?

"Secondly, we should like to be advised also whether a person who has had two years actual practice in cosmetology or hairdressing, even though one is not licensed by another state, could not upon proof of such actual practice, under our statute be issued a certificate to practice in Virginia without examination?"

The above numbered section of the Code reads as follows:

"(a) Any person who has been duly licensed to practice as a cosmetologist or hairdresser, in any state in the United States which has a standard of qualifications and examinations for such practice as high as that provided for in Virginia by this chapter, or who has been principally engaged in such practice pursuant to such license, for a period of not less than two years preceding may, upon proper application to the Board and upon the payment of the sum of fifteen dollars, in lieu of examination and registration fees, be issued a certificate of registration without examination and shall thereupon be authorized to practice as a 'registered professional hairdresser,' in this State, provided, however, the same privilege be granted to citizens of this State." (Italics supplied)
In a conference with Mr. Turner N. Burton, Director of the Department of Professional and Occupational Registration, soon after the act became effective we advised him that in our opinion the word “or” as used in this section must be construed to mean “and.” The courts have frequently held that where it is apparent the word “or” has been misused it will be construed as stated above. There are numerous cases to this effect cited in Words and Phrases and Black’s Law Dictionary. Therefore, as we construe paragraph (a) of this section of the Code, a person (1) who can show that she has been duly licensed as a cosmetologist or hairdresser in any State which has standards of qualifications and examinations for such practice as high as those provided in Virginia by Chapter 6.1 of Title 54 of the Code, and (2) who has been principally engaged in such practice pursuant to such license for a period of not less than two years preceding, is entitled to be issued a certificate of registration in this State without examination, provided the State which issued the license grants similar reciprocity to citizens of this State.

The standards of qualifications and examinations may be determined by the Virginia Board by examining the law of the State and the rules and regulations adopted by a comparable Board of such State. As an example, if the State that issued the registration certificate requires the same minimum educational requirements as Virginia, then the holder of the certificate may not be required to produce other evidence of having met such educational requirements.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Professional Engineer—Registration—Applies where person holds himself out as practicing.

March 26, 1965

HONORABLE STIRLING M. HARRISON
Commonwealth’s Attorney for Loudoun County

This is in reply to your letter of March 25, 1965, to which you attached a letter dated March 8, 1965, from Mr. George B. Joy, in which he requests you to obtain a ruling from this office “regarding the International Association of Electrical Inspectors issuing ‘Electrical Safety Engineer’ certificates to electrical inspectors in the State of Virginia.”

Mr. Joy states that holders of these certificates will not practice engineering for the public. Chapter 3 of Title 54 of the Code relating to the issuance of certificates by the State Board for the examination and certification of architects, professional engineers and land surveyors prohibits any person from practicing or offering to practice the profession of engineering, as that term is defined in § 54-17 of the Code, without first obtaining a certificate from said Board. The State is not concerned with the type of certificate issued by a private organization such as the International Association of Electrical Inspectors. The State is only concerned with persons who hold themselves out to the public as practicing professional engineers. The certificate issued by the International Association of Electrical Inspectors has no bearing upon the holder’s right to engage in the general practice of such profession in this State.
PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate
Commission—Grounds for suspension or revocation of license of real estate
broker or salesman.

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

I am in receipt of your letter of April 20, 1965, in which you call my attention
to § 54-762(2) of the Virginia Code and Section II(7) of the rules and regula-
tions of the Virginia Real Estate Commission and inquire whether or not the
following conduct would constitute a violation of the above-mentioned statute or
regulation:

“A licensed real estate broker in negotiating the sale of real property
guarantees the prospective purchaser that, in the event he purchases the
property in question and is transferred from the area within a two year
period, the licensee will buy back the equity the purchaser has in the
property at the time he is transferred.”

You further state that the phrase “buy back the equity” of a purchaser means
that the broker will pay the purchaser the amount which the purchaser has paid
on the property at the time he is transferred.

Section 54-762(2) of the Virginia Code and Section II(7) of the rules and
regulations of the Virginia Real Estate Commission respectively prescribe:

“The Commission may upon its own motion and shall upon the veri-
fied complaint in writing of any person, provided such complaint, or
such complaint together with evidence, documentary or otherwise, pre-
vented in connection therewith, makes out a prima facie case, investigate
the actions of any real estate broker or real estate salesman, or any per-
son who assumes to act in either capacity within this State, and shall
have the power to suspend or to revoke any license issued under the
provisions of this chapter, at any time when the licensee has
by false
or fraudulent representation obtained a license, or when the licensee in
performing or attempting to perform any of the acts mentioned herein, is
deemed to be guilty of:

*(2)* Making any *false* promises of a character likely to influence,
persuade or induce: ....

“A licensee shall not pay, or offer to pay, any valuable consideration
or rebate to any prospective purchaser or seller of real property, prior
to obtaining an offer or listing, as an inducement to purchase or to ob-
tain a listing, contingent upon the purchase or sale of such property.”
(Italics supplied).

Initially, I am of the opinion that the situation you present would not con-
stitute a violation of § 54-762(2) of the Virginia Code, as there is no evidence or
indication that the guarantee of the broker in question is a *false* promise. How-
ever, I am constrained to believe that a promise by a broker to pay a prospective
purchaser whatever amount the purchaser has paid on the property at the time he is subsequently transferred, regardless of the market value of the property at
that time, would constitute a “valuable consideration” sufficient to bring the con-
duct concerning which you inquire within the scope of the quoted regulation.
While the situation under consideration would thus appear to be embraced within the language of the regulation italicized above, I question whether such conduct is of the character intended to fall under the ban of the regulation. In light of our discussions following receipt of your communication, it is clear that the matter is not entirely free from doubt, and it would thus appear advisable for the Commission—if of the opinion that such activity should be forbidden—to clarify the regulation by amendment which would specifically proscribe the conduct in question.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Real estate broker's license—Requirements for members of corporations.

May 21, 1965

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in reply to your letter of May 20, 1965, which reads as follows:

“Section 54-749 of the Code provides that a corporation may act as a real estate broker provided that each officer of that corporation who actively participates in the brokerage business of such corporation is a holder of a real estate broker's license and each employee who actively participates in the brokerage business of such corporation is a holder of a salesman's license.

“In accordance with the above, can a member of the Board of Directors of a corporation, which corporation acts as a real estate broker, be a holder of a real estate salesman's license, or is this Board member required to be a holder of a real estate broker's license?”

Section 54-749 of the Code, to which you refer, is, in part, as follows:

“... Any partnership, association or corporation may act as a real estate broker, and no separate license for such partnership, association or corporation shall be required; provided, however, that no partnership, association or corporation may act as a real estate broker unless every member or officer of such partnership, association or corporation, who actively participates in its brokerage business, shall hold a license as a real estate broker, and every employee who acts as a salesman for such partnership, association or corporation shall hold a license as a real estate salesman.” (Italics supplied)

In my opinion, the term “every member” relates to partnerships, associations and corporations. I see no escape from the conclusion that a member of the Board of Directors of a corporation is a “member of the corporation” as that term is used in this Code section. If a member of the Board of Directors actively participates in the brokerage business in my opinion it is necessary that he hold a license as a real estate broker. The statute does not purport to define what constitutes active participation. However, engaging in any of the activities mentioned in § 54-732 would seem to be sufficient to bring a member or officer within the scope of § 54-749.
PROFESSIONAL AND OCCUPATIONAL REGISTRATION — Real Estate Salesman—What constitutes.

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This will acknowledge receipt of your letter of May 28, 1965, which reads, in part, as follows:

"John Smith, who is a duly licensed real estate broker, trading as Apex Realty Company, enters into an agreement with the A & B Corporation, which owns a large apartment house consisting of thirty-five rental units. Mr. John Smith is to receive 7 per cent of all rents collected on the behalf of A & B Corporation, owners, for services performed in negotiating leases for the rental of the property in question. Mr. Smith is also agent for numerous owners of real property and it is physically impossible for him to negotiate individual leases on all property wherein he acts as agent for owners.

"In order to render the proper services to his principals he employs Mr. Joe Doe at a salary of $600 per month. Mr. Joe Doe's duties are to negotiate leases for these rental units and to perform all of the administrative duties in connection with the management of these properties. He is authorized to sign leases negotiated by him on the behalf of Apex Realty Company.

"Mr. Joe Doe, as stated above, is paid a fixed salary for services performed for the Apex Realty Company and receives no other compensation, commissions or remuneration, or anything else of value for his services. The Apex Realty Company withholds from Mr. Joe Doe's salary, at the end of each pay period, Social Security, federal and state withholding taxes, and any other deductions authorized by Mr. Doe to be withheld.

"In your opinion, is Mr. Joe Doe, as an employee of Apex Realty Company, required to be a holder of a real estate salesman's license, or is Mr. Joe Doe exempt from the provisions as provided for in § 54-734 of Chapter 18 of Title 54 of the Code."

A real estate salesman is defined in § 54-731 of the Code as follows:

"A real estate salesman within the meaning of this chapter is any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to lease, to rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation."

It is clear from the statement of facts made by you that Joe Doe is a real estate salesman within the scope of the foregoing definition. He is employed by a real estate broker and he is authorized to negotiate leases for rental properties for which the broker is the rental agent. The services rendered by Joe Doe, in my opinion, do not come within any of the exceptions contained in § 54-734 of the Code, which provides as follows:

"The provisions of this chapter shall not apply to any person, partnership, association or corporation, who as owner or lessor shall per-
form any of the acts aforesaid with reference to property owned or
leased by them, or to the regular employees thereof, with respect to
the property so owned or leased, where such acts are performed in the
regular course of, or as and incident to, the management of such prop-
erty and the investment therein; nor shall the provisions of this chapter
apply to persons acting as attorney-in-fact under a duly executed power
of attorney from the owner authorizing the final consummation by per-
formance of any contract for the sale, leasing, or exchange of real es-
tate, nor shall this chapter be construed to include in any way the service
rendered by an attorney at law in the performance of his duties as such
attorney at law; nor shall this chapter be held to include, while acting
as such, a receiver, trustee in bankruptcy, administrator or executor,
or any person selling real estate under order of any court, nor to include
a trustee acting under a trust agreement, deed of trust, or will, or the
regular salaried employees thereof.”

It is my opinion, therefore, that the first part of the question presented
by you in the terminal paragraph of the above quoted portion of your letter must be
answered in the affirmative, and, due to the fact that Joe Doe does not qualify
for any of the exemptions set forth in § 54-734, the second part of the question
is answered in the negative.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Veterinary Med-
icine or Surgery—Persons permitted to practice.

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

June 22, 1965

This will acknowledge receipt of your letter of June 10, 1965, which reads as
follows:

“Section 54-787 of the Code of Virginia sets forth the persons who
shall be permitted to practice veterinary medicine and surgery in this
State.

“The Virginia State Board of Veterinary Examiners requests your in-
terpretation of the following sentence contained in the above-mentioned
section: ‘All persons, who, on the day before this Code takes effect, are
lawfully practicing veterinary medicine or surgery in this State.’ Does
this sentence refer to the Code of Virginia, 1950, or does this sentence
refer to the Code of Virginia, 1919, Section 1272.’”

The fourth paragraph of § 54-787 of the Code relates to the Code of 1950,
which became effective on the first day of February, 1950. This is provided for in
§§ 1-1 and 1-2 of the Code. The Code section involved here is not included in
the exceptions set forth in § 1-2.1 of the Code.

The effect of the above provision is that any person who was lawfully prac-
ticing veterinary medicine under the law prior to the enactment of Chapter 19 of
Title 54 of the Code of 1950 would not be required to take the examination re-
quired by that chapter.
PUBLIC FUNDS—City Treasurers—Authority to deposit public funds.

CITIES—Public Funds—Limitations on authority of treasurers in depositing public funds.

December 17, 1964

HONORABLE HARMON CRUMLEY
Treasurer of the City of Bristol

Your letter of December 9, 1964, to Honorable J. Gordon Bennett, Auditor of Public Accounts, has been referred to this office for reply. Your letter reads as follows:

"I have some city money, designated as 'Park Fund', invested at 4% interest with a local Federal Savings & Loan Company. The amount having passed the $10,000 insured limit, I will have to withdraw a portion of it at the end of the year to keep it within the insured limit.

"I would like to know if there is anything in the Tax Code or the Statutes that would prohibit me from depositing a part of this fund in another Savings & Loan Company that is located in the city but on the Tennessee side of the city."


I am unable to find any statutory provisions which would cause us to make any change in the opinion expressed by Mr. Staples. Certainly, no State funds should be deposited in a bank located outside of Virginia.

Although you did not make specific inquiry with respect to the matter, I am enclosing copies of several opinions relating to the depositing of county funds in Federal Savings and Loan Associations. These opinions are found in Reports of Attorney General (1939-40), at p. 187; (1956-57), at p. 91; (1961-62), at p. 84.

I suggest that you request the city attorney to examine the charter of the City of Bristol and advise you whether or not there are any provisions contained therein relating to the matter under discussion.

PUBLIC FUNDS—Time Deposits—No authority under § 58-943.2 for board of supervisors to require county treasurer to invest in time deposits.

BOARDS OF SUPERVISORS—Public Funds—No authority to require county treasurer to invest funds in time deposits.

December 15, 1964

HONORABLE PAUL BLANOCK
Commonwealth's Attorney for Mathews County

This is in reply to your letter of December 10, 1964, in which you state that the county finance board, established under § 58-940 of the Code, has been abolished in the manner provided in the terminal paragraph thereof, and that the
board of supervisors has authorized the county treasurer to place funds upon time deposit as allowed under § 58-943.2 of the Code.

You have requested my advice as to whether it is mandatory upon the county treasurer to place such funds on time deposit after such a resolution has been passed, or may the treasurer exercise his discretion in determining the amount of funds to place on time deposit.

Section 58-943.2 of the Code reads as follows:

"Notwithstanding other provisions of this article, whenever the county finance board shall determine that county or district funds in any given amount otherwise would lie idle and draw a lesser rate of interest for a period of time not less than sixty days, it may authorize the county treasurer to place such funds in such amount upon time deposit in such legal depository at such rate of interest and upon such conditions of withdrawal as the county finance board may determine."

The word "authorize" is defined in Webster's Dictionary to mean "to clothe with authority or to give legal authority; to give a right to act."

I am unable to find any case in which the word "authorize" has been construed to be a directive. Had the General Assembly intended to delegate the power to the finance board, or the board of supervisors when acting as a finance board, to require the treasurer to place funds in his custody on time deposit, it could have used appropriate language. In my opinion, the board of supervisors is not given the power under this section to require the treasurer of the county to invest funds in time deposits.

PUBLIC OFFICERS—Compatibility—Clerk of circuit court may not contract with board of supervisors.

CLERKS—Compatibility of Office—Clerk may not contract with board of supervisors.

Mr. J. N. Miller
Chairman, Rappahannock County Board of Supervisors

April 5, 1965

This will acknowledge receipt of your letter of April 2, 1965, in which you request my advice as to whether or not the board of supervisors may appoint Mr. E. M. Jones, who is clerk of the circuit court, as temporary administrator of the subdivision and building ordinances for which he would be paid a compensation.

In my opinion, this is prohibited under § 15.1-67 of the Code. Such an arrangement would be a contract between the clerk and the board of supervisors, which is expressly prohibited by this section.
PUBLIC OFFICERS—Compatibility—Deputy treasurer may not render service for compensation to school board.

PUBLIC OFFICERS—Employee of County Treasurer—Not a public officer.

HONORABLE EMMORY H. CROCKETT
Commonwealth's Attorney for Lee County

August 17, 1964

This is in reply to your letter of August 11, 1964, in which you state, in part, as follows:

"In a recent report on an audit of Lee County, Virginia, it was noted that a Deputy Treasurer of Lee County, Virginia, was employed by the School Board to maintain the school expenditure distribution ledger and to audit the activity funds of the various schools. The auditor indicated that the employment of the Deputy Treasurer for such activities was in conflict of the captioned section [§ 15.1-67] of the Code of Virginia.

* * * * * *

"A further question which arises out of the aforementioned matter is whether, if the said Deputy Treasurer is forbidden under the Provision 15.1-67 of the Code of Virginia to maintain such records, it would apply to a bookkeeper employed in the Office of the Treasurer of Lee County?"

A deputy treasurer is a paid officer of the county and, in my opinion, he is prevented under § 15.1-67 from rendering a service for compensation of the nature stated in your letter. I see no escape from this conclusion.

With respect to your second question, the answer is in the negative since a bookkeeper is not an officer of the county. Section 15.1-68, to which you refer in a portion of your letter which is not quoted herein, must be strictly construed. It does not, in my opinion, apply to services rendered for additional compensation by the county treasurer or the county clerk, or a deputy of either, for the school board. It applies only to services rendered for the board of supervisors in connection with the preparation of the county budget.

PUBLIC OFFICERS—Compatibility—Mayor of town limited in supplying services and materials to repair fire engine for town.

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

December 18, 1964

This is in reply to your letter of December 16, 1964, which, in part, reads as follows:

"The Mayor of the Town of Windsor, Virginia, is the sole owner and operator of a truck body building and repair business. The Civil Defense Organization of Isle of Wight County has made available for use by the Town, a surplus fire engine which is to be housed in and maintained by the Town and may be used by the Town Volunteer Fire Department for fire extinguishing purposes within, as well as without, the Town and is to be available for Civil Defense purposes. Certain changes
and additions must be made to this equipment to make it usable in the Town. It is proposed that this work be done under the following arrangement so that a considerable financial saving will accrue to the Town, to-wit:

"1. All materials are to be purchased directly by the Town through the Mayor and billed and shipped to and paid for by the Town.

"2. All workers are to be employed and paid directly by the Town. They are to be persons regularly employed by the Mayor in his body building business. They will do the work, from time to time, when they will not be working for or in the Mayor's business and all records therefor will be kept by the Town.

"3. The work is to be supervised by, done at the place of business and with the tools of the Mayor without any charge or cost to the Town for such supervision and for the use of such place of business and tools.

"4. The Mayor will receive no compensation or other consideration, directly or indirectly, for or from this work, the materials, labor and services used, furnished and performed therein, or for his supervision thereof or for the use of his place of business and tools therefor."

In my opinion, the arrangement outlined above will not be in violation of the provisions of § 15.1-73 of the Code of Virginia, since there is no contract between the town and the mayor for services or material.

PUBLIC OFFICERS—Compatibility—Member of board of supervisors may not serve as purchasing agent for county.

May 11, 1965

HONORABLE GEORGE C. RAWLINGS, JR.
Member, House of Delegates

This is in reply to your letter of May 7, 1965, which reads as follows:

"In your opinion, could a member of a County Board of Supervisors act as Central Purchasing Agent for the County while at the same time serving on the Board of Supervisors either with pay or without pay?"

In my opinion, a member of the board of supervisors may not hold the position of purchasing agent under the provisions of Article 7, Chapter 2, Title 15.1 of the Code. The purchasing agent of the county is under the direct supervision of the board of supervisors (§ 15.1-105) and, therefore, the two positions would be incompatible.
PUBLIC OFFICERS—Compatibility—Member of county board of supervisors may not serve as road viewer.

HIGHWAYS—Establishment or Alteration—Member of county board of supervisors may not serve as road viewer.

BOARDS OF SUPERVISORS—Members—May not serve as road viewers.

HONORABLE WILLIAM M. MCCLENNY
Commonwealth’s Attorney for Amherst County
July 16, 1964

This will acknowledge receipt of your letter of July 15, 1964, which reads as follows:

"Will you please advise me whether members of the Board of Supervisors of Amherst County can serve as road viewers under Article 2 of Chapter 2 specifically Virginia Code Section 33-142 through [Section] 33-149.

"My construction of these Sections is that the Supervisors sit somewhat in a judicial capacity and would be interested parties rather than disinterested freeholders as the Statute requires. Please advise me."

In my opinion, it would be improper for a member of the board of supervisors to accept an appointment and serve as a viewer under the provisions of Article 2, Chapter 2, Title 33 of the Code.

Upon examination of § 33-144, as amended by Chapter 565, Acts of Assembly (1964), relating to the duties of viewers, it will be noted that they are required to file a report of their findings with the board of supervisors in order to enable the board to determine the expediency of establishing or altering a road or bridge. These duties, therefore, would be incompatible with the duties incumbent upon the members of the board when considering and acting upon the report of the viewers.

Furthermore, such an arrangement, in my opinion, would be in violation of the provisions of § 15.1-67 of the Code.

PUBLIC OFFICERS—Compatibility—Member of school board prohibited from becoming interested in contracts with county or any of its departments.

HONORABLE ROBERT L. RHEA
Commonwealth’s Attorney for Augusta County
September 22, 1964

This is in reply to your letter of September 21, 1964, which reads as follows:

"I would appreciate your opinion as to whether or not a member of the County School Board is prohibited by § 15.1-67 of the Code, from contracting with the County in any capacity, or with any of the bureaus or departments of the County."

Subject to the exceptions set forth therein, a member of the school board of a county is prohibited by § 15.1-67 of the Code from becoming interested, directly or indirectly, in any contract or in the profits of any contract made with the county or any of its departments. This section, of course, must be read in connec-
tion with § 22-213 of the Code, in which the school officials may enter into certain contracts, provided permission of the State Board of Education is first obtained.

PUBLIC OFFICERS—Contracts—Mayor of city may not be interested in sale of insurance to city.

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for the City of Norton

This is in reply to your letter of December 9, 1964, in which you state that the mayor of the city of Norton is an employee of an insurance agency which provides, through the insurance companies it represents, the insurance carried by the city on its various properties. It is stated that the mayor does not receive any part of the commissions in connection with the sale of such insurance—that he is on a salary that is not affected by such sales. The mayor is neither an officer nor a stockholder in the agency, which is incorporated. There is a written contract, however, giving the mayor the right to purchase stock after a two-year period, the price of the stock to be determined at the time of the purchase. The contract does not limit the number of shares which the mayor may purchase.

Section 15.1-73 of the Code applies. Under this section, as well as Section 2-2 of the City Charter, which you cited in your letter, the mayor may not be interested directly or indirectly in the sale of such insurance to the city. On account of the option giving the mayor the right to purchase stock after a two-year period, he, in my judgment, has an interest in the matter.

The Charter provision which you cited, reads as follows:

"No member of the Council or other officer shall be interested directly or indirectly in the profits of any contract or work, or to be financially interested directly or indirectly in the sale to the City of any land, materials supplies or services (other than official services). The prohibitions of the paragraph shall not apply if the Council shall declare by unanimous vote of the members thereof that the best interest of the City is to be served despite a personal interest direct or indirect."

In order to remove all doubt that may exist, if any, I believe it would be advisable for the City Council to adopt the resolution that is permitted under the terms of the Charter.

PUBLIC OFFICERS—Contracts—Member of board of supervisors cannot share in proceeds for furnishing buses or parts for school board.

PUBLIC OFFICERS—Boards of Supervisors—Member may loan driver training vehicle to school without compensation.

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

You have submitted to this office a letter to you from M. E. Haynes, your Field Auditor, relating to a company engaged in the sale of motor vehicles and auto-
mobile supplies, and have requested my opinion. I quote from Mr. Haynes' letter as follows:

"While auditing the accounts of the Pulaski County School Board, I found that a bid for three school buses was submitted by the Pulaski Motor Company, of which Mr. Fred N. Cole, Chairman of the Board of Supervisors, is president. Two other bids were submitted by Luttrell Chevrolet Company and Jackson & Preston Equipment Company. However, since Pulaski Motor Company was the lowest bidder, their price was accepted by the school board. It was further noted in the minutes of the school board that the notation was made stating that this bid was being submitted for the Ford Motor Company but it was submitted on Pulaski Motor Company stationery. In a check of the school board bills I found the invoice for these buses was from Richmond Motor Company, Richmond, Virginia.

"It was noted that the school board is also buying parts from the Pulaski Motor Company for buses but the company is giving the school board large discounts on these purchases.

"I have discussed these matters with Mr. Cole and he has given me a letter of explanation. I called his attention to Section 15.1-67 of the Code of Virginia concerning county officials doing business with the county.

"Today, Mr. Cole asked me if I would write you and see if there was any violation in his company furnishing the school board with an automobile for the driver's training program in the schools of the county, and if so, they wanted to discontinue the practice. This car is furnished at no cost to the county and after it becomes a certain age or has so many miles on it, it will go back to the motor company. . . ."

With respect to the transaction involving the sale of three school buses to the school board, this, in my judgment, is clearly prohibited by § 15.1-67 of the Code—even though the sale was made as a result of the motor company being the lowest bidder. While it is stated that the invoices were made by Richmond Motor Company and payment was made to that company, yet, if Pulaski Motor Company shared in any way in the profit from such sale, the transaction was prohibited by the Code section under consideration.

The sale of parts—even at a discount—as set out in paragraph two of Mr. Haynes' letter, in my opinion, is in violation of § 15.1-67.

The transaction set out in the fourth paragraph of the letter, in my judgment, is not in violation of § 15.1-67 of the Code. As I understand the situation, no consideration passes from the school board to the Pulaski Motor Company for the use of the automobile. This section must be strictly construed in favor of the member of the board of supervisors who happens to be president of the Motor Sales Company. I do not feel that an understanding between the motor company and the school board of this nature is covered by the terms of the Code section in question, and in no sense by the spirit thereof. This conclusion is based upon the assumption that the motor company of which the board member is president receives no pay, directly or indirectly, out of the transaction—the loan of the car being solely a gesture of good will and public interest in the trainer-driving program of the school.
PUBLIC OFFICERS—Contracts—Member of board of supervisors furnishing printing services for board.

HONORABLE WM. M. McCLENNY
Commonwealth's Attorney for Amherst County

This is in reply to your letter of September 14, 1964, which reads as follows:

"A member of the Board of Supervisors of Amherst County, Virginia, is an official and part owner of the local newspaper. It has been customary heretofore that all ordinances, delinquent tax lists, legal notices from the Board of Supervisors as well as some printing and other services for county departments have been using the services of this newspaper.

"In my opinion this violates § 15.1-67 of the Code of Virginia, however by reason of close association with the Board, I feel that your opinion would be most beneficial on this question."

Whether or not this would be a violation of the provision of § 15.1-67 of the Code depends upon whether the newspaper in question is the only newspaper of general circulation published in Amherst County. You will note that the seventh paragraph of § 15.1-67 reads as follows:

"Nor shall this section apply to the publication of notices, lists, or other information, which the county is required or permitted by law to publish, in a newspaper owned directly or indirectly by a county officer or operated by such officer, provided such newspaper is the only newspaper of general circulation published in such county."

PUBLIC OFFICERS—Contracts—Member of board of welfare not to sell oil to county board of supervisors or to school board.

HONORABLE S. GARNETT MERCER, JR.
Commonwealth's Attorney for Lancaster County

This will acknowledge receipt of your letter of August 7, 1964, in which you state that consideration is being given to the appointment of a man to fill a vacancy on the County Board of Public Welfare and that the question has arisen as to whether or not the proposed appointee upon qualifying as a member of such Board could continue to enter into contracts with the county. You state that the proposed appointee is an oil distributor who regularly sells fuel oils to the county and to the public schools of the county. You have asked my advice as to whether or not this person, if appointed, while serving as a member of the Board of Public Welfare, would be precluded from entering into contracts for the sale of oil to the County Board of Supervisors and to the school board.

A member of the local Board of Welfare is deemed to be an officer of the county, and this office has so stated in previous opinions. It will be noted that under § 63-65 of the Code, it is provided:

"No member shall enter upon the discharge of his duties unless and until he shall have taken the usual oaths of office before the court or judge which appointed him, or the clerk thereof in vacation."
If a member of the Board of Public Welfare were not an officer of the county he would not be required to take the oath of office as provided in the foregoing section.

It is my opinion, therefore, that the person in question, if he qualifies as a member of the Board of Public Welfare, would be prohibited under § 15.1-67 from making further sales to the county or to the county school board.

PUBLIC OFFICERS—Contracts—Member of town council may not enter into contract for insurance with airport commission of which he is member.

TOWNS—Town Council—Member may not enter into contract to provide insurance to airport commission of which he is member.

February 10, 1965

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

This will acknowledge receipt of your letter of February 9, 1965, which reads as follows:

"The Town of Leesburg has created an Airport Commission for the establishment and maintenance of an airport and the Chairman of this Commission is an insurance broker who is providing insurance coverage on the buildings at said airport.

"I have been requested by a member of the Council of the Town of Leesburg to seek your opinion on the legality of the Chairman of said Commission in furnishing insurance coverage on the airport buildings as aforesaid. In doing so, is the Chairman violating the provisions of § 15.1-73 of the Code of Virginia, and are the insurance contracts valid and enforceable in the event of a loss?"

After receiving your letter, we conferred with you by telephone and find that the airport in question is owned by the town. Under § 15.1-73, no member of the town council or any agent of the town or any member of a committee constituted or appointed for the management, regulation or control of the corporate property of any town may, during the term for which he was appointed, be a contractor or subcontractor with the town or with its agents or with such committee.

In my opinion, under this provision, no member of the Airport Commission appointed by the town to operate the airport in question may sell insurance policies to the Commission during the term for which he was appointed on the Commission. In my opinion, any such contract would be void under this section.

With respect to your question as to whether or not the insurance contracts are valid and enforceable, in my opinion, if the contracts are otherwise valid, the underwriter could not escape his responsibility upon such contracts solely on the ground that his agent had violated § 15.1-73 of the Code.

__________________________________________
PUBLIC OFFICERS—Contracts—Physician member of town council may administer to employees of town.

PHYSICIANS AND SURGEONS—Public Officers—Physician member of town council may administer to employees of town.

September 9, 1964

HONORABLE DUNCAN C. GIBB
Town Attorney for Town of Front Royal

This will acknowledge receipt of your letter of September 4, 1964, in which you state as follows:

"One of the two resident surgeons of our community hospital has recently been elected as a member of our Town Council and he questions whether or not he would be precluded by Section 15.1-73 from administering to an employee of the Town.

"The employees of the Town are covered by Workmen's Compensation and the Town pays a portion of the Blue Cross coverage for them. It has been the policy of the Town when an employee is injured during the course of his employment to send the employee to the hospital for treatment and the employee selects his own physician. Of course, if the employee is unable to make this selection it is made at the hospital, and if our Town Councilman is the only surgeon on duty he would treat the patient.

"It would seem to me that the above Code section was not intended to cover cases such as this but it is so broad in its wording that I would appreciate your opinion as to the propriety of our physician Councilman administering to employees of the Town."

I agree with you that the service of the surgeon in this instance is not a contract prohibited by § 15.1-73 of the Code. The contractual relation, if any, of the surgeon in this case is with the hospital—not with the town.

PUBLIC OFFICIALS—Liability—Civil—When liability for damages may arise from performance of official duties.

July 7, 1964

HONORABLE CHESTER H. LAMB
Commissioner, Division of Motor Vehicles

This is in reply to your letter of June 24, 1964, in which you make reference to § 46.1-383.2 of the Code and request my opinion regarding the civil liability which may conceivably arise in the event you or your employees should release the information concerning revocations and suspension of operators' licenses as contemplated in that section.

You are aware that the General Assembly has undertaken to absolve you and your agents from legal liability which may arise out of any erroneous release of information so long as you reasonably believe it to be correct. While true that reasonable minds may differ as to whether or not you reasonably believe the information was correct, I am of the opinion that so long as you confine the release of information to that coming into your hands through the regular channels, you would be absolved from liability if the information should in fact be false or incorrect.
The Supreme Court of Appeals of Virginia has taken the position that an officer or employee of the Commonwealth of Virginia is immune from liability for damages which may arise from the performance of his official duties, even though such performance may have been negligent. It is only when such officer or employee departs from his official duties or performs such duty so negligently as to take him outside the scope of employment that personal liability affixes to such officer or employee.

I am not in the position to state categorically the results of a suit which may be instituted in a Federal Court against you or your agents in such cases, although it has been the practice in the past for the Federal judiciary to follow the same trend as taken by the Virginia Supreme Court of Appeals when civil suits are brought against the agents and officers of the State.

In reply to your question regarding legal representation, you are advised that this office will undertake the legal defense of the Commissioner or the employees of the Commissioner in the event a civil suit should be instituted arising from the performance of the duties imposed by § 46.1-383.2 of the Code.

PUBLIC RECORDS—Personal Property Assessment Books Open to Public Inspection.

HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for the City of Harrisonburg

November 13, 1964

This will acknowledge receipt of your letter of November 12, 1964, which reads as follows:

"A question has arisen locally as to whether the 'Personal Property Book' of a city is a public record in that taxpayers may have access to information contained therein. It has always been my interpretation that only records filed with a clerk of court are available to the public. Section 58-884 of the Code of Virginia specifies that a Commissioner of Revenue of a county is required to file a copy of his 'Personal Property Book' with the clerk of the circuit court of his county. No mention is made of a city commissioner of revenue providing same to the clerk.

"Therefore, Sir, can you clarify the question as to whether or not the 'Personal Property Book' of a city commissioner of revenue is a public record that should be available for inspection by anyone.

"Also, Sir, in the light of recent opinions by the U. S. Supreme Court is it now still mandatory for commissioners of the revenue to segregate 'white' and 'colored' taxpayers in our Real Estate and Personal Property Books for the year 1965 and subsequent years as set out in the appropriate sections of the State Code."

There is no requirement that a copy of the personal property book shall be filed by the commissioner of the revenue of a city with the clerk of a court. This requirement applies only to counties.

The information contained in the personal property book is not confidential. In this connection you are referred to § 58-46 of the Code, which makes it unlawful for the commissioner of the revenue to divulge certain information required by him with respect to transactions, property, income or business while in the performance of his public duties. This section expressly provides, however, that
this does not apply to any matters required by law to be entered on any public assessment roll or book. Therefore, I am of the opinion that the personal property assessment books are open to public inspection. This would include the book retained in the office of the commissioner of the revenue, as well as copies of the book filed with the treasurer and with the State Department of Taxation.

With respect to the third paragraph of your letter, the provisions of § 58-880 of the Code have been held by a federal court to be unconstitutional. This decision applies for the assessments made for the year 1965 and subsequent years.

I understand that Honorable C. H. Morrissett, State Tax Commissioner, will probably advise the commissioners of the revenue with respect to this matter. Section 58-857 of the Code requires the State Tax Commissioner to give instructions to the commissioners of the revenue with respect to their duties.

RECORDATION—Lease of Corporation—Clerk to record after acknowledgment.

TAXATION—Recordation—Applies to facilities operated as home for older retired persons.

HONORABLE J. FULTON AYRES
Clerk of Circuit Court of Accomack County

This is in reply to your letter of June 29, 1964, in which you state that you have for recordation a lease executed by two corporations; that the officer signing the lease has acknowledged the same in accordance with § 55-120 of the Code; that the respective seals of the corporation have been affixed but that the same have not been attested by the secretary or other appropriate official. You raise the question as to whether or not you should record these instruments because of the failure of the proper officer to attest the seal.

In my opinion, you should record these instruments. Under § 55-106, the clerk of the court is required to record any writing when it shall have been acknowledged by the person whose name is signed thereto. Inasmuch as this is acknowledged, it is a recordable instrument.

You also request my opinion as to whether or not a deed conveying property to Hermitage Methodist Home, Incorporated, is exempt from the recordation tax. You state that the attorney who presented several of these deeds for recordation is of the opinion that under § 58-64 such a deed would be exempt as being classified as a hospital and a nonprofit corporation.

Exemptions from the recordation tax provisions of Title 58 must be strictly construed and the burden is upon the person claiming the exemption to show clearly that the instrument proposed to be recorded comes within the statute. You do not state the purpose for which the Hermitage Methodist Home, Incorporated is organized, but in order for the deed to be exempt as a hospital it will be necessary for this organization to conclusively show that it is organized exclusively for the purpose of operating a hospital not for pecuniary profit. Facilities operated as a home for older retired persons would not qualify for relief from the recordation tax.

July 1, 1964
REPORT OF THE ATTORNEY GENERAL

RECORDATION—Plats—How recorded.  

HONORABLE H. P. SCOTT  
Clerk of Circuit Court of Bedford County  

September 28, 1964

This will acknowledge receipt of your letter of September 18, 1964, which reads as follows:

"I am enclosing herewith copies of two plats that have been presented to me for recording. The Attorney has cited Section 17-68 as my authority to record these plats. It is my contention that this section does not authorize me to record a plat such as these but only authorizes the clerk to keep a separate book to be known as the Plat Book.

"I would like to be advised if there is any provision for the recording of a plat such as this one in the Code of Virginia or would the recording of a plat such as this one come under the general section of the code providing for the recording of instruments, Section 55-106. If they should be recorded under Section 55-106 what type of acknowledgment should be on the plats?"

The plats which you enclosed are not signed by any surveyor or civil engineer and, of course, are not acknowledged. Each of these plats shows the metes and bounds of a parcel of real estate together with a notation as to the apparent owner of the property. The plats also show the county and the magisterial district in which the real estate is located. Section 17-68 of the Code, to which you refer, authorizes the recording of maps and plats in a book to be known as a "plat book." Section 55-106 of the Code provides that the clerk shall admit to record any writing as to any person whose name is signed thereto when it shall have been acknowledged by him or approved by two witnesses. The plats, in my judgment, are written instruments within the meaning of the above Code section. In connection with a plat of this nature, as distinguished from subdivision plats governed by Article 7 of Chapter 11 of Title 15.1 of the Code, the certificate of the surveyor or civil engineer would not be required to be in the form prescribed by that article.

In our study of this matter, we conferred with the Honorable Charles R. Purdy, Clerk of Hustings Court of the City of Richmond, Part II, and he is in accord with the view herein expressed.

RECORDATION—Tax—Correction of deed of trust—When additional tax required.

TAXATION—Recordation—Correction of deed of trust—When additional tax required.

DEEDS OF TRUST—Correction—Recordation tax required.  

HONORABLE RUSSELL M. CARNEAL  
Member, House of Delegates  

December 17, 1964

This is in reply to your letter of December 15, 1964, which reads as follows:
“The opinion of the Attorney General is respectfully requested on the following issue:

"Is the recordation tax on deeds of trust as provided by § 58-55 of the 1950 Code of Virginia applicable to a corrected Deed of Trust where the purpose of the correction instrument is to correct the amount of the monthly payments which by mistake were erroneous in the original deed of trust and where the recordation tax was paid on the original deed of trust which secured the same debt?"

Section 58-61 of the Code provides that no additional recordation tax shall be required for admitting to record any deed of correction. While this section does not specifically mention a deed of trust, in my opinion, it should be construed to apply to such instrument. Of course, if by correction of the monthly payments the amount secured by the deed of trust is increased, then the difference in the recordation tax would have to be paid.

RECORDATION—Tax—Involving change in tenancy only—How computed.

January 25, 1965

HONORABLE S. L. FARRAR, JR.
Clerk of Circuit Court of Amelia County

This is in reply to your letter of January 22, 1965, which reads as follows:

"There is a possibility I may have to record a deed under the following circumstances, and as it involves a considerable amount of valuable real estate the recordation tax would be quite a bit. Therefore, I would like your opinion as to how this tax should be based.

"A husband and wife now hold this property as joint tenants with right of survivorship and the same husband and wife may execute a deed between and among themselves to change the holdings from joint tenants with right of survivorship to tenants by the entirety with right of survivorship."

Under § 58-61 of the Code, it is provided that no additional recordation tax shall be required for admitting to record any deed of this nature, the only change being one of tenancy, when the tax has been paid at the time of the recordation of the original deed. This is subject to the proviso that if the tax paid on the original deed is less than a proper tax based upon the consideration or actual value of the property involved in the transaction, then an additional tax shall be paid based on the difference between the full amount of such consideration or actual value of the property and the amount of tax that was paid on the original deed.

RECORDATION—Tax—Not imposed on deed of trust executed by Ferrum Junior College.

February 24, 1965

HONORABLE W. A. ALEXANDER
Judge, Franklin County Court

This is in reply to your letter of February 22, 1965, requesting my advice as to
whether or not a deed of trust executed by Ferrum Junior College is subject to the recordation tax imposed under Title 58 of the Code.

Section 58-64 of the Code provides that the recordation taxes imposed by §§ 58-54 and 58-55 shall not apply to "any deed of trust or mortgage given by an incorporated college or other incorporated institute of learning, not conducted for profit." Since you state that Ferrum Junior College is an incorporated school or institute of learning, assuming it is not operated for profit, it would seem that it would not be subject to the recordation tax upon any deed of trust given by it.

I enclose an extra copy of this opinion which you may wish to give to the clerk.

REDISTRICTING—Changes in Magisterial Districts—Effects upon election districts.

BOARDS OF SUPERVISORS—Redistricting of County—Effect on representation of board members.

April 21, 1965

HONORABLE ANDREW J. ELLIS, JR.
Commonwealth's Attorney for Hanover County

This is in reply to your letter of April 20, 1965, in which you state that pursuant to the provisions of § 15.1-577 of the Code of Virginia, the Circuit Court of Hanover County has appointed commissioners to make a study of the magisterial districts in that county and if a rearrangement of the districts is made the number will probably be increased. You present the following questions which I shall answer in the order stated:

"(1) Would the incumbent supervisor continue to represent the district in which he resides, even though the boundaries thereof are changed?

"(2) If the answer to question #1 is in the negative, would the Circuit Court have the authority to fill the office by appointment or would a special election have to be called to fill the unexpired term, or would the Circuit Court have the option of making an appointment or calling a special election?

"(3) Would the Circuit Court have the authority to appoint a new supervisor for a new district or would a special election have to be called to fill the office, or would the Circuit Court have the option to make the appointment or call a special election?"

Under the provisions of §§ 15.1-51 and 15.1-52 of the Code it is necessary that a member of the board of supervisors shall be a resident of the district in which he holds office. In my opinion those members of the board of supervisors now in office will continue to represent the new district in which he resides even though the area of that district may be changed. This answers your question (1) and in view of this answer, it is not necessary to reply to question (2).

With respect to question (3), in my opinion it would be incumbent upon the circuit court to appoint a supervisor for each of the new districts. There is no provision in the statutes for holding a special election for the purpose of selecting a member of a board of supervisors. Section 24-145 of the Code would apply since this is a vacancy in the office of supervisor for which no other provision is made for filling the same.
In addition to the three questions which you presented and which I have answered you also presented the following question which was not numbered and which is the second paragraph of your letter and reads as follows:

"Section 24-44 of the Code provides that the district lines of a county shall constitute an election district, and § 24-46 of the Code gives the Circuit Court authority to change election districts upon certain conditions. If there is an increase in magisterial districts, would the new magisterial district lines automatically become the new election district lines, or would it be necessary to have the Circuit Court change the election district lines pursuant to the provision of § 24-46 of the Code?"

As you have stated, § 24-44 provides that the district lines of a county shall constitute an election district. This, of course, is necessary because the precincts in a county must be established so that all the voters therein will reside in the same magisterial district so that in case of elections for supervisor or any magisterial district question the voters in that magisterial district will be limited to the residents thereof. This section provides, however, that the magisterial election district may be broken down into precincts. In my opinion, the new magisterial district lines would automatically become the new election district lines for the magisterial districts.

If it is deemed desirable to change the lines of the precincts located within the magisterial districts, this can be done by the court upon the petition of the board of supervisors under §§ 24-46, 24-49 and 24-50 of the Code.

The procedure for adjusting the registration books so as to include only the names of those voters living in a particular district or in a precinct is set forth in § 24-90 of the Code.

The terms for which the new members of the board of supervisors will be appointed shall be determined by § 24-157 of the Code. In other words, the expiration date of the terms of the new supervisors will coincide with the expiration date of the supervisors who were last elected.

RESIDENCE—How Established.

November 17, 1964

HONORABLE VIRGIL H. GOODE
Commonwealth’s Attorney for Franklin County

This will acknowledge receipt of your letter of November 13, 1964, which reads as follows:

"A man came to America from a foreign country a number of years ago and is now a naturalized citizen of this country. He had a brother living in Rocky Mount, Virginia, so he established his residence here. He attended college and graduated from medical school and Rocky Mount, Virginia, was his residence at that time.

"He later married and moved to the District of Columbia where he is now practicing his profession and has been for the past ten or fifteen years. He has a wife and two children, all of whom live in the District of Columbia.

"He now wants to re-establish Rocky Mount, Virginia, as his legal
residence. Would you please advise me what would be the requirements for him to establish Rocky Mount, Virginia, as the legal residence for himself and his family?"

I assume this person moved from Franklin County to the District of Columbia with the intention of establishing his residence there. If that is true, it will be necessary for him to move back to Franklin County and establish his residence there again. This cannot be accomplished by intent alone.

After he has reestablished his residence in this State he can move out of the State without the intention of establishing a permanent residence elsewhere and with the intention of maintaining his permanent residence in Franklin County.

I enclose the following opinions which relate to this subject:

Opinion dated October 22, 1943 to J. L. Dillow (Report of Attorney General, 1943-44, at p. 63)

SCHOOLS—Funds—How local and state funds may be expended for school purposes.

February 8, 1965

HONORABLE OMER L. HIRST
Member, Virginia State Senate

This is in reply to your letter of February 4, 1965, in which you present the following questions:

"1. Could the General Assembly constitutionally by statute require cities and counties to actually spend from local revenues an amount equal to a sixty-cent (60¢) tax rate on the true value of real estate and public service corporation property as determined by the State Department of Taxation?

"2. Could the General Assembly constitutionally by statute require cities and counties to spend a fixed dollar amount per pupil in average daily attendance from all sources—state, federal and local?

"3. Could the General Assembly constitutionally by statute require cities and counties to spend for the public schools no less per pupil than they had spent the previous year?

"4. Could the General Assembly make the receipt of state school aid conditional upon any of these things—that is, a sixty-cent (60¢) true tax rate or a specified total per pupil expenditure or spending as much as in the previous year?"

The answer to the first three questions is in the negative. The localities are authorized under Section 136 of the Constitution to determine the amount of local funds that shall be expended for public school purposes and the General Assembly is prohibited by the Constitution from exercising that power. See, Griffin v. School Board, 203 Va. at p. 326. Also, see School Board v. Griffin, 204 Va. at p. 650.
With respect to your question 4, it is provided in Section 135 of the Constitution that the minimum funds provided for therein shall be appropriated to the several localities and allocated to the schools of the primary and grammar grades of such localities. The allocation of this minimum fund shall be based on school population of children between the ages of seven and twenty years in each school district. This section further provides "And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law." (Italics supplied)

Under this provision of the Constitution, in my opinion, the General Assembly may make its appropriations to the several localities upon a conditional basis. In fact, the General Assembly has in the Appropriation Act laid down certain conditions for the receipt of State funds by the localities. It is my opinion, therefore, that your question 4 must be answered in the affirmative.

SCHOOLS—Member of School Board—Basis upon which compensation paid.

January 18, 1965

HONORABLE H. S. ABERNATHY
Division Superintendent of Nansemond County Schools

This is in reply to your letter of January 14, 1965, which reads as follows:

"I respectfully request an opinion on two points related to the salary of School Board members.

"The first relates to the manner in which Board members may be paid. Should the salary authorized in Section 22-67, Code of Virginia 1964, be paid on a monthly basis, or does the Board have authority to determine whether such payments should be paid on a semi-annual or annual basis?

"The second relates to the payment of salary to a Board member who is continuously absent over an extended period of time due to personal illness. Should the salary be pro-rated in terms of the number of meetings attended, and does a member disqualify for salary upon being absent from any given number of meetings."

With respect to the first paragraph of your letter, § 22-67.2 of the Code provides that "the county school board of the following counties may pay each of its members an annual salary not to exceed the limits hereinafter set forth." The limit for Nansemond County is $600.00 per annum.

The terminal sentence of this Code section provides that "such salary and mileage shall be paid as other school expenses are paid."

Section 22-67, to which you referred, provided that the salary should be paid in equal monthly installments. This section was repealed by Chapter 217, Acts of Assembly (1960), and § 22-67.2 was enacted, and the terminal sentence cited above was placed in the new statute. In my opinion, under this provision, if the other expenses of the school board are paid on a monthly basis, the salary and mileage of the members should be paid on that basis.

With respect to the second paragraph of your letter, the answer is in the negative. There is no provision under the statute which would authorize the school board to pay the annual salary of a member on the basis of the number of meetings...
attended by him. I enclose copy of an opinion dated April 5, 1946 to the treasurer of Buckingham County (Report of Attorney General, 1945-46, at p. 124), relating to this question.

SCHOOLS—School Board—Conveyance of real property to county.

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County
January 20, 1965

This is in reply to your letter of January 19, 1965, in which you state that the school board of your county contemplates conveying to the board of supervisors certain real estate owned by the school board which it will no longer use for public school purposes. You state that the school board has agreed to convey the property to the county without any cash consideration under condition that the school board reserves the right to use the gymnasium for storage and other such purposes during the period of ownership of the property by the county, together with the right to make such alterations and changes in the gymnasium as the school board deems necessary to make it suitable for its purposes, and further, that the school board shall reserve all necessary rights of ingress and egress to the property.

You ask the following questions:

"I will appreciate your opinion as to whether or not (1) the above mentioned conveyance may be made and the title to said property accepted by the County under the above mentioned conditions, and (2) the above mentioned conveyance must be made pursuant to §§ 22-161, 15.1-262, 15.1-285 and 15.1-286 of the Code."

In my opinion, the procedure outlined in the Code sections to which you refer will have to be followed in the event there is conveyance of the property to the county. In this connection, I enclose copy of an opinion from this office dated December 16, 1952, published in Report of Attorney General (1952-53), at p. 205, to the Commonwealth's Attorney of Hanover County, in which the Attorney General at that time was of the opinion that these statutes would have to be complied with to the same extent as if the property were being conveyed to someone else.

I believe that this could be avoided and probably the same result obtained if the county and the school board should enter into an agreement with respect to the use of the property, the title remaining in the school board.

SCHOOLS—School Board—May convey surplus school property to board of supervisors.

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County
May 21, 1965

This is in reply to your letter of May 19, 1965, in which you state the following:

"The Loudoun County School Board is seised and possessed of a lot
of land in Bluemont, Virginia, on which there is an old school building that has not been used for school purposes for a long time. It is the desire of the School Board to dispose of this property, and it has been tentatively understood that if the same could be done the Board would convey the property to the county who in turn would make the same available as a recreation area. No compensation is contemplated in this transaction. I cite you 46-47 page 131 and 63-64 page 268 of the Opinions of the Attorney General. I will appreciate it if you will give me the benefit of your opinion as to whether or not lawful authority exists permitting such a transaction as described above. . . . .”

The opinion published in the Report of Attorney General (1963-64), at p. 268, held that under the provisions of § 22-161 of the Code there was no authority in the school board to donate surplus school property to the State. The opinion of July 16, 1946 (Report of 1946-47, at p. 131), held that the school board of Pittsylvania County could not convey surplus property to the board of supervisors, either as a gift or for a nominal consideration. At the time of the opinion of July 16, 1946, the proceeds from the sale of school property went into the school fund.

In an opinion dated July 16, 1960, to the Treasurer of Campbell County, published in Report of Attorney General (1959-60), at p. 301, this office held that due to the amendments made to §§ 15-575 and 15-577 of the Code at the 1959 special session of the General Assembly, the proceeds from the sale of surplus school property would go into the general fund of the county. There has been no change in these sections (now §§ 15.1-160 and 15.1-162) since the date of that opinion. Inasmuch as any funds received from the sale of surplus public school property would go into the general fund of the county subject to the appropriation power of the board of supervisors, in my opinion, the school board, by following the procedure required by § 22-161, may convey surplus school property to the board of supervisors without receiving payment for such property. At the time of the opinion of 1946, inasmuch as the receipts from the sale of surplus school property went into the public school fund the Attorney General at that time was justified in holding that the school board could not donate surplus property to the board of supervisors. The opinion of October 29, 1963 (Report of 1963-64, at p. 268) is proper due to the fact that the conveyance there would have been to the State and not to the county.

In light of the foregoing, I deem it unnecessary to comment upon the questions raised in the letter of the superintendent of schools, which letter you enclosed.

SCHOOLS—School Boards—Authorized to determine whether or not to contract loan from Literary Fund.

BOARDS OF SUPERVISORS—Not Authorized to Hold Referendum on Question of School Board Contracting Loan from Literary Fund.

HONORABLE KERMIT L. RACEY
Commonwealth’s Attorney for Shenandoah County

July 2, 1964

This is in reply to your letter of July 1, 1964, in which you, at the request of the board of supervisors, present the following question:

“May a binding referendum be initiated by the Board of Supervisors of Shenandoah County to determine whether or not a loan should be
obtained by the School Board of Shenandoah County from the State Literary Fund pursuant to Title 22, Section 105, Code of Virginia, 1950, as amended, for the purpose of constructing music wings or additions to the three public high schools in the county. If so, whether said referendum could be submitted to the voters in the general election to be held in November, 1964."

The answer to your question is in the negative. There is no provision in the law providing for a referendum upon the question as to whether or not the school board shall contract a loan with the State Board of Education out of the Literary Fund. The question as to whether or not the loan shall be made is determined by the school board under the provisions of Chapter 7, Title 22 of the Code.


SCHOOLS—School Boards—Liabilities under contract for remodeling school building in absence of performance bond.

October 27, 1964

HONORABLE A. D. JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is to acknowledge receipt of your letter of October 14, 1964, in which you state that the local school board of your county entered into a contract in which the board agreed to pay the contractor $15,000.00 upon completion of the contract to remodel a school building and that there is now a balance of $3,500.00 due the general contractor on the contract. No bond was required of the contractor pursuant to § 11-23 of the Code. The school board has been informed that there are unpaid claims in favor of certain subcontractors and also claims for labor and material outstanding amounting to approximately $5,000.00. The board also has been informed that the general contractor is now insolvent. You request my opinion on the following questions:

"I will appreciate your opinion as to
(1) the effect of the failure of the School Board to require the afore-said bond on its liability to the subcontractors, known or unknown to it, who have not been paid by the general contractor and whether or not such liability, if any, is limited to the balance of $3,500.00 due the general contractor or extends to the full amounts due such subcontractors.
(2) whether or not there is any liability, and the extent thereof if you conclude there is, on the School Board to such subcontractors, known or unknown to the School Board, and
(3) whether or not the School Board may settle with and pay to the general contractor the balance due him under the contract without being liable to such subcontractors."

In my opinion, although the county school board failed to require a performance bond as required by § 11-23 of the Code, its liability is limited by the amount due on the contract price at the time the statutory notice was given under § 43-11. In my opinion, the school board should withhold such balance until it is assured that it can pay the same without incurring further liability. As you pointed out, and as our Supreme Court has held, no mechanics' lien may be enforced against
public buildings—Phillips v. University, 197 Va. 472, Somerville v. Broyhill, 200 Va. 358—but these cases do not precisely decide whether or not a lien against the balance of the funds owing to a contractor, perfected under §§ 43-11 and 43-12 of the Code, would be invalid on the ground that no lien may attach to public funds unless there is express statutory authority to that effect.

The prudent course to follow, it would seem, would be to notify the general contractor and the subcontractors who have given the statutory notice, that no further payments will be made by the board until (1) a release is obtained from all the parties involved, or (2) an order of distribution has been entered by a court in an appropriate proceeding.

I doubt that there would be any personal liability upon the members of the board on account of the failure to require the performance bond.

SCHOOLS—School Boards—Loans—For what purposes funds may be used.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Loans to School Boards—How funds may be used.

October 15, 1964

HONORABLE A. DUNSTON JOHNSON
Commonwealth’s Attorney for Isle of Wight County

This is in reply to your letter of October 14, 1964, which reads as follows:

"In 1962 the County School Board of Isle of Wight County, Virginia, obtained a loan of $450,000.00 from the Virginia Supplemental Retirement System. There is an unused balance or surplus of $7,715.48 remaining from this loan.

"I will appreciate your opinion as to what disposition should be made of the above balance or surplus and whether or not the School Board may use such balance or surplus, either with or without the approval of the Board of Supervisors of Isle of Wight County, for public school purposes, other than the purposes for which said loan was obtained, such as the purchase of land for school purposes and/or permanent improvements to existing school buildings and/or sites."

This office has consistently held that proceeds of bond issues may be used only for the purposes for which the bonds were issued. This same principle would apply to loans obtained through the facilities of the Virginia Supplemental Retirement System under the provisions of Chapter 6 of Title 15.1 of the Code.

Section 15.1-231 of the Code provides as follows:

"All proceeds received from the sale of the bonds issued under the provisions of this chapter shall be paid to the treasurer or chief financial officer of the county, who shall promptly deposit such funds in bank or banks as prescribed by general law. He shall account for such money through a fund, separate from all other funds, in the system of accounting."

This provision is similar to § 15.1-206 which applies to bonds issued under Chapter 5 of Title 15.1.
The balance of $7,715.48 may be used for the purpose of the payment of interest and principal upon the $450,000 issue of bonds held by the Virginia Supplemental Retirement System in my opinion, but may not be used for any of the purposes set forth in your letter.

SCHOOLS—School Boards—May charge fees to students for use of lockers.

HONORABLE JOSEPH M. WHITEHEAD
Commonwealth's Attorney for Pittsylvania County

This is in reply to your letter of September 17, 1964, which reads as follows:

"Title 22, Chapter 10, Section 199 of the Code of Virginia of 1950, as amended, pertains to permitted fees and charges as to high schools under the public school system of Virginia. Assuming a situation whereby lockers are placed in elementary and high schools by the local School Board with a charge of .50 per locker to each student assigned a locker, with combination locks supplied, would the payment of this fee be enforceable?"

"This would be a specific service which the School Board is not obligated to perform. However, the service does not seem to fit the language of the statute above referred to relating to high schools, i.e., 'books, supplies and materials.' Also, we would like to obtain an opinion as to the applicability as to elementary schools."

I can find no provision in the school statutes under which the school board is authorized to require students to use the lockers. If such lockers are installed, I see no reason why such fee may not be required of those students who elect to make use of them. It would seem appropriate in such cases for the school board to obtain a commitment from the students' parents or other person in loco parentis, agreeing to pay the fee.

SCHOOLS—School Boards—May employ relative of member as lunchroom worker where salary not paid out of public funds.

MR. R. P. REYNOLDS
Division Superintendent of Carroll County Schools

This is in reply to your letter of April 9, 1965, which reads as follows:

"In the public school lunch program in Carroll County each lunch room worker and manager is employed by the principal or committee at each school, and paid for services from funds collected at the school from the price charged pupils for lunch and from funds received from Federal reimbursement paid to each school through the county school board."

"In your opinion could a relative of a school board member be employed as a lunch room worker by the school principal or lunch program committee without this employment being in violation of § 22-206 of the law which relates to the employment of relatives of school board members?"
"Would an employee of this status, paid wages by the individual school and not directly from funds handled by the county school board, be considered an employee of the county school board?"

Whether or not an employee comes within the provisions of § 22-206 of the Code depends upon whether or not his compensation is paid out of the public funds. In my opinion, the term "public funds" as used in this section, relates to the funds appropriated to the school board by the board of supervisors as distinguished from funds collected from the pupils and grants made by the Federal government for cafeteria purposes.

Statutes of this nature are subject to strict interpretation and applying that rule, I am of the opinion such employment in the capacity stated in your letter would not be in violation of § 22-206 of the Code.

SCHOOLS—School Boards—Member may furnish automobile free for driver education classes.

HONORABLE LEONARD F. JONES
Commonwealth’s Attorney for Campbell County

This will acknowledge receipt of your letter of May 24, 1965, enclosing a letter to you from the superintendent of schools, which letter reads as follows:

“A member of the School Board for the County of Campbell has agreed to furnish an automobile to the School Board for use in Driver Education classes this summer. These vehicles ordinarily carry a sign stating that the vehicle is being used for driver training purposes and is supplied by a certain company.

“The member of the School Board has an interest in the automobile firm who is furnishing the vehicle without cost. Would this constitute any violation of Section 15.1-67 of the Code of Virginia? Would the advertising feature be interpreted as receiving compensation?”

You have requested my opinion with respect to the question raised in that letter. A transaction of this nature would not, in my opinion, be in violation of either §§ 15.1-67 or 22-213 of the Code. A similar question was presented to this office by the Hon. J. Gordon Bennett, State Auditor, on September 8, 1964, involving the furnishing of an automobile to the School Board of Pulaski County by a member of the board of supervisors of the county who had an interest in the automobile company involved. In that case the automobile company furnished an automobile to the school board without charge for use in the driver’s trainer program, with the understanding that when the car became a certain age or had been run a certain number of miles it would be returned to the motor company. In passing upon the question, we stated as follows:

“. . . The transaction set out in the fourth paragraph of the letter, in my judgment, is not in violation of § 15.1-67 of the Code. As I understand the situation, no consideration passes from the school board to the Pulaski Motor Company for the use of the automobile. This section must be strictly construed in favor of the member of the board of supervisors who happens to be president of the Motor Sales Company. I do not feel that an understanding between the motor company and the school board of this nature is covered by the terms of the Code section in question,
and in no sense by the spirit thereof. This conclusion is based upon the assumption that the motor company of which the board member is president receives no pay, directly or indirectly, out of the transaction—the loan of the car being solely a gesture of good will and public interest in the trainer-driving program of the school. . . ."

The statement quoted above, in my judgment, is applicable to the situation presented here, although it involved a member of the board of supervisors rather than a member of the school board. Section 22-213, which prohibits members of the school board from entering into certain types of contracts with the school board, does not relate to an arrangement of the nature under consideration.

With respect to the last question presented by the Division Superintendent, I do not feel that the advertising feature would bring this transaction within the scope of the prohibitions of § 15.1-67.

SCHOOLS—School Boards—Restrictions on employment of persons related to board member.

SCHOOLS—Teachers—Restrictions on employment.

HONORABLE PAUL X. BOLT Commonwealth's Attorney for Grayson County

This will reply to your letter of June 11, 1965, in which you inquire whether or not a sister of the wife of a school board member would be a "sister-in-law" within the purview of Section 22-206 of the Virginia Code which forbids the employment of persons within certain degrees of relationship to members of a school board.

I am of the opinion that your inquiry should be answered in the affirmative. In Webster's New International Dictionary, Second Edition, the term "sister-in-law" is defined to include the "sister of one's husband or wife"; while in Black's Law Dictionary, Fourth Edition, the term is defined as including the sister "of one's spouse; . . .".

It would thus appear that a sister of the wife of a member of a school board would be a sister-in-law within the scope of the prohibitory provisions of Section 22-206 of the Virginia Code.

SCHOOLS—Teachers—May be appointed as special policeman under § 15.1-144 of the Code.

SCHOOLS—Teachers—Not officers of county as used in § 15.1-67 of the Code.

HONORABLE C. PEMBROKE PETTIT Commonwealth's Attorney for Louisa County

This will acknowledge receipt of your letter of May 18, 1965, which reads as follows:
"We have a school teacher in the County who would like to be employed during his off work periods by a private corporation as a Special Policeman and to be appointed as a Special Policeman under the provisions of the Virginia Code Section 15.1-144.

"After considerable research by attorneys for the corporation and this office, we are unable to find any prohibition of such an appointment.

"However, under Section 15.1-146, the Board of Supervisors may under the circumstances there stated, allow compensation to the policeman appointed.

"Please advise whether or not in your opinion there is any prohibition against such appointment. I might add that the school teacher normally renews one contract with the School Board prior to the time that his existing contract expires but each contract runs for certain periods during the year. He is not actually on duty or paid by the School Board for certain summer months. In addition, he has certain days off even when school is in session."

In my opinion there are no statutes which would prevent a person employed as a school teacher by the county school board from being appointed as a special policeman under the provisions of § 15.1-144 of the Code. The provisions of § 22-213 of the Code do not apply to contracts of this nature. The provisions of § 15.1-67 would not apply because a school teacher is not an officer of the county as used in that section.

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SCHOOLS—Teachers—Marriage of teacher to another does not prohibit continued employment where parties regularly employed by school board prior to their marriage.

March 15, 1965

HONORABLE C. PEMBROKE PETTIT
Commonwealth’s Attorney for Louisa County

This is in reply to your letter of March 4, 1965, in which you present the following facts:

"The principal of one of our schools expects to marry a teacher in the same school system and in fact, in the same school. They are both now regularly employed. The County School Board is considering the appointment of the principal as School Superintendent. The teacher or bride-to-be was not employed prior to June 21, 1938."

You refer to § 22-206 of the Code of Virginia, and ask the following questions:

"1. If the appointment is made as Superintendent and then the couple marry, would they be within this Section.

"2. If the appointment is not made and the principal and teacher are retained in the same school, would they, in that event, be within this Section.

"3. Would the marriage of the couple prior to the possible appointment as Superintendent have any effect on their status."

Section 22-206 of the Code prohibits the employment of teachers and other employees who are related to the division superintendent or members of the school board in certain classifications. This section was amended by Chapter 635,
Acts of 1958, so as to provide that the prohibitions contained therein shall not apply to any person "who has been regularly employed by any school board prior to the inception of such relationship or relationships."

In my opinion, each of the situations presented by you falls within the provisions of the 1958 amendment. Therefore, § 22-206 will not be violated under either of the situations stated in your letter.

SCHOOLS—Technical—Authority of State Board of Technical Education.

SCHOOLS—Technical—Means of financing.

December 18, 1964

HONORABLE DANA B. HAMEL
Director, Department of Technical Education

This is in reply to your letter of December 7, 1964, in which you ask my opinion on the following questions as they pertain to the State Board of Technical Education:

"1. Can political subdivisions jointly provide public funds to purchase land and erect buildings for educational purposes?

"2. Can political subdivisions jointly provide funds for sharing in the costs of operations and continuing maintenance and service of the buildings?

"3. May the State Board of Technical Education work in a cooperative effort with existing community colleges to establish technical education on their campuses where technical courses and programs are not presently offered?

"4. May the State Board of Technical Education work in a cooperative effort with existing community colleges where some technical courses and programs are offered, but where there is a demonstrated need for expansion of the existing courses and programs? (For example, School of Engineering Technology at Richmond Professional Institute)?"

In regard to your first question, Section 137 of the Virginia Constitution reads as follows:

"The General Assembly may establish agricultural, normal, manual training and technical schools, and such grades of schools as shall be for the public good."

Debates of the Constitutional Convention indicate that schools so established were not intended to be under the supervision of the State Board of Education.

The powers and duties of the State Board of Technical Education are generally defined in § 23-201 of the Code of Virginia (1950), as amended, and this section contains the following language:

"The State Board of Technical Education shall perform such duties as may be prescribed by law. The Board shall develop, administer and supervise new area vocational and technical schools established by the State subsequent to January one, nineteen hundred sixty-four, and such other institutions and programs in the field of vocational and technical
education which it may be directed from time to time by the General Assembly to establish.

* * *

"The Board shall determine the locations for area vocational and technical schools established by the State subsequent to January one, nineteen hundred sixty-four, and shall determine the requirements for participation by the political subdivisions of the State in the establishment and operation of such schools . . . ."

I believe that it is clear from the foregoing language, when read in conjunction with Items 497.1-497.3, and § 16a of the Appropriations Act for the biennium 1964-1966, that the General Assembly conferred upon the State Board of Technical Education the power to establish new area technical and vocational schools.

Section 141 of the Virginia Constitution reads, in part, as follows:

". . . third, that counties, cities, towns, and districts may make appropriations to non-sectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district."

When the Board decides to establish a new school, no reason is perceived as to why it may not determine as part of the "requirement for participation by the political subdivisions" that the land and buildings for such school be provided by such political subdivisions.

Section 15.1-172(b) of the Code reads, in part, as follows:

"The word 'project' shall mean any public improvement or undertaking for which the unit is authorized by law to appropriate money, except for current expenses, including, without limiting the generality of the foregoing . . . school buildings . . . ."

Section 15.1-175 of the Code reads, in part, as follows:

"Any municipality shall have power and is hereby authorized: (a) To acquire, construct, . . . repair and operate any project which is located within or partly within and partly without the municipality . . . ."

Section 15.1-185 of the Code confers upon counties the same powers conferred upon municipalities under § 15.1-175 of the Code, but with a limitation upon the power to contract a bonded debt.

Section 15.1-21 prescribes how political subdivisions may jointly exercise the powers they may exercise separately.

I believe the foregoing statutes and constitutional provisions sufficiently indicate that your first question may be answered affirmatively.

In response to your second question, in my opinion, the portion of Section 141 of the Virginia Constitution herein quoted authorizes the governing bodies of the counties and cities to make appropriations to your Board for expenses incurred in the operation of technical and vocational schools. Funds, thus appropriated, would not be subject to the control of the local school board.
Your third and fourth questions, in my opinion, may be answered affirmatively. The last paragraph of § 23-201 of the Code, which prescribes the powers and duties of the State Board of Technical Education, reads as follows:

"The Board shall co-ordinate its efforts in the field of vocational and technical education where feasible, with all other institutions or agencies, public or private, offering vocational and technical education as far as practicable in determining the need for vocational and technical education, and in maintaining adequate standards of instruction."

I believe the foregoing provision is sufficient to permit the Board to work in a cooperative effort with community colleges in each of the situations outlined.

SEAL OF VIRGINIA—Use in Badge of Private Detective Permitted.

April 9, 1965

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is in reply to your letter of April 6, 1965, in which you enclosed a letter from a private detective inquiring whether it would be a violation of the statutes pertaining to the State seal to have the State seal in the center of a badge he proposes to have made.

I am of the opinion this would come within the scope of § 18.1-426 of the Code, since I do not feel that a badge of this nature would be considered to be an advertisement. The opinions published in the Reports of the Attorney General (1954-55 and 1958-59), at pp. 222 and 268, respectively, would seem to apply.

I am not aware of any statute which provides that the seal is to be used only by those persons who are connected with the State Government.

SHERIFFS AND SERGEANTS—Civil Defense—Duties and responsibilities during State or National emergencies.

May 27, 1965

HONORABLE KERMIT E. ALLMAN
City Sergeant of the City of Roanoke

This will acknowledge receipt of your letter of May 26, 1965, which reads as follows:

"I have been informed two or three times during the past year that Sheriffs and City Sergeants have certain duties and responsibilities with increased authority in state or national emergencies as to Civil Defense. I was further informed that such authority is contained in either the State Constitution or State Code. "I have been unable to find any information in this matter and will appreciate it very much if you will advise me of any such statutory provisions covering the same."

The statutes relating to civil defense are contained in Chapter 3, Title 44 of
the Code. Under this Chapter the Governor is the Director of Civil Defense for the Commonwealth and is vested with broad powers to proclaim rules and regulations. It is my understanding that such rules and regulations have been issued and published and that copies have been placed in the hands of the local defense councils. It is probable that your informants may be referring to the powers vested in the local officers under these regulations. I am unable to find any specific statutes such as you have mentioned.

Section 50-a of the State Constitution which was ratified November 6, 1962, is the only constitutional provision relating to such emergencies.

SHERIFFS AND SERGEANTS—Fees—Allowable in garnishee and attachment proceedings, witnesses in felony and misdemeanor case, arrest and executing capias pro fine.

FEES—Sheriff’s and Sergeant’s—Garnishee and attachment, civil and criminal witness, arrest, and capias pro fine.

HONORABLE AUSTIN EMBREY
Clerk of Circuit Court of Nelson County

July 20, 1964

This is in reply to your letter of July 17, 1964, which reads as follows:

"It is necessary that I ‘tax’ as costs and collect certain fees of Sheriffs and Sergeants but since the 1964 Acts of the Assembly became effective there is a difference of opinion as to certain fees provided for in Sections 14.1-105 and 14.1-111 of the Code of Virginia. Because of the conflicting opinions I would like to know what is the proper Sheriff’s or Sergeant’s fee for each of the following services:

(1) For serving a witness summons in a criminal case?
(2) For serving a witness summons in a civil case?
(3) For serving a garnishee summons?
(4) For executing a capias pro fine?
(5) For executing a criminal warrant of arrest?"

Under the provisions of § 14.1-105 of the Code, the fee for serving a summons of a witness in a civil case is $1.25. This is in accord with paragraph (1) of this section. The fee for serving a garnishee summons under Article 7 of Chapter 19, Title 8 of the Code, is $1.25. Although you did not specifically ask the question, under this paragraph (2) of § 14.1-105, the fee for summoning a witness in a garnishee proceeding on an attachment is $1.00.

Under § 14.1-111 of the Code, it is provided that the fee for summoning a witness in a felony or misdemeanor case is $1.00. This section provides that the fee for an arrest in a misdemeanor or felony case is $1.50.

Section 19.1-341 of the Code provides for the compensation to the sheriff or sergeant for executing a capias pro fine. This, you will note, provides for a commission of 5% on the amount collected. I enclose herewith an opinion by former Attorney General Staples, dated May 5, 1943, published in Report of Attorney General (1942-43), at p. 246, in which Attorney General Staples took the following position:

"... Other than this commission in the case of a collection I know
of no statute which allows a fee to the sheriff or sergeant for making a
return on such an execution. In the absence of a statute providing for a
fee for this service, I am of opinion that no such fee can be collected."

Section 2561 of the Code to which Mr. Staples referred, is now § 19.1-341, and
there have been no amendments to this section that would have the effect of
justifying a departure from the opinion rendered by Mr. Staples. At the time this
opinion was written, paragraph (6) of § 14.1-105 ("for serving any order of
court not otherwise provided for") was contained in § 3487 of the Code, except
that the fee at that time was seventy-five cents. Inasmuch as this provision was
construed by Mr. Staples not to cover service of a writ of capias pro fine, in my
opinion, it must be so construed at this time.

SHERIFFS AND SERGEANTS—Fees—Process served under § 14.1-105—Appli-
cation in civil cases.

FEES—Sheriffs' and Sergeants'—Process served under § 14.1-105—Applies in
civil cases.

March 19, 1965

HONORABLE RUTH O. WILLIAMS
Judge, Patrick County Court

This will acknowledge receipt of your letter of March 11, 1965, relating to my
opinion of February 16, 1965, to the Clerk of the Circuit Court of Patrick County.
I enclose herewith copy of that opinion for your file. You are correct in your
understanding that we have interpreted § 14.1-105 of the Code as applying only
to fees in cases that are civil in nature. You will note that this opinion of ours
was in conformity with previous opinions of this office.

You are correct in your assumption that § 53-162.1 of the Code has been re-
pealed. This was done in Chapter 250 of the Acts of Assembly, 1958.

With respect to the question of whether or not the fee allowed a sheriff when
a person is committed to jail should be taxed as a part of the costs, I am inclined
to the view that this would be a proper charge against the accused if he is found
guilty. Former Attorney General Staples ruled in an opinion to Hon. L. McCarthy
Downs, Auditor of Public Accounts, dated January 22, 1943 (See, Report of At-
torney General, 1942-43, at p. 54) that the mileage allowance to a sheriff under
the provisions of § 3508 of the Code (now § 14.1-105) should be taxed as costs
against the defendant. It would appear, therefore, that the fee for receiving and
discharging a person in jail under this section would likewise be a proper item to
tax as costs. Furthermore, in another opinion by Attorney General Staples to Mr.
Downs, dated January 21, 1943, and reported in the same Volume of Attorney
General Reports, at page 55, he made this statement:

"The committal and release fee when collected from the prisoner, in
my opinion, shall be disposed of as other fees of the sheriff, that is, they
should be paid into the county treasury to be credited as provided in sec-
tion 1, subsection (b), of said Chapter 386."

The last paragraph of your letter reads as follows:

"I assume from your letter to Mr. Hanby that fees for arrests of def-
endants on capias pro fines as well as capiases to show cause, criminal in
nature, are to be taxed under provisions of Sec. 14.1-111. If this assumption is not correct, I will also appreciate your advice as to these fees."

You are correct in your assumption as to the interpretation of our opinion to Mr. Hanby with respect to this point.


FEES—Sheriff’s and Sergeant’s—Where person served with process under § 14.1-105.

February 16, 1965

HONORABLE DAVID G. HANBY
Clerk of Circuit Court of Patrick County

This is in reply to your letter of February 15, 1965, which reads as follows:

"I hereby request your opinion as to when and under what circumstances a sheriff would be entitled to the fee of $5.00 as provided in Section 14.1-105 (3) of the Code of Virginia. Does this fee apply (a) when a sheriff makes an arrest on a capias for non-payment of a fine and costs? (b) when a sheriff arrests a defendant on a capias to show cause? (c) on an arrest by a sheriff on a contempt attachment?

"Section 14.1-105 seems to apply to fees of sheriffs, sergeants and criers generally in civil matters.

"Section 14.1-111 of the Code provides for fees of sheriffs, sergeants and criers in criminal cases. A capias for non-payment of a fine and cost would normally derive from a criminal case, therefore, it is my conclusion that the $5.00 fee for taking the body as provided in Section 14.1-105 (3) would not apply, in cases of arrest on a capias for non-payment of a fine and cost, since the capias was the result of a criminal case.

"Would the $5.00 fee as provided in Section 14.1-105 (3) apply to arrests under Section 8-438 of the Code?"

This office has ruled on several occasions that § 14.1-105 (formerly § 3487, Code of 1919), relates primarily to fees in civil cases, as distinguished from criminal cases. See, Opinions of Attorney General (1936-37, at p. 92), (1937-38, at p. 81), (1940-41, at pp. 154-155).

Section 14.1-111 relates to fees of sheriffs in criminal cases. Therefore, I concur in your conclusion that the fee to an officer for executing a capias pro fine and costs (§§ 19.1-339 through 19.1-341) is controlled by the terms of this section. A contempt attachment under § 18.1-292 also comes under this section since it is a criminal proceeding.

Assuming you have reference in question (b) to a capias ad respondendum (Article 6, Chapter 24, Title 8), this proceeding is civil in nature and the fee allowed in § 14.1-105 (3) would apply.

With respect to your last question, the proceedings had under Article 6, Chapter 19, Title 8 of the Code, are of a civil nature. Therefore, § 14.1-105 (3) would apply where a summons is issued and an arrest is made under § 8-438 of the Code.
REPORT OF THE ATTORNEY GENERAL

SHERIFFS AND SERGEANTS—Fees for Service in Garnishment Proceeding.

FEES—Sheriff's and Sergeant's—Service of civil process.

HONORABLE T. F. TUCKER
Clerk of Corporation Court for City of Danville

July 7, 1964

This is in reply to your letter of July 6, 1964, which reads as follows:

"Section 14.1-105 of the Code of Virginia describes the fees of sheriffs, sergeants and criers generally. Subsection (1) states that their service on any person, firm or corporation of a notice, summons or any other civil process, except as herein otherwise provided, and making a return thereof, the fee shall be $1.25. Subsection (2) states for summoning a witness or garnishee on an attachment the fee shall be $1.00. Some Court officials in this vicinity take the position that the service fee of a sheriff or sergeant in a garnishment proceeding is $1.00, whereas I take the position that the service fee is $1.25. Am I correct in this regard?"

Section 14.1-105, insofar as it is material to your questions is as follows:

"The fees of sheriffs, sergeant and criers shall be as follows:
"(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of one dollar twenty-five cents.
"(2) For summoning a witness or garnishee on an attachment, one dollar."

This question has been discussed with court officials here in Richmond, and we advised them verbally that in our opinion the fee for summoning a witness or summoning a garnishee on an attachment is One Dollar. This provision (2) has been in the Code for many years, having been contained in section 3487 of the Code of 1919. It is our understanding that it has been generally interpreted to be an exception to paragraph (1) of § 14.1-105.

SHERIFFS AND SERGEANTS—Fees for Serving Execution on Judgment Debtor and Garnishment Summons on Garnishee.

FEES—Sheriff’s and Sergeant’s—For serving execution on judgment debtor and garnishment summons on garnishee.

HONORABLE T. F. TUCKER
Clerk of Corporation Court for City of Danville

July 31, 1964

This is in reply to your letter of July 30, 1964, in which you refer to my opinion of July 7, 1964, in response to your inquiry dated July 6, relating to § 14.1-105(2) of the Code concerning the proper fee to be paid to an officer for "summoning a witness or garnishee on an attachment."
In my reply to you of July 7, I stated:

"... This question has been discussed with court officials here in Richmond, and we advised them verbally that in our opinion the fee for summoning a witness or summoning a garnishee on an attachment is One Dollar. This provision (2) has been in the Code for many years, having been contained in section 3487 of the Code of 1919. It is our understanding that it has been generally interpreted to be an exception to paragraph (1) of § 14.1-105."

Your letter of July 30 concerns the question as to the proper service fee for serving an execution on a judgment debtor and a garnishment summons on a garnishee.

In garnishment proceedings under Article 7, Chapter 19 of Title 8 of the Code, where an officer serves a summons upon the judgment debtor, as well as the person who is presumed to be liable to the judgment debtor, the fee for service of such summons on each person is $1.25, as this type of proceeding is not "a garnishee on an attachment," to which subsection (2) of § 14.1-105 applies, but comes within the provisions of subsection (1) of § 14.1-105.

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SHERIFFS AND SERGEANTS—Fees for Serving Papers under Paragraphs (1) and (2) of § 14.1-105.

FEES—Sheriff's and Sergeant's—For serving papers under paragraphs (1) and (2) of § 14.1-105.

HONORABLE KERMIT E. ALLMAN
City Sergeant for City of Roanoke

July 8, 1964

This is in reply to your letter of July 7, 1964, which reads as follows:

"Service fees charged by Sheriffs and City Sergeants were increased by the Legislature during the last session of the General Assembly by Section 14.1-105 through Section 14.1-111, effective July 1, 1964.

"Several of our local attorneys and some out of town have placed different interpretations as to the new rates especially as to witness subpoenas in civil cases and serving garnishments and it appears that some of the jurisdictions in the State are not uniform in service fees charges.

"Under the provision of Section 14.1-105, subsection (1) we interpret this to mean that we would charge $1.25 for serving a witness subpoena in a civil case and I have been unable to find anyone who can define subsection (2).

"Therefore, we will appreciate your opinion and advice as to what service fee should be charged for serving a witness subpoena in a civil case and the service fee to be charged for serving a garnishment on the employer as well as the employee. In addition to this I would like to have a complete definition on subsection (2) of Section 14.1-105. Who is a garnishee on an attachment?"

I enclose copy of an opinion dated July 7, 1964, to the Honorable T. F. Tucker, Clerk of the Corporation Court at Danville, Virginia, which relates to the fee for serving papers under paragraph (2) of § 14.1-105. You will note it is our opinion
that the fee for summoning a witness or a garnishee in an attachment proceeding is One Dollar.

The fee for serving a witness subpoena in a civil case is fixed at One Dollar and Twenty-five cents by paragraph (1) of this Code section.

With respect to your question—who is a garnishee in an attachment?—a garnishee is the defendant who is alleged to be liable to the debtor in an attachment proceeding.

SHERIFFS AND SERGEANTS—Liability—Counties not liable for acts of sheriffs.

SHERIFFS AND SERGEANTS—Liability Insurance—Must provide own when using personal car as no authority in board of supervisors to purchase.

February 15, 1965

HONORABLE W. D. DEANE
Sheriff of Greene County

This will acknowledge your letter of February 11, 1965, which reads as follows:

"I would like your opinion on the following matter.
"As Sheriff of Greene County and my deputy have to transport all prisoners to Albermarle County jail a distance of about twenty-two miles, as we do not have a jail in Greene County. Transporting prisoners to Charlottesville is by order of the court.
"We do not have liability insurance on prisoners. We use our personal cars as the county does not furnish us with cars. What would be our liability or who is responsible in case we have an accident en-route to jail or back to court with prisoners in case a prisoner should get injured?
"In case we must have liability insurance to your opinion should the county pay for same or is it our responsibility to carry the extra insurance for prisoners?"

Section 114 of the Constitution of Virginia provides as follows:

"Counties shall not be made responsible for the acts of the sheriffs."

Under this section, there can be no liability upon the county in case a prisoner is injured while being transported by the sheriff. Upon inquiry to the State Compensation Board, I find that it does not provide for an allowance to a sheriff for the purpose of purchasing liability insurance.

In my opinion, if you desire liability insurance protection, it will be necessary for you to personally make arrangements for this protection. I can find no statute requiring or authorizing the board of supervisors to make an appropriation for the purpose of providing such insurance protection.
SHERIFFS AND SERGEANTS—No Authority for City Sergeant to Serve Legal Process Outside City.

HONORABLE KERMIT E. ALLMAN  
City Sergeant for City of Roanoke

This is in reply to your letter of May 26, 1965, which reads, in part, as follows:

"I am writing to ascertain jurisdiction of authority for Sheriffs and Sergeants to serve any type of legal process outside of their designated jurisdiction. To be more specific, I am interested in jurisdiction involving Roanoke City and Roanoke County.

"It has been the practice of this office for a number of years to send any and all legal processes to the Sheriff of Roanoke County to be served on persons who do not reside within the City of Roanoke. However, the Sheriff's Department of Roanoke County serves papers on persons residing in Roanoke City."

The power of a sheriff to serve process in an adjoining city is contained in § 8-50 of the Code, which reads as follows:

"The sheriff of any county in which is situated a city, or any part thereof, may execute in such city or part, any process which he might execute in any other portion of his county."

In this connection I enclose copy of an opinion dated February 20, 1957 to the Clerk of the Hustings Court, Part II, in the City of Richmond, which construes the above Code section. I believe that the City of Roanoke is entirely surrounded by Roanoke County and, if this is true, then the Sheriff of Roanoke County, in accordance with this section and with the enclosed opinion, may serve process anywhere in the city.

I am unable to find any comparable statute which would authorize the Sergeant of the City of Roanoke to serve process in the County of Roanoke.

Your attention is directed to § 15.1-79 of the Code, which reads, in part, as follows:

"Every officer to whom any order, warrant, or process may be lawfully directed, shall execute the same within his county or corporation or upon any bay, river or creek adjoining thereto. The word 'county' as hereinbefore used shall embrace any city included within the boundaries of such county, and the word 'corporation' as hereinbefore used shall embrace all property belonging to the county within the territorial limits of such corporation. . . ."

You will note that the word "county" as used in this section embraces any city included within the boundary of such county and the word "corporation" as used in this section embraces all property belonging to the county within the territorial limits of such corporation. Under this definition of the word "corporation" a Sergeant of the City of Roanoke would not have jurisdiction to serve process in the county, except on property belonging to the county within the territorial limits of the city.

You will note by reference to § 15.1-824 of the Code that the Sergeant of a city within the jurisdiction of the court of his city may exercise the same powers..."
and perform the same duties touching all process issued by the court of such city
or by the clerk of such court that the Sheriff of a county exercises in his county.

SPECIAL JUSTICES—Authority—Established by § 19.1-32.1.

CRIMINAL PROCEDURE—Preliminary Hearings—May not be held by special
justice.

HONORABLE ANDREW L. GEISLER
Special Justice for Arlington County

As we stated to you over the telephone, we have been having difficulty with the
points raised in your letter of December 5, 1964. Your first question refers to
§ 19.1-101 and is as follows:

"Should the special justice conduct the examination prescribed when
a person is brought before him accused of an offense?"

If the special justice has no authority to conduct the examination provided
for in Article 2 of Chapter 6, Title 19.1—§§ 19.1-101 through 19.1-108—of the
Code, it would seem that no comment on the other questions submitted by you
should be necessary.

The statute under which you were appointed is § 19.1-32.1 of the Code. This
section provides that the special justice "shall exercise within such county all the
power and authority which is conferred upon justices of the peace by general law
except the power to issue civil processes."

Section 39-4 of the Code relates to the jurisdiction of a justice of the peace and
his powers. This section reads as follows:

"No justice of the peace shall, within any county or in any incorporat-
ated town located therein or in any city for which a trial justice is ap-
pointed under the provisions of chapter 2 of Title 16, exercise any civil
or criminal jurisdiction conferred on such trial justice. Justices of the
peace within their respective counties and on any property geographi-
cally within any city therein, which is owned and used by the county,
shall, however, have the same power to issue attachments, warrants and
subpoenas within the jurisdiction of such trial justice as is conferred
upon the trial justice, and they shall also have power to grant bail in
any case in which they are authorized by general law to grant bail and to
receive their fees therefor; provided that any justice of the peace of any
county, while on any property geographically located within any city
having a population of more than eleven thousand and less than twelve
thousand which property is owned and used by the county, shall not ad-
mit any person to bail while on such county property geographically
within the city aforesaid unless the judge or the circuit court of such
county wherein the justice of the peace holds office shall by order
entered of record grant authority to such justice of the peace to admit
persons to bail. But such attachments, warrants, and subpoenas shall be
returnable before the trial justice for action thereon. Any officer making
an arrest for a misdemeanor within any county or city for which a trial
justice has been appointed shall, upon the request of the person so ar-
rested, take him with reasonable promptness before the nearest or any
It will be noted that in the first sentence of this section it is stated that no justice of the peace shall within any county for which a trial justice is appointed under the provisions of Chapter 2 of Title 16 exercise any civil or criminal jurisdiction conferred on such trial justice. The section further provides, however, that a justice of the peace shall have the power to issue attachments, warrants and subpoenas within the jurisdiction of such trial justice as is conferred upon the trial justice and that they shall also have the power to grant bail in any case in which they are authorized by general law to grant bail. The section further provides that such attachments, warrants and subpoenas shall be returnable before the trial justice. It provides further that any officer making an arrest for a misdemeanor within any county for which a trial justice has been appointed shall, upon the request of the person so arrested, take him with reasonable promptness before the nearest or any other available justice of the peace, or such other officer authorized to grant bail, for the purpose of being admitted to bail for his appearance before the trial justice.

Under Chapter 2 of Title 16.1 of the Code, the trial justice courts are abolished and all of their duties are transferred to the county courts. Therefore, the reference in § 39-4 to a trial justice has since that time applied to judges in courts not of record.

After the establishment of the trial justice courts, the Supreme Court of Virginia, in the case of Dotson v. Dickenson, 169 Va. 50, 192 S. E. 700, made this observation:

"... In the gradual creation and enactment of that system, with amendments from time to time increasing the powers, authority and jurisdiction of trial justices, police justices and civil justices, leaving certain concurrent powers to justices of the peace, some of the new statutes are in apparent contradiction of old statutes. The new statutes have not always been correlated and coordinated with those still applying to the old practice. The manifest intention of the legislature is to supplant the old system with the new, leaving in the old system only certain specified powers, including the right to issue warrants, but not to try them, ..."

The provisions of Article 2, Chapter 6 of Title 19.1 were contained in the Code of 1919 and have not been amended. These statutes were enacted at a time when a justice of the peace had the power to hold preliminary hearings and try misdemeanor cases. The authority conferred upon a justice of the peace in these sections seems to be in conflict with the powers conferred upon a judge of a court not of record. It is my opinion, therefore, that a justice of the peace does not have the power to make such examination and hold a preliminary hearing as is contemplated by Article 2 of Chapter 6, Title 19.1.

As set out in § 39-4, a justice of the peace may admit persons to bail. A justice of the peace, or you as special justice, would not, in my opinion, have the authority to discharge the accused under the provisions of § 19.1-106.

You refer to § 46.1-7 of the Motor Vehicle Code and ask the following questions:

"Should the special justice dismiss the charge of 'no registration' and 'no operator's permit' when the person so charged appears, prior to the
traffic court appearance date and produces a proper registration or operator's permit, or should the person be advised by the justice . . .

"a. To appear before the court?

"b. That the charge will be dismissed by the traffic court judge when the case is called and he need not appear (in such case the justice making a notation for the judge's information that the persons charged did present for examination valid pre-existing registration or permit)?"

In my opinion, you should advise the person to appear before the court to which the summons is returnable and exhibit his operator's permit to that court.

I do not believe the procedure suggested under "b" would be proper.

STATE EMPLOYEES—Physician—Not an employee of State where periodic, part-time service with local health department incidental to principal occupation of practice of medicine.

PHYSICIANS AND SURGEONS—Not State employees where periodic, part-time service with local health department incidental to principal occupation of practice of medicine.

August 3, 1964

HONORABLE CHARLES H. SMITH
Director, Virginia Supplemental Retirement System

This will acknowledge receipt of your letter of July 22, 1964, which reads as follows:

"The question has been raised as to whether or not the above named was an employee of the State Department of Health, and, if so, whether or not he should have been reported under the Federal-State Social Security agreement.

"We enclose copies of our correspondence in this matter and respectfully request your opinion as to whether or not Dr. Powell was an employee of the State Health Department."

Attached to your letter is copy of a form used by the State Department of Health, designated as "Clinic Report and Honorarium Request" which is a form used by physicians making claims for services rendered to patients at a clinic operated by the State Department of Health. Also attached to your letter is copy of a letter from Dr. Mack I. Shanholtz, State Health Commissioner, to you dated July 14, 1964, in which he states that he discussed this question with Mr. John Garber, Director of Personnel, and that Mr. Garber has informed him that Dr. Powell is not an employee of the State "as his periodic, part-time service with the local health department is incidental to his principal occupation, which is the practice of medicine."

I can find nothing in the information submitted with your letter which would justify the conclusion that there is an employee-employer relationship in this instance. Ordinarily, where a person is engaged in a profession such as attorney at law or physician and such person agrees to perform services for a client or a patient at specific times, no relationship of employee-employer is formed. An ar-
rangement of this nature is usually considered to be that of an independent con-
tractor.

STATE INSTITUTIONS—Division of Industrial Development and Planning—
Authorized to contract with Federal Government concerning planning pro-
gram of State.

INDUSTRIAL DEVELOPMENT—Division of Industrial Development and Plan-
ing—Authorized to contract with Federal Government concerning planning pro-
gram of State.

HONORABLE JOSEPH G. HAMRICK
Director, Division of Industrial Development and Planning

July 9, 1964

This will acknowledge receipt of your letter of July 1, 1964, enclosing a letter
from the office of the Regional Administrator of the Federal Housing and Home
Finance Agency, requesting an opinion of this office on the presently effective
State Planning Legislation in Virginia, including the amendments to § 2-57.01
of the Code, as enacted by Chapter 328, Acts of Assembly of 1964.

The Division of Industrial Development and Planning, established in the
Governor's office by Chapter 356, Acts of Assembly (1962), is the Planning
Agency of the State charged with the duty to (1) encourage and foster the de-
velopment of the planning process at the local, regional, and State levels; (2)
administer and perform a program of comprehensive planning, research and other
activities related thereto, for the State, its metropolitan or other urban areas,
regions and local jurisdictions, including the disbursement of regional planning
funds; (3) provide planning assistance, upon request, to any county or municipal-
ity or any group of adjacent communities, incorporated or unincorporated, having
common or related planning or development problems, or any metropolitan or
regional planning agency; (4) maintain an account of the planning work already
accomplished in Virginia, including the status of local, regional, and State plan-
ning activity and, upon request of the Governor, prepare recommendations re-
garding plans and projects.

The Division of Industrial Development and Planning is authorized to apply
for and accept and utilize grants and other assistance from any governmental
agency or department, and from any public or private foundation, fund or trust,
to contract with such governmental agency or department and any other public or
private sources, to receive advances or progress payments.

The terms "governmental agency" and "governmental department," as used in
§ 2-57.01 of the Code, include such agencies or departments of the government
of the United States.

The Division of Industrial Development and Planning is a legal entity of the
State with full power to administer the provisions of § 2-57.01 of the Code of
Virginia and any and all other statutes relating to the planning program of the
State.

You will recall that the authority of your Division to contract with the Federal
government in connection with the planning program of the State was questioned
by the Federal authorities. The amendments to § 2-57.01 of the Code are for
the purpose of clarifying the law so as to make it clear that your Division has the
power to negotiate for and accept grants from the Federal authorities for planning programs in which the State participates. In my opinion, the amendments accomplish that purpose.

STATE INSTITUTIONS—Longwood College—Construction fees—Students may be assessed as source of revenue to retire bonds.

November 12, 1964

Dr. F. G. Lankford, Jr.
President, Longwood College

This is in reply to your letter of November 10, 1964, the first paragraph of which reads as follows:

"Currently, we are making some plans for the future development of Longwood College and in these plans, we have raised the question of how our dormitories can best be financed. Certainly a portion, or all, of the cost of these buildings will have to be met by the sale of revenue bonds. It seems highly important to us that we plan to charge all resident students a construction fee and use the proceeds from this fee to amortize the bonds on dormitories, or any other buildings for which we borrow money. Would you regard this as a proper procedure in light of current Virginia law?"

Section 23-19 of the Code was amended by Chapter 635, Acts of Assembly (1964), so as to permit educational institutions to fix and collect "student building fees and other student fees" and to pledge the same in whole or in part to the payment of principal and interest on any bonds issued by the institution for the purpose of building dormitories or other facilities. This amendment is contained in paragraph (d) (3) of § 23-19.

A similar provision is contained in § 23-30.7 of the Code in paragraph (d) thereof. This latter section is a part of "The Virginia College Building Authority, Act of 1964," which is an additional method of financing dormitories.

There is at present a suit pending in the Supreme Court of Virginia involving the constitutionality of §§ 23-19(d) (2) and 23-30.7(c), but the constitutionality of the provisions referred to above authorizing the collection of student building fees is not involved in that suit.

It is my opinion, therefore, that an educational institution as defined in §§ 23-14 and 23-30.2(b) of the Code may charge and collect student building fees and pledge the same to the payment of bonds issued under § 23-19 or to the payment of rentals as provided in § 23-30.7(b).

STATE INSTITUTIONS—Medical College of Virginia—Authority—Concessions—May enter into agreement for banking services in clinic center.

April 15, 1965

Honorabe John H. Heil, Jr.
Assistant President, Medical College of Virginia

This will acknowledge receipt of your letter of April 9, 1965, in which you state
that pursuant to the authority granted to the Medical College of Virginia by Chapter 431, Acts of Assembly, 1964, the College proposes to construct a building to be used as a Clinic Center to be financed through the issue and sale of revenue bonds. The Act authorizing this project provides that the bonds shall be payable out of the revenues from the rentals received from the operation of such project.

You further state:

"... The Clinic Center will have two floors of underground parking, probably to be used in part by tenants and in part by the general public. The first floor will contain the entrance hall to the building and space to be used on a concession basis by a bank, for a branch, by a combined restaurant and gift shop, and by a pharmacy all to serve the general public in addition to the persons in the Medical College community. The second and third floors will contain offices for physicians and others in related health fields. The remaining floors will contain residence facilities for the use of ambulatory patients and their relatives. It is contemplated that the net revenues from the operation of the building will pay the charges of the revenue bonds required to pay for its construction.

"The restaurant, the bank and the pharmacy will of course serve not only the tenants of the building but the whole College community and others in adjacent areas. The General Assembly was advised, during the course of its enactment of Chapter 431, that the general public would be so served by these facilities. Some question has been raised as to the right of the College to provide services of this character to the general public, but it seems to me clear that, in the light of the Legislative history of the Act and the provisions of § 1 of the Act and § 23-15(e) of the Code, as amended in 1964, and the fact that service to the general public is incidental only to the College community which, including staff, students and patients, numbers more than 6,000 persons, no substantial question can arise as to the right of the College to provide these services through concessions. Otherwise, the whole purpose of the 1964 legislation might well be defeated.

"Accordingly, I have prepared a letter agreement between the College and The Bank of Virginia relating to the proposed concession for banking services in the Clinic Center. A draft of that letter agreement is enclosed for your review. I should be grateful if you would consider this draft and advise me that it is in proper form for execution by the College."

The agreement which you have submitted is in the nature of a concession to the Bank of Virginia authorizing it for a concession fee therein stated to operate a banking facility in the proposed building. It is not necessary for the purpose of this opinion to discuss the details of the concession.

It has been the policy of the State to grant concessions for the purpose of providing essential services to the officials and employees of the State, such as in the State Capitol, the State Office Building, and in the buildings now owned and operated by the Medical College. In fact, a restaurant and a bank facility have been operated by concessioners in the Medical College properties for a number of years. These facilities, I assume, are deemed essential by the Board of Visitors for the officials, employees and students of the College. Such services, I am informed, are available and in fact are used by others than those who are directly connected in some way with the College, but this, in my judgment, does not impair the usefulness and necessity of such facilities to the College personnel and its student
body. The concessions will produce revenues which, no doubt, will be an advantage to the College in financing the project by the issuance of revenue bonds. The statute authorizing the bonds shows on its face that the project can only be a revenue producing facility as a means of financing its construction as well as for maintenance and operation.

Section (9) of § 23-50 of the Code, which pertains to the Medical College, provides that—

“(9) The board of visitors shall manage the affairs of the corporation, care for its property, conduct its business, control its finances and shape its policy.”

This provision places in the Board of Visitors broad authority to manage the affairs of the College, including its property, in such manner as the Board may deem appropriate for the successful operation of that institution.

In my opinion, the Board of Visitors has the power to enter into the proposed agreement.

STATE INSTITUTIONS—State Board of Education—Authority to assess and collect service charges re surplus property program pursuant to Federal Property and Administrative Services Act.

May 26, 1965

HONORABLE WOODROW W. WILKERSON
Superintendent of Public Instruction

This is in reply to your letter of May 24, 1965, in which you quote from a letter to you from the U. S. Department of Health, Education and Welfare, as follows:

“A new opinion will be obtained from the Attorney General to the effect that the Executive Order, and redelegations by the Superintendent of Public Instruction to the Administrative Assistant and Director, Division of Administration and Finance, and his subsequent redelegation to the Executive Officer to sign certifications and agreements, are proper and legally sufficient. The Attorney General will also be specific in some finding that the existing State Agency has authority to assess and collect service charges.”

This office has reviewed the Executive Order entered by Governor Battle on the 14th day of May, 1953, and the opinions issued by Hon. J. Lindsay Almond, Jr., Attorney General, to Hon. Dowell J. Howard, Superintendent of Public Instruction, under dates of May 22, 1953 and April 26, 1956. The opinions rendered by Attorney General Almond and referred to above are hereby confirmed at this time.

With specific reference to the last sentence of the above quoted letter from the Department of Health, Education and Welfare, you are advised that the State Board of Education has authority to assess and collect service charges in connection with the administration of the surplus property program being administered pursuant to the provisions of Section 203(j) of the Federal Property and Administrative Services Act of 1949, as amended.
STATE INSTITUTIONS—Western State Hospital—Enforcement of parking regulations.

MOTOR VEHICLES—Parking Vehicles Within Boundaries of State-supported Institution—May be controlled by local ordinance adopted at request of governing body of such institution.

HONORABLE T. C. ELDER
Commonwealth's Attorney for the City of Staunton

April 16, 1965

This is in reply to your letter of April 7, 1965, in which you request my advice as to the applicable law and procedure to be followed relative to the problem of improper parking at the old unit of Western State Hospital, located within the corporate limits of the City of Staunton.

It is apparent that you have reference to the parking of vehicles within the area comprising the hospital roads, streets and grounds. The authorization and procedure for regulation of the parking of vehicles within the boundaries of State-supported institutions is found in § 15.1-516, Code of Virginia (1950), as amended, which reads as follows:

"Every county or city may, upon request of the governing body of any State-supported institution lying wholly or partially within the county or city, regulate the parking of motor vehicles and all other vehicles on the roads, streets, alleys, grounds and other areas within such portions of the boundaries of such institution as lie within the county or city.

"Any city adopting an ordinance pursuant to this section may provide in such ordinance that regulations made pursuant to this section shall be enforced by persons appointed under the provisions of § 19.1-28. No penalty for the violation of any ordinance carrying into effect the powers hereby granted shall exceed a fine of twenty dollars. Any request from the governing body of any such institution to the governing body of the county or city shall be in writing signed by the presiding officers of the governing body of such institution and shall be accompanied by a certified copy of a resolution of such governing body authorizing such request to be made.

"The county court of the county or the municipal court of the city wherein any ordinance is in effect under the authority of this section shall have jurisdiction to try cases arising thereunder to the same extent as criminal cases arising in the county or city. All fines paid in such cases shall be disposed of by the court as prescribed by § 14.1-44.

"The provisions of this section shall not be deemed to affect the application of §§ 46.1-551 and 46.1-552."

You will observe from the quoted statute that any city adopting an ordinance pursuant to this section may provide in such ordinance that the regulations shall be enforced by persons appointed under the provisions of § 19.1-28, Code of Virginia (1950), as amended. The latter section provides for the appointment by the circuit, corporation or hustings court, or the judge thereof in vacation, of one or more citizens of the Commonwealth as conservator or conservators of the peace. In the case of any hospital under the management, supervision and control of the State Hospital Board, this appointment shall be upon proper application therefor made by the superintendent of such hospital. Any conservator so appointed shall be employed by such hospital only as an institutional policeman, fireman, safety officer, security officer or caretaker and the termination of such employment shall
automatically revoke the appointment as conservator of the peace. Separate and apart from this section, § 37-15, Code of Virginia (1950), as amended, makes the superintendent, resident officers, policemen and firemen of any such State hospital conservators of the peace on the hospital property with all the powers of conservators of the peace under the laws of the Commonwealth. Thus, an appointment under the provisions of § 19.1-28 will be made only upon application of the superintendent of the hospital concerned.

You state that the City of Staunton will do anything required to alleviate the situation, including the enactment of a city ordinance, if this be indicated. The Western State Hospital, by § 37-1, Code of Virginia (1950), as amended, is under the management of the State Hospital Board. In my opinion, therefore, it is proper and appropriate that the City of Staunton, upon receipt of written request of the State Hospital Board accompanied by certified copy of its resolution in accordance with the statutory requirements, adopt an ordinance pursuant to § 15.1-516 in regard to the parking of motor vehicles and all other vehicles on the roads, streets, alleys, grounds and other areas within the boundaries of Western State Hospital located within the corporate limits of such city. The Municipal Court of the City of Staunton shall have jurisdiction to try cases arising thereunder to the same extent as criminal cases arising in such city.

Incidentally, it is noted that § 15.1-516 provides that this section shall not be deemed to affect the application of §§ 46.1-551 and 46.1-552, authorizing the removal of trespassing vehicles by the owner of any parking area.

SUBDIVISIONS—Plats—Procedure required to be followed in changing name.

Mr. G. M. Cornell
Executive Secretary, Board of Supervisors of Nansemond County

This is in reply to your letter of April 9, 1965, which reads as follows:

"The Board of Supervisors of Nansemond County will appreciate your opinion on the following question:

"There is a subdivision in Nansemond County named ‘Nansemond Shores,’ a plat of which is duly recorded in the office of the Clerk of the Circuit Court of Nansemond County.

"The western edge of this subdivision lies on the banks of the Nansemond River and nice homes have been built on lots sold in this area. In the portion of the subdivision east of this area, lots have been sold and houses have been built on them of a more modest nature not in keeping with the type of homes built in the area adjacent to the river. The residents of the area adjacent to the river desire to separate their portion of the subdivision from the balance by a distinctive name.

"If this separation can be done, will you please outline the procedure to be followed under the laws pertaining to the subdivision of land."

The statutes relating to subdivision plats are silent with respect to the name of the plat; however, I am inclined to the opinion that the name is a part of the plat and it cannot be changed except by process of amendment. I know of no way this can be done except by going through the procedure of preparing a new plat and getting it approved and at the same time vacating the old plat. It would be necessary to have all the property owners consent to the new subdivision (§ 15.1-477 of the Code) and also to consent to the vacation of the old plat under
the procedure set out in § 15.1-482. Quite likely it would require the preparation
and recording of two plats—one to include the area that would continue to be
known as "Nansemond Shores" and another to include the area to be designated
by a different name.

We consulted one of the oldest established firms here in Richmond engaged in
the business of preparing subdivision plats and they are in accord with the view
expressed herein.

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TAXTATION—Assessors—May be full-time appraiser for lending corporation.

PUBLIC OFFICERS—Compatibility Assessor may serve as full-time appraiser
for lending corporation.

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney for Prince William County

January 6, 1965

This is in reply to your letter of January 4, 1965, in which you state that one
of the members appointed to the Board of Assessors is a full-time appraiser for a
federal savings and loan association which is engaged in making loans upon real
estate in Prince William County. You state that the question has been raised as
to the possible conflict or impropriety of this person serving on the Board.

I know of no statutory provision which would prevent an appraiser for a lend-
ing corporation from serving upon the Board of Assessors. I can see no reason for
assuming that there is any conflict between his duties as an assessor and his duties
to the savings and loan corporation.

Section 58-789 of the Code provides that persons appointed on such a Board
shall be freeholders in the county.

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TAXATION—City and Town Licenses—Limitation of authority.

CITIES—License Tax—Limitation of authority.

TOWNS—License Tax—Limitation of authority.

HONORABLE JOSEPH E. SPRUILL, JR.
Commonwealth’s Attorney for Essex County

March 30, 1965

This is in reply to your letter of March 29, 1965, which reads in part as fol-
lows:

"The Board of Supervisors of Essex County is considering the pos-
sibility of imposing a vendor's tax based on gross receipts on all mer-
chants doing business within the county. * * "Essex County has only one incorporated town, being the Town of Tappahannock, within its limits, and this town has a license tax on all persons, firms and companies engaged in business within the Town of Tappahannock, which tax is also based on gross receipts, and is payable
to the town."
"I notice that paragraph 7 of § 58-266.1 of the Code of Virginia indicates that where a town imposes a town license tax, a similar license tax imposed by the county would not be applicable within the town. I would appreciate very much your advising me whether this means that Essex County, in effect, could not impose a vendor's tax which would be applicable to the merchants located in Tappahannock.* * *"

In a telephone conversation today you stated that the tax under consideration by the board of supervisors is the license tax permitted under § 58-266.1 of the Code. The terminal paragraph of this section is as follows:

"(7) Any county license tax imposed hereunder shall not apply within the limits of any town located in such county, where such town now, or hereafter, imposes a town license tax on the same privilege."

This paragraph prevents the county license tax from being imposed on merchants who have a business located within the limits of a town in the county if the town imposes a town license tax on the same privilege.

TAXATION—Coin-operated Machine or Device—Car wash machine subject to tax under § 58-355.

March 19, 1965

HONORABLE RICHARD M. CHAPMAN
Commissioner of the Revenue for Scott County

On December 10, 1964, I furnished you an opinion with respect to an inquiry from you as follows:

"I would like a ruling on the following: Mr. James Howard Addington is engaged in the operation of the Moccasin Gap Shell Service Station, Route 4, Gate City, Virginia, at which he has installed a coin operated car wash on the premises.

"Will Mr. Addington be required to purchase additional licenses on his coin operated machines in this car wash if all revenue derived from these are included in the sales of the service station?"

In response to your question, I expressed the view that the coin-operated car wash machine, if owned and operated by a regularly licensed retail merchant paying retail merchants' tax on his sales, would be exempt from the license tax imposed under § 58-355 of the Code. This conclusion was based upon the belief that the exemption would be allowed under the following provision of said Code section:

"Regularly licensed retail merchants paying retail merchants license tax on their sales at retail shall not be required to have any separate vending machine license on such coin-operated machines which are located on the premises of their place of business."

We have now been advised by Hon. C. H. Morrissett, State Tax Commissioner, of a bulletin issued by him on December 1, 1960. This bulletin was directed to the commissioners of the revenue and related to the exception quoted above and which was enacted by the General Assembly as an amendment to § 58-355 by Chapter 59 of the Acts of 1960. Mr. Morrissett pointed out in this bulletin as follows:
"If a regularly licensed retail merchant can show that he has bona fide purchased a coin-operated vending machine and that he uses the same in his licensed place of business for vending his own merchandise, the retail merchant will not be required, on and after January 1, 1961, to take out a specific license to cover such a machine. . . ."

We are in receipt of a letter from Mr. Morrissett calling particular attention to the use of the term "any separate vending machine license" and pointing out that a "vending machine" is a coin-operated machine vending goods, wares and merchandise, and that this term has never been construed as including any other kind of coin-operated machine. The "car wash" machine involved here fails to qualify as a "vending machine" as defined above.

As a result of Mr. Morrissett’s bulletin and his comments in his letter to the Attorney General, we have concluded that our opinion furnished you under date of December 10, 1964 with respect to this matter is in error. Therefore, that opinion is being withdrawn and we now express the opinion that under the facts presented the coin-operated car wash machine is subject to the license tax imposed by § 58-355 of the Code.

TAXATION—Deduction by Treasurer from State Drawn Warrants—Not applicable to welfare payments.

WELFARE AND INSTITUTIONS—Payments by State—Taxes not to be deducted.

HONORABLE WILLIAM L. PAINTER
Director, Department of Welfare and Institutions

February 9, 1965

This will reply to your letter of February 4, 1965, in which you call my attention to Sections 58-922 and 63-102 of the Virginia Code and inquire whether or not a county treasurer may properly deduct from public assistance payments the amount of any taxes which may at that time be owed by the prospective recipient in whose favor the public assistance is to be paid.

I am of the opinion that your inquiry should be answered in the negative. Initially in this connection, Section 58-922 of the Virginia Code authorizes treasurers to deduct taxes in those instances in which a warrant has been lawfully drawn “on account of allowances made against the Commonwealth” and it is questionable whether or not a warrant representing a payment of public assistance falls within the ambit of the above quoted phrase. In any event, it would appear that the general provisions of Section 58-922—even if otherwise applicable—have been superseded by the subsequently enacted specific provisions of Section 63-102 of the Virginia Code which prescribes:

“No public assistance given under this law shall be transferable or assignable, at law or in equity, and none of the money paid or payable as public assistance under this law shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency laws.”

I am therefore of the opinion that a county treasurer may not properly deduct from public assistance payments the amount of any taxes which may be owed by the prospective recipient of such assistance.
TAXATION—Deductions by Treasurer from County School Checks May Be Made for County Taxes Owed by Recipient.

SCHOOL—Appropriations—Cash appropriation may be made in addition to amount raised by maximum levy for school purposes.

February 15, 1965

HONORABLE W. A. HOWLETT
Treasurer of Carroll County

This will acknowledge receipt of your letter of February 11, 1965, which reads as follows:

"Please give me your opinion on the following:
"Can a county treasurer deduct from county school checks the amount owed by recipient for county taxes?
"Is it lawful for a county that is levying the maximum rate of $3.00 as provided by law for school operating expense to supplement this amount by appropriation from a levy raised for general county operating expense?"

With respect to your first question, you will find this procedure provided for in § 58-921 of the Code. This office has ruled on several occasions that this section is applicable to school warrants as well as other types of county warrants. In this connection, I refer you to the following prior opinions of the Attorney General:

Opinions of Attorney General (1940-41), p. 185

With respect to your second question, the answer is likewise in the affirmative. In this connection, I refer you to an opinion dated April 18, 1961 to Hon. W. W. Wilkerson, Superintendent of Public Instruction. See, Opinions of Attorney General (1960-61), at p. 259.

March 10, 1965

HONORABLE W. A. HOWLETT
Treasurer of Carroll County

This is in reply to your letter of February 19, 1965, which reads as follows:

"In a recent inquiry to your office I asked for your opinion on the following: 'Can a county treasurer deduct from county school checks the amount owed by recipient for county taxes?'

"Your opinion offered was in regard to county school warrants and was to the affirmative. Our county pays its teachers by individual checks signed by the chairman and clerk of the school board and by myself as county treasurer. What I want to know is 'can I apply this check to taxes owed by the recipient? If I may do this, what constitutes endorsement of this check?'"
The opinion to which you referred was issued by this office on February 15, 1965, in response to your inquiry of February 11, 1965.

Section 22-76 of the Code reads as follows:

"The warrant may be converted to a negotiable check by the treasurer, or appropriately designated deputy treasurer, by affixing his signature thereto in conformity with the provisions of § 58-951, and by designating thereon the bank by which it is to be paid."

A similar provision is found in § 15.1-547 of the Code relating to other types of warrants drawn on county funds.

In my opinion, under the provisions of § 58-921 and under the general principles of setoff, the treasurer may refuse to release a warrant that has become a check to a person who owes county taxes and may apply the check in accordance with § 58-921. Of course, after the warrant has been signed by the treasurer and it has become a negotiable check, if the treasurer releases this check to the school board for transmittal to the school teacher, it could no longer be applied to the payment of taxes owed by the payee. It occurs to me that the best procedure in such cases would be for the treasurer to defer signing those warrants payable to teachers or other persons who owe taxes to the county and notify them that the warrant is being held for the payment of taxes. If the taxpayer does not make payment of the taxes following this notice, and if the taxes are less than the amount of the warrant, the treasurer can then convert the warrant to a check and deposit the check in his official account and issue a check on that account for the difference. Of course, the treasurer would furnish the person a receipt for such taxes, showing how the tax was paid.

We have discussed this matter with Hon. J. Gordon Bennett, State Auditor, and he is in agreement with this conclusion. It might be well for you to get in touch with Mr. Bennett should you desire any further advice in connection with how to handle matters of this nature.

TAXATION—Delinquent Personal Property Taxes—Collection costs.

COSTS—Fees to Be Taxed in Tax Cases by Localities.

March 31, 1965

Honorable Porter R. Graves
Judge, Rockingham County Court

This is in reply to your letter of March 30, 1965, which reads as follows:

"The treasurer for the County of Rockingham is in the process of filing civil warrants in the Rockingham County Court against a number of local residents for the collection of delinquent 1962 Rockingham County personal property taxes.

"From the information I have received, there seems to be some conflict among the various courts as to the appropriate amount of court costs that should be collected at the time the civil warrants are filed and the costs that should be charged against the defendants.

"I would, therefore, appreciate it very much if you would inform me as to the proper amount of court costs, including sheriff's fees, if any, that should be collected from the county treasurer at the time he files the
Civil warrants for the collection of taxes due Rockingham County and the amount of costs that should be charged against the defendants."

I enclose the following opinions relating to this matter:


Section 14-133, referred to in these opinions, is now § 14.1-125, and § 14-82 is now § 14.1-69.

The twenty-five cent fee for the Circuit Court Clerk mentioned in the opinion to Mr. Bennett is a proper fee to be collectible.

The terminal sentence of the first paragraph of subdivision (1) of § 14.1-125 was added to this section by an amendment contained in Chapter 106, Acts of 1960. This provision appears to be in conflict with language that was already in this section and which is found in the third paragraph of § 14.1-125. However, since the 1960 amendment is the last expression of the General Assembly, under the accepted rules of statutory construction, we have held, as noted in the opinions which we enclose, that it takes priority over the inconsistent provision.

As pointed out in our opinion to Mr. Bennett (1960-61, Attorney General Report, p. 83, at p. 85), the sheriff is not entitled to any fee because of the provisions of § 14.1-69 of the Code (former § 14-82).

Furthermore, as stated in the terminal paragraph of the opinion to Mr. Bennett, referred to herein, the costs to be taxed do not include anything except the twenty-five cents clerk's fee.

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TAXATION—Delinquent Real Estate—No authority to receipt for payment of delinquent taxes between time of sale and recordation of the list.

March 11, 1965

HONORABLE SAMUEL W. SWANSON
Clerk of Circuit Court of Pittsylvania County

This will acknowledge receipt of your letter of March 5, 1965, which reads as follows:

"We have a problem regarding accepting payment of delinquent taxes for the year 1962. Our treasurer has sold the delinquent land as provided by statute and purchased it in the name of the Commonwealth but the list has not been delivered to this office. The treasurer refuses to accept payment and we do not feel we have the right to accept payment until the list is delivered to us properly signed and an order entered on our books by the judge. We have been unable to find any statute covering payment of delinquent taxes during this interim and would greatly appreciate an early reply as we are confronted with this problem now."

There is no statute providing for the receipt of payment of delinquent taxes during the period between the time of sale and the recordation of the list pur-
suant to § 58-1038 of the Code. You will note that under § 58-1080 the treasurer is authorized "to receive and collect moneys in payment of taxes and levies for any year subsequent to the year for which the sale was made * * *.”

We have conferred with the Honorable C. H. Morissett, State Tax Commissioner, with respect to this matter, and he concurs with our conclusion.

TAXATION—Delinquent Real Estate—Penalty—Mandatory that treasurer collect.

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

January 22, 1965

This is in reply to your letter of January 21, 1965, in which you refer to my opinion of January 15, 1965, with respect to the 5% penalty provided for in § 58-963 of the Code. You state as follows:

"The two taxpayers mentioned in the previous letter had paid their taxes prior to December 5, 1964 and were not aware of the additional assessment until after December 5, 1964. If this additional assessment had been made prior to December 5th I am sure that the amount would have been paid before the penalty date. Would it be possible for the Board of Supervisors to relieve the penalty in the cases where the Equalization Board increases assessments after December 5th."

The penalty for the late payment of taxes is fixed by the General Assembly in the above section and neither that section nor any other statute confers upon the board of supervisors the power to relieve the penalty. The situation that has arisen is one that creates a hardship for which no statutory relief seems to be available. The above section and § 58-961 make it mandatory upon the treasurer that he exact the penalty for any local tax due during any year in which it is not paid on or before December 5 of that year.

I enclose copies of two opinions, dated December 19, 1957 and April 28, 1961, respectively, to the treasurers of Northampton County and Hanover County (Reports of Attorney General, 1957-58 at p. 268, and 1960-61, at p. 303), which relate to the late payment of taxes.

TAXATION—Delinquents—Fees involved in collection.

FEES—Collection of Delinquent Taxes.

HONORABLE WESCOTT B. NORTHAM
Commonwealth's Attorney for Accomack County

October 15, 1964

This is in reply to your letter of October 13, 1964, which reads as follows:

"The Treasurer of Accomack County is now making a drive to collect delinquent taxes, and a number of judgments have been obtained. "The Treasurer has delivered to the Sheriff executions obtained on these judgments with instructions to levy on any personal property which he may find subject to levy."
"Section 14.1-105 (8) of the Code provides for a fee of $3.00 to the Sheriff for levying an execution. Please advise if this fee of $3.00, and also if the additional fee of $1.25 for making his return, should be paid to the Sheriff by the County.

"Also, should the County pay the Clerk of the Circuit Court $1.00 for recording the judgment?"

I refer you to two opinions of this office relating to suits brought in county courts for the purpose of collecting local taxes. These opinions were furnished to the Treasurer of the City of Roanoke and the State Auditor of Public Accounts and were published in Report of Attorney General (1960-61), at pages 83 and 293, respectively. These opinions do not directly relate to the questions which you have presented, but I feel they should be called to your attention, as they relate to fees in cases where the county is plaintiff in a tax case.

Section 14-133 of the Code, referred to in these opinions, is now § 14.1-125; § 14-82 is now § 14.1-69; § 14-175 is now § 14.1-178; § 14-195 is now § 14.1-198; § 14-196 is now § 14.1-200, and § 14-116 is now § 14.1-105.

In my opinion, the provisions of § 14.1-69 would prevent the sheriff from collecting the two fees mentioned in the third paragraph of your letter. With respect to the last paragraph of your letter I am not aware of any statute which would prevent the clerk of a court of record from collecting the fee allowed under § 14.1-112(22) for docketing and indexing the judgment obtained in another court.

TAXATION—Erroneous Assessment—How refund may be made.

March 11, 1965

HONORABLE J. K. NEWMAN
Treasurer of Lee County

This is in reply to your letter of March 4, 1965, which reads as follows:

"Mr. L. S. Turner, St. Charles, Va. sold to the State Highway Department lots located in Rocky Station Magisterial District in August, 1950. Through no fault of Mr. Turner, the tax continued to be assessed against him for the years 1950 through and including 1964.

"I would like to know what action should be taken in order for Mr. Turner to acquire a refund of taxes for the years above stated.

"Could this be ordered by the Circuit Judge, or by the Local Board of Supervisors?"

Article 2 of Chapter 22, Title 58 of the Code, contains methods for refund of any local taxes erroneously paid. Section 58-1141 applies where the error was made by the Commissioner of the Revenue. Under this section, the application must be filed within five years from the thirty-first day of December of the year in which the erroneous assessment was made.

Section 58-1145 provides a different remedy and the application must be made within two years from December thirty-first of the year in which the assessment was made.

Section 58-1152.1 provides a third remedy. Under this section no refund may be made when more than three years have elapsed since payment of the amount erroneously assessed.
You will note that in the first two sections mentioned, the statute of limitations runs from the date of the erroneous assessment. In the latter section the statute of limitations runs from the date of payment.

I assume Mr. Turner has made timely payment of the taxes and that more than three years have elapsed since several of the payments were made, but § 58-1152.1 is probably the most advantageous statute for him to proceed under as that procedure would probably allow him to be refunded for a larger number of years than the other statutes. There is no statute that would allow a refund back as far as 1950 unless it has not been more than three years since he paid the taxes for that year and subsequent years.

TAXATION—Erroneous Assessments—Procedure for correcting.

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

November 17, 1964

This will acknowledge receipt of your letter of November 13, 1964, in which you state that during the year 1964 the United States government purchased certain lands in Wise County for use on their South Fork Dam Project. You refer to §§ 58-818 and 58-820 of the Code relating to abatement or proration of taxes to persons whose real estate has been acquired by the United States government.

It appears from your letter that the persons involved have already paid the taxes for the full year and you make the following statement:

"... My personal opinion is that in order for these people to obtain a refund of their taxes, that application would have to made to the Circuit Court pursuant to Section 58-1145 of the Code of Virginia. The Board felt that under Section 58-1141 of the Code that a refund could be made on order from the Board of Supervisors. Your attention is directed to the second paragraph of this Code section which states that this method of correcting erroneous assessments shall be made under this system if the error sought to be corrected was made by the Commissioner of the Revenue. Inasmuch as this error was not made by the Commissioner of Revenue, my question is this: May the Board of Supervisors order a refund of taxes on land taken by the United States Government under Section 58-818 of the Code of Virginia, or must the taxpayer apply to the Circuit Court pursuant to Section 58-1145 of the Code of Virginia?"

I agree with you that if these people have paid the total amount of taxes due upon the property for the year 1964, it will be necessary for them to file applications for correction of erroneous assessments pursuant to the provisions of § 58-820 of the Code. If the taxes have not been paid, then, of course, under §§ 58-818 and 58-819 the treasurer can make an adjustment and give proper credit before the taxes are paid.

With respect to the suggestion that the board of supervisors could authorize these refunds by an order, you are advised that in my opinion the board of supervisors have no jurisdiction or authority in connection with the matter.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Exemptions—Property operated for the purpose of caring for stray, lost, abandoned and abused animals, birds and fowls not exempt.

January 14, 1965

HONORABLE JOHN F. EWELL
Commonwealth’s Attorney for Warren County

This will acknowledge receipt of your letter of December 30, 1964, in which you enclosed copy of the last will and testament of Julia Woods Wagner, in which she made provision that a portion of her property shall go to the Humane Society of Warren County, Inc. for the purpose of constructing a permanent and substantial shelter for the care and maintenance of stray, lost, abandoned and abused animals, birds and fowls. The last paragraph of your letter is as follows:

“It would appear that, this property being owned by the trustee of an individual and not of a community club or association, that it would not come within the exemption set forth in Section 58-12 of the Code, even if such use which would fall within the language of Section 58-12 and Section 183 of the Constitution of Virginia.”

In my opinion, the property is not exempt from taxation under the provisions of Section 183 of the Constitution, and this is true whether or not it is owned by a trustee or by a community club or association or other form of organization. I can see nothing in Section 183 of the Constitution which would exempt property held and operated for the purposes set forth above.

TAXATION—Exemptions—Real estate of Scout organizations not exempt.

January 12, 1965

MRS. ELSA B. ROWE
Treasurer of Northumberland County

This will acknowledge receipt of your letter of January 8, 1965, which reads as follows:

“On April 1, 1964, a deed was recorded in the Northumberland County Clerk’s Office transferring 395 acres of land from an individual to Girl Scouts of Richmond, Virginia, Incorporated.

“Please advise me whether or not under Section 58-822 and in the light of Section 58-12 of the Code of Virginia I have authority to relieve the pro-rata part of the 1964 taxes from April 1, 1964, to December 31, 1964.”

Section 58-822 of the Code provides for a credit on the current year’s taxes when land is acquired by the State, a county, a municipality, or any church or religious body, which is exempt from taxation by Section 183 of the Constitution.

In my opinion, the Girl Scouts organization is not a religious body as that term is used in the above cited Code section. This conclusion is in conformity with an opinion rendered by the State Tax Commissioner, copy of which I enclose.

This office rendered an opinion on September 23, 1955 to Honorable Felix E. Edmunds, then a member of the General Assembly, in which it was held that
such an organization was not exempt under the provisions of Section 183 of the Constitution. Subsequently, by Chapter 478, Acts of 1956, § 58-12 of the Code was amended so as to exempt from taxation real estate belonging to the Boy Scouts of America and the Girl Scouts of the United States of America. Section 183 of the Constitution prohibits the General Assembly from extending the constitutional exemptions. Therefore, to the extent that § 58-12 of the Code exempts from taxation real estate belonging to the above mentioned scout organizations, it is invalid.

The tax upon the property mentioned in your letter is, therefore, not subject to proration under the provisions of § 58-822 of the Code.

TAXATION—Homestead and Poor Debtors' Exemptions—Effects of on claims for taxes.

HONORABLE OTIS B. CROWDER
Treasurer of Mecklenburg County

May 17, 1965

This is in reply to your letter of May 14, 1965, which reads as follows:

"Please advise me if the sheriff of a county may levy on any or all personal property for delinquent personal property taxes turned over to him by the county treasurer, or are certain classes of such property exempt from levy and distress under the Poor Debtors Exemption Laws."

Section 34-3 of the Code of Virginia reads as follows:

"The exemption under §§ 34-26, 34-27, 34-29 and 64-121 shall not extend to distress for State, county, or corporation taxes or levies, nor to levy or distress for the purchase price of any property therein mentioned nor for fines and damages or either arising from trespass by animals under § 8-874 as to such animal so trespassing."

Under this section the exemptions contained in the sections numbered therein do not apply to taxes levied by the State, county or municipal corporation. The exemptions under § 34-4 do not apply to valid claims for taxes. Section 34-5(5) provides that these exemptions do not apply "for a lawful claim for any taxes, levies or assessments."

This opinion is in accord with a prior opinion of this office by the late Abram P. Staples, Attorney General, to the Treasurer of Rockbridge County under date of March 15, 1939, published in Report of Attorney General (1938-39), at p. 267.

COMMISSIONERS OF REVENUE—Building Permits—Responsibility for issuance established by § 58-766.

BOARDS OF SUPERVISORS—Ordinances—Building Permits—No authority to enact ordinance requiring approval of local health officer.

January 14, 1965

HONORABLE PAUL X. BOLT
Commonwealth's Attorney for Grayson County

This is in reply to your letter of January 13, 1965, which reads as follows:

"The Board of Supervisors for Grayson County, Virginia, has proposed to pass a building permit ordinance as authorized by Section 58-766 Code of Virginia, 1950, as amended. Said proposed ordinance would require, in addition to the requirements as set forth in the above mentioned section, an approval by the local health officer of the plans for construction, before the Commissioner of Revenue could issue a building permit. The above mentioned section of the Code of Virginia states, 'The Commissioner of the Revenue shall issue such permits, when the same are required, to every person who shall apply therefor and describe, with reasonable certainty, the kind and character of work to be done and the estimated cost thereof; and each such permit shall state the matter so described.'

"I would like your opinion as to whether or not the Grayson County Board of Supervisors has the authority to require a citizen to have the approval of the local health officer, in addition to the requirements as set forth in the above mentioned section of the Code of Virginia."

Section 58-766 of the Code applies to Grayson County, unless the county has adopted a zoning ordinance pursuant to the provisions of Article 8, Chapter 11, Title 15.1 of the Code, in which event the issuance of permits would be governed by the zoning ordinance. I assume your county has not adopted the zoning ordinance. Under § 58-766 no provision is made for any action to be taken by the local governing body with respect to such permits but the responsibility is upon the commissioner of the revenue to enforce this provision.

I can find nothing in this section, nor in Chapter 3, Title 32, which relates to local boards of health, which would authorize that board of supervisors to enact and enforce an ordinance of the nature suggested in your letter.

This office has issued two previous opinions relating to this subject, and I enclose herewith copies of said opinions. They are as follows:

Opinion to A. A. Rucker
dated March 1, 1955

Opinion to C. E. Gnadt
dated November 1, 1957
(Report of Attorney General, 1957-58, at p. 52)
TAXATION—Licenses—Vending Machines—Localities limited to rate of tax levied by State.

HONORABLE JUNIE L. BRADSHAW
Member, House of Delegates

This is in reply to your letter of February 4, 1965, which reads as follows:

"I would appreciate your giving me your opinion on the following matter:

"Henrico County recently imposed a tax on vending machines, and the new county tax is in excess of the tax imposed upon the same machines by the state.

"Henrico County cites as their authority for this increase Section 58-266.3. This section does give, since it is under the county-manager form of government and adjoins a city of more than sixty thousand, the privilege of paralleling city ordinances on such machines. However, as I read this section, it also contains the language, '... unless otherwise prohibited by law.'

"Under Virginia Code § 58-367.2 it states, '... and the license tax so imposed by any county shall not be in excess of the State rate levied on that article.'

"It appears to me that the county would have authority under § 58-266.3, but it is strictly prohibited by § 58-367.2. I would appreciate your opinion as to whether the county does have a right to impose a tax in excess of the state rates, or if my interpretation of the law is correct."

In my opinion, the provisions of § 58-367.2 of the Code control, inasmuch as this section of the Code is a part of the general law relating to the license requirements for the operation of vending machines. As you have pointed out, the authority contained in § 58-266.3 is restricted by the phrase "when not otherwise prohibited by general law."

It is my opinion that the power of Henrico County to impose the license tax in question at a rate in excess of the rate levied by Article 12, Chapter 7, Title 58 of the Code, is prohibited by this section.

TAXATION—Merchants' Capital Assessment—May be made based on best information available.

HONORABLE R. S. MARTIN
Commissioner of the Revenue for Cumberland County

In reply to your letter of May 7, 1965, in which you state that certain oil companies storing petroleum products on the Colonial Pipeline Company's tank farm in your county have refused to make returns in accordance with Chapter 16 of Title 58 of the Code which relates to the assessment of merchants' capital, you are advised that under § 58-838 of the Code you have the right to make an arbitrary assessment based upon the best information you can obtain. Notice of this assessment should be mailed to the oil company involved and the assessment should be delivered to the treasurer for collection by him.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Motor Fuel Tax Refund—Payable to person buying motor fuel on which tax has been paid.

HONORABLE RALPH G. LOUK
Commonwealth's Attorney for Fairfax County

This is in reply to your letter of May 24, 1965, in which you request my opinion as to whether the County of Fairfax may make the request for refunds of tax on gasoline used by the volunteer fire departments of Fairfax County.

The authority for refund of State tax on gasoline used by voluntary fire fighting companies is set forth in § 58-715, Code of Virginia (1950), as amended, the pertinent language of which reads as follows:

"Any person who shall buy, in quantities of five gallons or more at any one time, any motor fuel for the purpose of operating or propelling * * * (5) equipment of voluntary fire fighting companies within the State actually and necessarily used for fire fighting purposes, equipment of volunteer rescue squads within the State actually and necessarily used for rescue purposes, * * * on which motor fuel the tax or taxes imposed by this chapter shall have been paid, shall be reimbursed and repaid the amount of such tax or taxes paid by such person."

The purpose of § 58-715, in general, is to permit refunds of the State tax on motor fuel used for certain given purposes. One of these purposes is use in voluntary fire fighting equipment, as indicated in the quoted portion. In my interpretation, the person who pays the tax for the stated purpose is entitled to reimbursement of the amount so paid. It is, therefore, my opinion that if the County of Fairfax or one of its agents makes the purchase for use by the voluntary fire departments, the reimbursement may be claimed in the same name in which the purchase was made. It would not be proper under the statute, however, for one person to claim reimbursement for taxes paid by another or in another name.

TAXATION—Motor Vehicles—Ordinance imposing local license tax.

MOTOR VEHICLES—Local License—Ordinance imposing tax.

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

This will acknowledge receipt of your letter of December 11, 1964, in which you state that several years ago the board of supervisors of your county adopted an ordinance pursuant to § 46.1-65 of the Code, imposing a local license tax on motor vehicles. I assume the provision requiring the payment of the personal property tax as a condition to obtaining the license was not included in that ordinance.

The board has adopted a resolution as follows:

"BE IT ORDAINED that no motor vehicle, trailer or semitrailer shall be locally licensed by the County of Smyth, Virginia, unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer
report of the attorney general

or semitrailer to be licensed have been paid which have been properly assessed or are assessable against the applicant by the County of Smyth."

You request my opinion as to whether or not the ordinance (I assume you mean the resolution) is permitted by the above numbered section of the Code.

An ordinance containing the provision set forth in the resolution may be adopted, but only in the manner prescribed in § 15.1-504 (a) (b) and (c). The resolution constitutes an amendment to an ordinance imposing a county motor vehicle license tax and may be enforced if the statutory procedure is followed in its adoption.

TAXATION—Peddler’s License—Local authorities prohibited from imposing tax on wholesaler unless wholesaler has definite place of business in said city, town or county.

COUNTIES, CITIES AND TOWNS—Peddler’s License Tax—May not impose on wholesaler unless has definite place of business in said county, city or town.

HONORABLE A. BURKE HERTZ
Commissioner of the Revenue for City of Falls Church

January 15, 1965

This is in reply to your letter of January 11, 1965, in which you call attention to subsection (6) of § 58-266.1 of the Code and request my opinion as to whether the city of Falls Church may levy a peddlers’ license tax against firms that peddle goods, wares and merchandise to dealers or retailers pursuant to a city ordinance which reads as follows:

"An annual license tax is hereby imposed on peddlers of goods, wares or merchandise who sell to licensed dealers or retailers, other than at a definite place of business, of $25.00 for each vehicle used in such business. The license shall not be issued quarterly, nor shall it be transferable, nor shall the tax be subject to proration. The following peddlers are exempted from the tax imposed by this section: Distributors and vendors of motor vehicle fuels and petroleum products, farmers, dealers in forest products, producers of agricultural products and manufacturers, taxable on capital by the State of Virginia and distributors of manufactured goods paying a tax on his purchases."

Subsection (6) of § 58-266.1 of the Code provides that:

"(6) No city, town or county shall levy a tax upon a wholesaler for the privilege of selling goods, wares and merchandise to other persons for resale unless said wholesaler has a definite place of business or store in said city, town or county."

It will be observed that the above provision prohibits a city, town or county from imposing a tax on a wholesaler for the privilege of selling such merchandise in such city, town or county to retailers unless the wholesaler has a definite place of business or store in said city, town or county. The ordinance purports to impose a license tax on peddlers who sell to dealers or retail merchants, if the peddlers makes the sale at a place other than his definite place of business. The peddler, I assume, would be a wholesaler as that term is used in subsection (6) of § 58-266.1. If the peddler is a wholesaler, and his place of business is outside the city, in my
opinion, the provisions of subsection (6) prevent the city from imposing and collecting the tax in question.

TAXATION—Personal and Real Property—Deductions allowed for contributions to private schools.

SCHOOLS—Private—Contributions to—Allowed as deductions from taxation.

October 20, 1964

HONORABLE E. CARTER NETTLES, JR.
Commonwealth's Attorney for Sussex County

In response to your inquiry of October 16, 1964, I am of the opinion that the Board of Supervisors of Sussex County may provide for the tax deduction specified in Art. 3.1 of Title 58 of the Virginia Code by enacting an ordinance allowing such deduction within the limitations and upon the conditions prescribed in the various provisions of the above mentioned article. In this connection, the Board of Supervisors of Prince Edward County enacted such an ordinance, and although that ordinance has since been repealed, you may wish to obtain a copy of it for consideration.

Moreover, I am of the opinion that receipt of a tuition grant under the provisions of § 22-115.29, et seq., of the Virginia Code would not prevent the recipient thereof from being eligible to receive a tax deduction or credit under the provisions of Art. 3.1 of Title 58 and an implementing local ordinance. In this connection, tuition grants authorized by the above mentioned provisions of the Virginia Code are in no sense paid "directly or indirectly as a result of such contribution" to a private school within the scope of § 58-19.4 of the Virginia Code.

TAXATION—Personal Property—Motor vehicles owned by Delaware corporation and based in Virginia on first day of tax year subject to local taxation.

MOTOR VEHICLES—Registration—Vehicles owned by Delaware corporation operating from a Virginia base subject to Virginia registration.

October 19, 1964

HONORABLE WESCOTT B. NORTHAM
Commonwealth's Attorney for Accomack County

This is in reply to your letter of October 1, 1964, in which you ask my opinion relative to two questions regarding vehicles licensed in the State of Delaware, but based in Accomack County, Virginia.

First, you inquire what the Commissioner of Revenue should do in the case of a number of local trucking companies incorporated in the State of Delaware, which have paid personal property taxes on their vehicles in Accomack County in the past without protest, but are now instructing the Commissioner to remove the vehicles from the personal property tax rolls because they are owned by a Delaware corporation.

The fact that the vehicles are owned by a Delaware corporation does not exempt them from the tangible personal property tax laws of Virginia. The situs of tangible personal property for taxation is the locus of the property itself, rather than the domicile of the person required to be taxed. See, Taylor v. Common-
wealth, 124 Va. 445. In this relation, § 58-834, Code of Virginia (1950), as amended, reads as follows:

"The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall in all cases be the county, district or city in which such property may be physically located on the first day of the tax year." (Emphasis supplied).

As pointed out in the case of Hogan v. Norfolk County, 198 Va. 733, the situs for taxation as used in this section means something more than the place where the property is. It does not mean property that is casually or incidentally there, but it is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county. The vehicles are based in Accomack County, and, under the facts, it appears that they were physically located there on the first day of the tax year. They are not located there casually, as the vehicle of a visitor passing through, or under circumstances of a transient nature. The trucking companies have been using Accomack County as their base of operations while engaged in the trucking business during this and prior years. Previously, they have recognized this as the proper jurisdiction for tax purposes and have paid the local personal property assessments. Under the circumstances, it is my opinion that the vehicles are subject to local taxation in Accomack County and, if the taxpayer liable fails or refuses to file a return for same, the Commissioner of Revenue should enter the fair market value of such vehicles and make the assessment in accordance with § 58-838, Code of Virginia (1950), as amended.

Secondly, you inquire whether Delaware corporations having bases of operations in Accomack County are required to purchase Virginia license plates.

In my judgment, the vehicles so based in Virginia must comply with Virginia registration requirements. Generally, the tractor trucks are registered in the name of a Delaware corporation and leased to a Virginia resident. The trailers drawn by such tractor trucks are registered in Virginia. Although the Reciprocity Agreement with Delaware dated May 5, 1943, to which you refer, leaves something to be desired under present conditions, it contains no clause permitting operations from a Virginia base on Delaware registration. Further, it contains no clause relative to leased vehicles. Under § 46.1-1 (16) (b), Code of Virginia (1950), as amended, "a person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days shall be deemed a resident for the purposes of this title," which includes the registration laws. Obviously, it was not the intention of the signatories to permit such avoidance of the Virginia registration laws, as this would allow all vehicles engaged only in interstate commerce to register in the State of Delaware, to the exclusion of Virginia registration, regardless of the location of the business or base of operations. Exemption from taxation is the exception, rather than the rule, and any agreement under which such exemption is claimed should be strictly construed against the taxpayer.

TAXATION—Personal Property—Motor Vehicles—Situs.

MOTOR VEHICLES—License Taxation—Situs.

Honorable Joseph F. Spinella
Assistant Commonwealth's Attorney for Henrico County

December 21, 1964

This is in reply to your letter of December 4, 1964, which reads, in part, as follows:
"We are writing concerning the taxation of automobiles as personal property by the County of Henrico. It has always been our understanding of the law that personal property is taxed in the County or City in which such property is physically located on the first day of January of each year, as stated in § 58-834 of the Code of Virginia..." A number of situations have arisen in which both the County of Henrico and the City of Richmond claim to be the taxing authority. We, therefore, respectfully request that you consider the various situations and render to us an opinion concerning each situation as to the proper taxing authority. They are as follows:

1. A company with its office located within the City of Richmond has employees living in the County of Henrico. The company has assigned cars to these employees and permits them to use the company cars for both business and pleasure. The company requires employees to report to the office each day. Who would be the proper taxing authority—the County of Henrico or the City of Richmond?

2. A company with its office located within the City of Richmond has employees living in the County of Henrico. The company has assigned cars to these employees and permits them to use the company cars for both business and pleasure. The employees are not required to report to the office each day but operate to a great extent from their homes. Who would be the proper taxing authority—the County of Henrico or the City of Richmond?

3. In the cases stated, had the cars been used solely for business, who would be the proper taxing authority?

4. We have had considerable difficulty dealing with leasing companies which lease cars to businesses; in particular, Service Leasing Corporation, Rollins Leasing Corporation and D. L. Peterson, Trustee. All three of these companies are foreign corporations; these companies have no principal office located in the County of Henrico or in the City of Richmond. These companies lease cars to other companies, for example, to the A. H. Robins Pharmaceutical Company, whose offices are in the City of Richmond, some of the drivers of these cars live in the County of Henrico, and County of Henrico license plates are purchased for these cars. The drivers are not required to report to the office each day, but operate to a great extent from their homes. They have permission from their employer to use these cars for pleasure as well as for business. Who would be the proper taxing authority—the County of Henrico or the City of Richmond?

4. A leasing company leases a car directly to an individual who lives in the County of Henrico but whose business contacts are principally in the City of Richmond. Who is the proper taxing authority—the County of Henrico or the City of Richmond?

"Does the fact that the vehicle registration shows an out-of-state address make any difference?"

I am enclosing a copy of an opinion of this office, dated August 21, 1963, addressed to Lewis Jones, Jr., which appears to be applicable to the questions which you have raised. Other opinions of this office which appear to be applicable can be found in the Reports of the Attorney General, (1960-1961), p. 306; (1959-1960), p. 354; (1957-1958), p. 274 and (1950-1951), p. 289.

Your letter refers to the case of Hogan v. County of Norfolk, 198 Va. 733, in which the Court, in construing Code § 58-834, stated:

"The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit,
but it does not necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county." 198 Va. at p. 735.

The opinion in that case also refers to 51 Am. Jur., Taxation, § 449, at p. 464. There is also a reference to 84 C.J.S., Taxation, § 115, at pp. 225-6.

I am assuming that in the several situations which you have outlined, the employees to whom the cars are assigned keep them overnight at their homes in the County of Henrico. I am also assuming that specific cars are assigned to specific employees for a given period of time, and that there is no so-called "motor pool" from which employees draw different cars on different occasions.

In answer to your first question, it is my opinion that the County of Henrico is the proper taxing authority. The vehicle is assigned to a specific employee, is used exclusively by him for a specific period of time, both for business and for pleasure, is kept by him at night at his home and he sees to its proper maintenance and care. For all intents and purposes, the car is physically treated by him as if it were his own. If it were his own, it would be taxable in the County of Henrico. I do not believe that the fact that the vehicle happens to be owned by his employer, whose place of business is in the City of Richmond, is significant in determining taxable situs in this situation.

In answer to your second question, it is my opinion that the vehicle is taxable in the County of Henrico for the reasons already stated in my answer to your first question. My opinion in this regard also includes the situation where the vehicle is used solely for business.

In answer to your third question, it is my opinion that the proper taxing authority is the County of Henrico. I do not believe that the leasing arrangement in any way affects the conclusions which I have already reached in answer to your first question. It is important to recognize that the criteria is the physical location of the vehicle, not the titling or leasing arrangements of the vehicle. Again, it seems to me from the facts which you state, that these vehicles are assigned to employees who reside in Henrico and who, for all intents and purposes, deal with the vehicles as their own.

In answer to your fourth question, it is my opinion that the proper taxing authority is the County of Henrico. The fact that the vehicle registration reflects an out-of-State address, in my opinion, makes no difference. The vehicle is leased directly to an individual who, except for whatever rental payments he makes, operates the vehicle as if it were his own. He keeps it at his home overnight and uses the car for whatever purposes he desires. If the car were not leased, but were owned by him, it would be taxable in the County of Henrico, even though he might use it for business in the City of Richmond. The single fact that the vehicle is leased, and not owned, by the Henrico resident does not, in my opinion, affect its taxable situs in Henrico.

TAXATION—Personal Property Tax—When treasurer may proceed to collect.

Honorable Dwight L. Estep
Treasurer of Rockingham County

This is in reply to your letter of April 19, 1965, which reads as follows:
"Please advise me the earliest date a Civil Warrant may be issued to collect 1962 personal property tax.
"This action has been authorized by The Board of Supervisors."

Subsequent to receipt of this letter you advised us that it is contemplated that suits for the collection of these taxes will be in accordance with the provisions of Article 9, Chapter 20 of Title 58 of the Code—§§ 58-1014, et seq.

Section 58-1014 of the Code provides as follows:

"The payment of any taxes, State, county or municipal, both those which have been assessed and those which ought to have been assessed, may, in addition to the remedies now allowed by law, be enforced by warrant, motion for judgment at law, bill in chancery or by attachment before a trial justice or a court of record within this State in the same manner, to the same extent and with the same rights of appeal as now exists or may hereafter be provided by law for the enforcement of demands between individuals. The jurisdiction here conferred on courts of equity shall be concurrent with the jurisdiction in actions at law and in such equitable proceedings it shall not be necessary to allege or prove any equitable grounds of jurisdiction."

It will be noted that this method for the collection of taxes is in addition to other remedies allowed by law. Under § 58-963 of the Code the penalty for the failure to pay taxes attaches after the fifth day of December of the year in which the taxes were assessed. Under § 58-965 of the Code the treasurer, after the fifth day of December, is authorized to proceed to collect these taxes by distress or otherwise. As pointed out, § 58-1014 is an additional proceeding for the collection of such taxes and, in my opinion, this method may be adopted any time after the penalty attaches after December fifth of any year.

TAXATION—Poultry—Under § 58-412.1 taxed as other tangible personal property in county where located.

MOTOR VEHICLES—Registration—Farm vehicles used to transport poultry, feed and water between locations in county not exempted.

HONORABLE T. B. P. DAVIS
Commonwealth's Attorney for Greene County

This is in reply to your letter of August 24, 1964, in which you present the following questions for my consideration:

"(1) Should poultry producers be assessed for poultry under the provisions of Section 58-412.1 or as tangible personal property?

"In some cases the fowl are owned exclusively by producers and in other cases the poultry individual on whose property the poultry are located has no title to the poultry but performs certain services in connection therewith. In most cases very little poultry is located on the premises as of the 1st day of January of each year.

"(2) Should poultry producers be required to purchase auto license for their motor vehicles used in connection therewith which travel over the public highways or be exempt therefrom as envisioned under Section 46.1-45?"
“These vehicles are used to transport fowl, feed, water, etc. from one turkey or chicken raising activity to another located at various places within the county and are large scale commercial operations.”

Section 58-412.1 of the Code of Virginia reads as follows:

“All persons, firms, or corporations who enter into contracts with farmers for the production of poultry or livestock under which contracts such persons, firms, or corporations furnish the poultry or livestock and feed and other supplies therefor and assumes all financial risks, including all losses in the growing and marketing of such poultry or livestock, shall be taxable on the capital of such business under § 58-410 and not as a merchant; provided, however, that such poultry and livestock shall not be included in such capital but shall be assessable locally as tangible personal property.”

The foregoing quoted statute provides an exception to the general rule that the inventory or stock in trade of a business is deemed to be intangible personal property for purposes of taxation. In cases of poultry or livestock which are maintained under the circumstances contemplated in § 58-412.1 of the Code, the poultry or livestock are taxed as any other tangible personal property in the county where such property is located. All other capital of such business is taxable as intangible personal property as contemplated by § 58-410 of the Code.

In answer to your second inquiry, I am of the opinion that the poultry producers who do not own or lease the land upon which such poultry is being raised, must obtain motor vehicle licenses in order to operate vehicles upon the public highways. The exception to the general rule which is provided in § 46.1-45 of the Code is quite narrow and applies only in those cases coming within the clear purview of that statute. For a similar expression of this view, see Report of Attorney General (1955-56), p. 148.

TAXATION—Public Service Corporations—Assessments—Authority of State Corporation Commission.

COMMISSIONERS OF REVENUE—Assessments—Public Service corporations—No authority to determine valuation in sanitary district of county.

HONORABLE C. E. GNADT
Commissioner of the Revenue for Prince William County

February 8, 1695

This is in reply to your letter of February 5, 1965, which reads as follows:

“I am enclosing herewith a copy of a letter from the late Mr. J. C. Masten of the State Corporation Commission. The question now arises in regard to the taxation of property owned by a public utility within a sanitary district. My question is, does the Commissioner of Revenue have the authority to break down the assessments of public service corporations within a sanitary district, wherein the Board of Supervisors has placed a levy of all real and personal property within the said sanitary district.”

The letter from Mr. Masten referred to Article 17, Chapter 12, Title 58, which contains §§ 58-681 through 58-685, and which place upon the State Corporation Commission the duty of furnishing the Commissioner of the Revenue the assess-
ments by districts, including sanitary districts, on public service company property. This Article, however, does not apply to Prince William County. No statute has been enacted requiring this information to be furnished to counties generally.

Under Section 169 of the Constitution, the assessment of the property of public service corporations is made by the State Corporation Commission, and no authority is lodged in the Commissioners of the Revenue to make such assessments. Therefore, in my opinion, a Commissioner of the Revenue does not have authority to determine the assessed valuation of the property of public service corporations located in a sanitary district of his county, for the purpose of levying a sanitary district tax under § 21-138 of the Code.

TAXATION—Real Estate—Assessments—County voting to assess under § 15.1-686.2 governed exclusively thereunder.

COUNTIES—Reassessments on Real Estate—How governed.

HONORABLE CHARLES R. FENWICK
Member, Virginia State Senate

September 2, 1964

This will acknowledge receipt of your letter of July 22, 1964, in which you state as follows:

"The last session of the General Assembly adopted a special provision (Chapter 645) amending the County Manager Act providing for a referendum of the people to determine how real estate shall be periodically reassessed 'notwithstanding any other provision of law providing for a periodic reassessment of property.'

"At this session the General Assembly also added a new section (Chapter 281) number 58-795.2 which provides that ABC funds shall be withheld from any county or city which 'shall fail to comply with the provisions of this Article requiring a general reassessment of real estate periodically in such county or city by omitting such general reassessment in the year required by this Article.'

"Although I do not see any possible conflict between these two sections, the question has been raised whether there could be a withholding of ABC funds in the event that the referendum was adopted providing for this special periodic reassessment when it has been certified in accord with 15-35.2(f) that the county has an efficient system of annual assessment established under Sec. 15-354.1."

In your letter of July 27, 1964, you advise that § 15-35.2(f), cited in the last paragraph of your earlier letter, should have read "§ 15-354.2(f)."

The section of Chapter 645 of the Acts of 1964 to which you refer in the first paragraph of your first letter is § 15.1-686.2. This was formerly § 15-354.2. Section 15-354.1 to which you refer in the last sentence of your first letter is now § 15.1-686.

As you know, § 15.1-686.2(a) reads as follows:

"(a) Notwithstanding any other provision of law providing for a periodic reassessment of property, if, in any county operating under the county manager plan provided for in this chapter, a majority of the
qualified voters voting on the question submitted in the election held as provided in paragraph (b) of this section shall approve the adoption of the plan provided in this section, real estate shall thereafter be periodically reassessed only in the manner prescribed by this section.”

Section 15.1-686.2(d) reads as follows:

“(d) If the result of the election held as provided in paragraph (b) hereof be in the affirmative, then the provisions of this section shall supersede all other provisions of law in conflict herewith.”

Because of these provisions, it is my opinion that when a county operating under the county manager plan adopts, by referendum, the plan of periodic real estate assessment provided for in § 15.1-686.2, § 58-795.2 has no application to that county except insofar as other subsections of § 15.1-686.2 might apply, [see, subsections (e), (f) and (g)], thereby requiring the county to reassess real estate “in the manner provided by law,” that is, under Title 58, Chapter 15. It is my opinion that where a county votes to assess as provided in § 15.1-686.2, then its assessment is governed exclusively by that section, and Title 58, Chapter 15, Article 9, in which is included § 58-795.2, would apply to it only as provided by the referenced subsections of § 15.1-686.2.

TAXATION—Recordation—Deed of trust when printed in pica type.

CLERKS—Fees—Recordation—When deed of trust printed in pica type.

RECORDATION—Fees—Deeds of trust printed in pica type.

HONORABLE GEORGE E. HOLT, JR.
Clerk of Circuit Court of Botetourt County

July 10, 1964

This will acknowledge receipt of your letter of July 9, 1964, which reads as follows:

“Would you please clarify § 14.1-112, subsection (2) concerning the charging of double fees for me? A deed of trust has been presented in this office for recordation which is printed pica type, but is single spaced. Under this section would the clerks be justified in charging a double fee for printed forms which are printed pica type, but are single spaced?”

The answer to your question is in the negative. The statutory provision to which you refer reads as follows:

“A clerk of a circuit or other court of record shall, for services performed by virtue of his office, charge the following fees, to-wit:

*   *   *

“(2) For recording and indexing in the proper book any writing and all matters therewith, except plats, or for recording and indexing anything not otherwise provided for, provided that no additional charge shall be made for recording less than one-half of a page, a minimum of four dollars for up to three pages and one dollar for each page over three; and for admitting to record, or making a copy of any paper or record to go out of the office, which has been typewritten single space,
or is printed in smaller than pica type, the fee for admitting to record or making such copy shall be double the amount of the fees allowed above. . . .”

It will be noted that under this section, the double amount of fees allowed therein applies for admitting to record a paper which has been typewritten single space or is printed in smaller than pica type. Therefore, although the deed of trust that has been presented to you is single spaced, it is not typewritten and, therefore, does not come within the provision allowing a double fee.

TAXATION—Recordation—Exemptions—Deed conveying property to nonstock corporation to provide, care for and extend physical and spiritual ministry to aged and disabled people not exempt.

June 24, 1965

HONORABLE GEORGE W. KEMPER
Clerk of Circuit Court of Rockingham County

This will acknowledge receipt of your letter of June 23, 1965, in which you request my advice as to whether or not under the provisions of § 58-64 of the Code a deed conveying property to a Virginia nonstock corporation named “Bridgewater Home for Aging” is exempt from the recordation tax. You state that the corporation is a nonprofit organization organized “to provide, care for and extend a physical and spiritual ministry to aged and disabled people.” You specifically refer to that portion of § 58-64 which exempts from the recordation tax “any deed conveying property to any nonstock corporation organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit.

Statutes of this nature must be strictly construed. In order for this corporation to be entitled to the benefit of this exemption, the corporation must be organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit.

In my opinion, this corporation fails to come within this exemption. In my opinion, the recordation tax must be charged in connection with this recordation.

TAXATION—Recordation—Fee for issuing abstract of judgment must relate to recorded judgment.

RECORDATION—Fee—For issuing an abstract of judgment must relate to recorded judgment.

July 13, 1964

HONORABLE T. F. TUCKER
Clerk of Corporation Court of City of Danville

This is in reply to your letter of July 10, 1964, relating to § 14.1-112(22) of the Code of Virginia, wherein it is provided that—

“A clerk of a circuit court or other court of record shall, for services performed by virtue of his office, charge the following fees, to-wit:

*[ ] *[ ] *
"(22) For docketing and indexing a judgment from any other court, a fee of one dollar; and for issuing an abstract of any recorded judgment, when proper to do so, a fee of one dollar and fifty cents."

You have requested my opinion as to whether under this section a clerk can charge a fee of $1.50 for issuing an abstract of a judgment rendered in a court not of record and filed in your office pursuant to § 16.1-115, the purpose of issuing the abstract being to place it upon the judgment lien docket.

The fee of one dollar and fifty cents allowed under this section for issuing an abstract relates only to the issuance of an abstract of a recorded judgment. I assume the word "recorded," as used in this section, means the same as "docketed."

Inasmuch as the judgment in the case presented has not been recorded or docketed, in my opinion, the fee of one dollar and fifty cents does not apply.

TAXATION—Recordation—For deed from a landowner to Department of Highways.

CLERKS—Fees—For recordation of deed from landowner to Department of Highways.

March 11, 1965

HONORABLE J. CLOPTON KNIBB Commonwealth's Attorney for Goochland County

This is in reply to your letter of March 1, 1965, relative to the charges that the clerk of the circuit court should make when recording a deed from a landowner to the Department of Highways.

As you pointed out, § 14.1-112, Code of Virginia (1950), as amended, provides in part as follows:

"A clerk of a circuit or other court of record shall, for services performed by virtue of his office, charge the following fees, to-wit:

“(1) When a writing is admitted to record under chapter 2 (§ 17-33 et seq.) of Title 17, or chapter 5 (§ 55-80 et seq.) or 6 (§ 55-106 et seq.) of Title 55, for everything relating to it, except the recording in the proper book, to-wit: For receiving proof of acknowledgments, entering orders, endorsing clerk's certificate, and when required, embracing it in a list for the commissioner of the revenue, one dollar.

“(2) For recording and indexing in the proper book any writing and all matters therewith, except plats, or for recording and indexing anything not otherwise provided for, provided that no additional charge shall be made for recording less than one-half of a page, a minimum of four dollars for up to three pages and one dollar for each page over three; and for admitting to record, or making a copy of any paper or record to go out of the office, which has been typewritten single space, or is printed in smaller than pica type, the fee for admitting to record or making such copy shall be double the amount of the fees allowed above."

The use of the language, "except for recording in the proper book," contained in subsection (1) above, leads me to the conclusion that the clerk is entitled to
a fee of $1.00 for the services performed under this subsection, which includes the endorsing of the clerk's certificate reflecting that the deed has been properly recorded.

Section 14.1-112 (2) provides that a minimum amount of $4.00 will be charged for up to three pages of the instrument to be recorded and $1.00 will be charged for each page over three provided no additional charge shall be made for recording less than one-half of a page.

An additional charge of $0.50 may be made for each sheet of plat that is to be filed in the State Highway Plat Book pursuant to § 17-69.1 of the Code.

Therefore, it is my opinion that the clerk of the circuit court may properly make the following charges in recording the usual three-page deed used by the Department of Highways which has one plat attached:

<table>
<thead>
<tr>
<th>Service</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recording clerk's certificate, etc.</td>
<td>$1.00</td>
</tr>
<tr>
<td>Recording three-page deed</td>
<td>4.00</td>
</tr>
<tr>
<td>Filing plat of one sheet</td>
<td>.50</td>
</tr>
</tbody>
</table>

$5.50

**TAXATION—Recordation—How calculated on deeds of trust or mortgages.**

**RECORDATION—Tax—How calculated on deeds of trust.**

**DEEDS OF TRUST—Tax—How calculated.**

July 6, 1964

**HONORABLE J. FULTON AYRES**

Clerk of Circuit Court of Accomack County

This will acknowledge receipt of your letter of June 30, 1964, in which you request my advice as to what recordation tax, if any, should be charged for the recordation of a deed of trust upon certain real estate which is given by Charles Rudolph Poulson and Flora M. Poulson, his wife, to George Walter Mapp, Jr. and L. Franklin Davis, Trustees. The purpose of the deed of trust is stated as follows:

"NOW, THEREFORE, THIS DEED WITNESSETH: That for and in consideration of the premises herein stated and One Dollar ($1.00) and other valuable consideration, the said Charles Rudolph Poulson and Flora M. Poulson, his wife, do hereby give, grant, bargain, sell and convey, with GENERAL WARRANTY of title, unto the said George Walter Mapp, Jr. and L. Franklin Davis, Trustees, either or both of whom may act in the execution of this trust, the following real estate; . . . ."

The deed of trust recites that during her lifetime, Annie M. Poulson, a widow, the mother of the grantors, and of Ora Poulson (now Ora P. Rodgers), a daughter, conveyed all of her real estate by deed of trust dated January 31, 1964, to R. Norris Bloxom and C. Lester Drummond. Trustees, to secure a bond in the amount of $30,000, which bond was executed by Annie M. Poulson, the mother, and Charles Rudolph Poulson, the son, and his wife, Flora M. Poulson. Annie M. Poulson, in her will, devised part of her real estate to her son and part to her daughter, all of which, of course, is subject to the outstanding deed of trust, dated
January 31, 1964. It has developed that the proceeds of the loan were for the sole benefit of Charles Rudolph Poulson. The deed of trust now proposed to be recorded is upon Charles Rudolph Poulson's property devised to him under the will of his mother and the purpose of the deed of trust is to indemnify and save harmless Ora P. Rodgers on account of the deed of trust that was executed during the mother's lifetime.

In my opinion, § 58-55 of the Code is applicable, the first paragraph of which reads as follows:

"On deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or other obligations secured thereby."

The deed of trust proposed to be recorded, in my opinion, is given for the purpose of securing Ora P. Rodgers against the payment of the $30,000 debt or any part thereof. Therefore, in my opinion, the tax on this instrument must be calculated upon the amount secured, namely, $30,000.

TAXATION—Religious Organizations—Sale of surplus land not within tax exemption provisions of Section 183(b) of Virginia Constitution.

TAXATION—Exemptions—Religious organizations subdividing and selling land not within exemption provisions of Section 183(b) of Virginia Constitution.

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will acknowledge receipt of your letter of July 11, 1964, in which you request my opinion as to whether or not a religious organization may subdivide land it owns and sell the lots in such subdivision.

I know of no statute or other provision of law which would prevent a religious organization from subdividing and selling any surplus lands. Property of this nature held by the religious organization would not, in my opinion, come within the tax exemption provisions of Section 183(b) of the Constitution.

TAXATION—Sale of Delinquent Land—When clerk to execute deed.

CLERKS—Sale of Delinquent Land—When deed to be executed.

HONORABLE J. T. MARTZ
Clerk of Circuit Court of Loudoun County

This is in reply to your letter of January 25, 1965, which reads as follows:

"On January 1, 1934, a certain tract of real estate here in the County was sold by the Treasurer to the Commonwealth for 1932 delinquent real estate taxes.

"According to the records of this office, the 1934, 1938, 1939, 1940,
1941 and 1942 taxes were paid by someone prior to the annual sale to the Commonwealth for those years. The taxes for the years 1933, 1935 and from 1943 to the present were not paid and the land in question was sold to the Commonwealth each year.

"I have a party who is interested in paying these taxes and obtaining a Clerk's deed to the property.

"However, in reading Section 58-767 of the Code, it states that the Clerk cannot give a tax deed on any real estate sold for delinquent taxes for more than twenty years. This same section states that the taxes delinquent for twenty or more years are barred and cancelled after such time.

"Therefore, I would like to know if under the above circumstances could I give a Clerk's deed for the property and if so, what delinquent taxes should be paid by the prospective purchaser?

"If the aforementioned section bars me from giving a Clerk's deed, what procedure should be used in acquiring title to the property?"

Unpaid taxes for the year 1943 and prior years are now delinquent for more than twenty years and under § 58-767 of the Code no longer constitute a lien against the property. The taxes for 1944, pursuant to § 58-979, became delinquent as of June 30, 1945. Therefore, in my opinion, the taxes for 1944 and subsequent years are liens against the property involved and § 58-767 does not prevent the clerk from making a deed to a purchaser upon the payment of such taxes. It appears that the provisions of Article 5, Chapter 21, Title 58 would apply.

I enclose copy of an opinion to the clerk of Tazewell County, dated December 13, 1954 (Report of Attorney General, 1954-55, at p. 239), relating to this question.

TAXATION—Tangible Personal Property—Must be uniform on the same class of subjects.

MOTOR VEHICLES—Taxation—Defined as tangible personal property in § 58-829(5).

February 9, 1965

HONORABLE A. D. JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of February 8, 1965, in which you state that the governing body of your county is considering placing automobiles, motor trucks, motorcycles and other motor vehicles in a separate classification from all other tangible personal property and imposing a different and higher rate of levy on such automobiles and other vehicles than on other kinds of tangible personal property. It is proposed to tax other tangible personal property at the same rate that real estate is taxed, being a rate different from the rate proposed for automobiles and other motor vehicles.

In my opinion, the plan proposed is prohibited by Section 168 of the Constitution, to which you referred, and which requires taxes upon the same class of subjects to be uniform. Tangible personal property consists of those items classified in § 58-829 of the Code, and automobiles, motor trucks, etc., are given that classification in paragraph (5) of that section.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Trailer Camps—How assessable.

COUNTIES—License Tax on Trailer Camps—Imposition authorized.

Honorable Boyd W. Gwyn
Commissioner of the Revenue for Gloucester County

January 13, 1965

This will acknowledge receipt of your letter of January 11, 1965, relating to a trailer camp ordinance adopted by Gloucester County, in which you present the following questions:

"(1) Under what condition should a trailer be placed upon real estate and removed from tangible personal property?"

"(2) Can a trailer that is correctly assessed on real estate be assessed under the license of chapter 35-64.5?"

"(3) Under chapter 35-64.5, are we authorized to enforce the license upon a free land owner?"


I cannot answer your question (1) without knowing in what manner the trailer is attached to the real estate. Of course, a trailer camp mounted on a foundation in such manner as to make it have the character of a permanent attachment to the realty, such as a building, rather than a movable trailer, would be assessable as an improvement to the real estate rather than an article of personal property.

Reverting to your question (3), I believe that the opinions, copies of which I have enclosed, sufficiently inform you with respect to the power of a locality to enforce a license fee upon a trailer camp within the limitations of § 35-64.5. I assume the phrase "free land owner" which you have used, relates to a person who owns the fee simple title to the land which is being used as a trailer camp. I cannot see how this could affect the right of a county to enforce a licensing ordinance.

TOURIST CAMPS—Definition—For purposes of requiring a permanent register to be maintained.

Honorable G. Duane Holloway
Commonwealth’s Attorney for York County

January 4, 1965

This is in reply to your letter of December 21, 1964, in which you state that State Police Officers arrested a person upon a charge of statutory rape involving inmates of a mental institution and that the alleged offense occurred in a motel in York County. The manager of the motel failed to require the defendant to register and does not keep records or a permanent register. You direct attention to § 35-58 of the Code which requires the operator of any tourist camp to keep a permanent register on which shall be entered the name and address of every person furnished lodging at or in such tourist camp, as well as the license number
and state of registration of the motor vehicle, if any, being used at such time by the person furnished such lodging. Any person operating a tourist camp and failing to keep the register shall be guilty of a misdemeanor and upon conviction be punished accordingly.

Section 35-54 of the Code defines a tourist camp as follows:

"(3) 'Tourist camp' shall be construed to mean any plot of land used, maintained, or held out to the public as a place for use for camping or lodging purposes, whether equipped with tents, tent houses, huts, cabins, or cottages, or not so equipped, and by whatever name the same may be called, whether any fee is charged for the use thereof or not. Such words shall not be construed to include the following:

"(a) A hotel as defined in §§ 35-1 or 58-380, provided such hotel is located in a city or in an incorporated town or contains ten or more bedrooms in a single structure of more than one story.

"(b) Tourist home."

Section 35-1 of the Code reads as follows:

"A 'hotel' within the meaning of this chapter is any inn or public lodging house where transient guests are lodged for pay in this State."

Section 58-380 of the Code reads as follows:

"Any person who keeps a public inn or lodging house of more than ten bedrooms where transient guests are fed or lodged for pay in this State shall be deemed for the purposes of this section to be engaged in the business of keeping a hotel. A transient guest is one who puts up for less than one week at such hotel, but such a house is no less a hotel because some of its guests put up for longer periods than one week. Any person conducting the business of keeping a hotel as defined in this section shall pay an annual license tax of one dollar for each bedroom in such hotel; provided that hotels at summer and health resorts, keeping open not more than four months in the year, shall pay only one-half of the foregoing sum."

Your conclusion with respect to this matter is stated as follows:

"Section 35-54, Code of Virginia, defines tourist camp but excepts the hotel as defined in §§ 35-1 and 58-380. Section 35-1 and § 58-380 are rather general in defining a hotel and it is my opinion that this would also include a motel. Consequently, it seems that the only place of lodging where a permanent register is required is a 'tourist camp' which excludes a hotel or motel."

Statutes providing penalties for lack of observance must be strictly construed. In my opinion, taking into consideration the definition of a hotel, if the motel in question is (1) located in an incorporated town or (2) contains ten or more bedrooms in a single structure of more than one story, it should not be classified as a tourist camp.
TOWNS—Bonded Indebtedness—Limitations under Section 127, Constitution of Virginia.

November 6, 1964

HONORABLE DONALD A. MCGLOTHLIN
Member, Virginia State Senate

This is in reply to your letter of November 4, 1964, which reads as follows:

"The voters of the Town of Grundy had an election, held pursuant to Section 127 of the Constitution, which approved the issuance of $550,000.00 Sewer Bonds. The Town proposes to borrow part or all of this amount by issuing bond anticipation notes under § 15.1-223 of the Code, and to sell the bonds at a later date.

"These bonds are in excess of the Town's 18 percent debt limit, but as the bonds will be for a revenue-producing project, this is permissible under Section 127(b). I have been requested by the Town officials to obtain your opinion whether the Town may sell bond anticipation notes in excess of the debt limit, when the question submitted at the bond election does not specifically authorize such short term borrowing.

"It would seem that authority to issue bonds for up to 40 years would carry with it the authority to issue bond anticipation notes payable in not more than two years. It has been suggested, however, that Paragraphs (a) and (b) of Section 127 of the Constitution, draw a distinction between bonds and notes."

Sections 15.1-223 and 15.1-224 of the Code are applicable. Under these sections the town may borrow money to be expended for the purposes for which the bonds were authorized in the bond issue election. Any short term notes issued by the town within the limitations of these sections will be considered as a part of the debt that has been authorized by the voters. A loan of this nature, in my opinion, will not be repugnant to any of the provisions of Section 127 of the Constitution.

"Bonds," as used in paragraph (b) of Section 127 of the Constitution, means the obligations issued for the payment of a debt which has been authorized by the voters to finance a specific project from which the city or town may derive revenue. Sections 15.1-223 and 15.1-224 authorize the issuance of interim obligations pending the sale of the long term bonds. These obligations may be paid out of the proceeds of the long term issues, or, if paid out of current revenues, the amount so paid must be deducted from the total debt authorized by the voters.

TRAILER CAMPS—Regulation and Taxation—Definition of trailer.

TAXATION—Trailer Camps—Authority to license extends to "trailers" resting on jacks or on solid foundation.

November 9, 1964

HONORABLE CATESBY GRAHAM JONES, JR.
Commonwealth's Attorney for Gloucester County

This is in reply to your letter of October 23, 1964, in which you request my opinion as to whether a trailer, as defined in §§ 35-61 and 35-64.3 of the Code, includes a trailer resting on a solid foundation or on jacks or other temporary support.
These sections are found in Articles 1 and 1.1, Chapter 6 of Title 35, Code of Virginia (1950), as amended, the purpose of which is to permit counties to regulate by ordinance the location and operation of trailer camps and to authorize any political subdivision to levy, and provide for the assessment and collection of, license taxes upon such trailer camps. These sections define a trailer as a vehicle "constructed" or "maintained for use" as a conveyance upon highways and designed or constructed to permit occupancy as a dwelling or sleeping place for one or more persons.

Under the same chapter, § 35-64.5 authorizes any political subdivision to impose an annual license tax on the operator or owner of any trailer park or trailer camp of not less than five dollars nor more than fifty dollars per trailer lot used or intended to be used by a trailer. The wording of the last named statute bases the license tax on the trailer lot rather than on the trailer itself. Under § 35-64.3, a "trailer lot" is defined as "a unit of land used or intended to be used by one trailer."

Many owners remove the wheels and park their trailers upon various types of foundation to prevent deterioration of the wheels or tires, in order to maintain the vehicles for possible future use upon the highways. In my opinion, the fact that a trailer rests upon jacks or other temporary support or even upon a solid foundation, would not, in itself, be sufficient to eliminate such trailer from the statutory definition of trailer found in these sections. This is in accord with an opinion expressed in Report of the Attorney General, (1961-1962), p. 252, that resting a trailer upon a solid foundation, rather than upon its wheels, would not act to defeat an ordinance enacted by a county pursuant to this chapter.

TRAILER CAMPS—Taxation—License fee ordinance—Enforceable unless alteration of trailer eliminates it from statutory definition.

TAXATION—Trailer Camps—Authority under Chapter 6 of Title 35 applies unless trailer so altered as to eliminate it from definition in § 35-64.3.

March 31, 1965

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

This is in reply to your letter of March 17, 1965, in which you refer to a "trailer ordinance" recently enacted by the Board of Supervisors of King George County and pose the following:

"The question now arises as to whether a trailer or mobile home that has had its wheels removed and placed upon a permanent foundation can be subjected to such tax or license fee on constitutional or other legal grounds. In other words, if the trailer or mobile home has been altered in such a way as to form a part of the real estate, can it be subject to the licensing fee mentioned?"

The authority for regulating and imposing license taxes upon the operation of trailer camps or trailer parks and the parking of trailers is found in Articles 1 and 1.1, Chapter 6, of Title 35, Code of Virginia (1950), as amended. This office, on at least two previous occasions has expressed the opinion that the removal of the wheels of a trailer and placing it upon a solid foundation would not, in itself, be sufficient to defeat an ordinance enacted by a county pursuant to this chapter. For your convenience, I am enclosing a copy of my letter of November
9, 1964 to the Commonwealth's Attorney for Gloucester County. See, also, Report of the Attorney General (1961-1962), p. 251. The related statutes have not been changed since those opinions were issued and as to that portion of your question relative to removal of the wheels and placing the trailer upon a permanent type foundation, in my opinion, this, in itself, would not act to defeat the ordinance.

In regard to your reference to the status of a "trailer" or "mobile home" which "has been altered in such a way as to form a part of the real estate," the test, in my opinion, rests with the definitions found in § 35-64.3. Under that section, "a 'trailer' shall mean any vehicle used or maintained for use as a conveyance upon highways, so designed and so constructed as to permit occupancy thereof as a temporary dwelling or sleeping place for one or more persons." If the alteration be such as to eliminate the property from this statutory definition, I do not believe it would then be subject to the license fee authorized under this chapter.

TREASURERS—Salaries—City of Newport News may not supplement salary.

HONORABLE W. C. ANDREWS, JR.
Commissioner of the Revenue for City of Newport News

This is in reply to your letter of November 25, 1964, which reads as follows:

"The Council of the City of Newport News has adopted a 2% sales tax to be effective in this city July 1, 1965. The administration of this ordinance has been thrust upon the office of the Commissioner of the Revenue of the city, and in so doing, the city may be interested in supplementing the salaries of the Commissioner and the Treasurer, as such additional service to the city is not required by the general law."

"Will you kindly give me a ruling as to whether a small supplementary salary for this service, which would be paid solely by the city, is legal under existing compensation law for Constitutional Officers."

"I note, in § 14.1-57 of the 1964 Acts of Assembly the last paragraph, which reads:

"'Notwithstanding the repeal of §§ 14-8.1, 14-70, 14-70.1, 14-70.2 and 14-75, effective July 1, nineteen hundred sixty four, the prior authority of such section is continued in effect as to any person holding office on such date.'"

"When I refer to § 14-70 of the old code, however, I become somewhat confused about the interpretation of the law."

Section 14-70 of the Code, referred to in § 14.1-57, provided as follows:

"The annual salaries of city commissioners of the revenue shall be within the limits prescribed for the several city treasurers by §§ 14-68 and 14-68.1. Nothing herein contained shall prevent the council of any city having a population of more than one hundred and twenty-five thousand people according to the nineteen hundred and thirty United States census from supplementing the salary of the commissioner of the revenue in such city for additional services not required by general law, provided, however, that any such supplemental salary shall be paid wholly by such city."
Under that section, the council of a city having a population of more than 125,000 people according to the 1930 United States census, was permitted to supplement the salary of the commissioner of the revenue in such city for additional services not required by general law. Section 14.1-57 of the Code preserves this provision for commissioners of the revenue who were holding that office on July 1, 1964, in cities having a population of more than 125,000 according to the 1930 United States census. The population of Newport News under the 1930 census was less than 35,000, according to the report of the Secretary of the Commonwealth. Therefore, this section does not authorize the supplement.

UNIFORM COMMERCIAL CODE—Application—Will repeal “old Conditional Sales Act.”

HONORABLE W. L. PRIEUR, JR.
Clerk of Courts for City of Norfolk

May 25, 1965

This is in reply to your letter of April 14, 1965, which reads in part as follows:

“... Your opinion on the following will greatly help: 

“(1) Will the original paper have to be filed with the Clerk or may a photostatic copy be filed?

“(2) Where personal property is sold under the contract, and the vendor retains the title to the goods, when the possession is allowed to remain with the grantor (i.e. buyer) under the old Conditional Sales Act, does this contract have to be filed to protect the seller?

“(3) Would filing under this Act eliminate the recordation of a deed of trust on real estate, where the grantor remains in possession of the premises?”

I will endeavor to answer these questions seriatim.

(1) Section 8.9-402 of the Code describes the paper which is to be filed. It is required to be signed by both parties. Section 8.1-201(39) defines “signed,” i.e., “includes any symbol executed or adopted by a party with present intention to authenticate a writing.” It is my opinion that whether or not the paper presented to the Clerk for filing under the U.C.C. is the original or is a photostatic copy of the original, it is the duty of the Clerk to file the same. Whether or not the filing of the original or of a photostatic copy thereof is sufficient to meet the requirements of the Uniform Commercial Code is not, in my opinion, within the power of the Clerk to determine.

(2) It must first be noted that as of January 1, 1966, when the U.C.C. becomes effective, the “old Conditional Sales Act” to which you refer will be automatically repealed. (See § 8.10-103 of the Code). So, obviously, there will no longer be recordation of contracts under the “old Conditional Sales Act,” namely, present §§ 55-88, et seq. After January 1, 1966, one must look to the U.C.C. to determine the answer to your question. Specifically, one looks to Title 8.9, Part 4, § 8.9-401, et seq. Note that § 8.9-402 sets out the formal requisites of the paper to be filed. What is filed is a “financing statement” or the “security
agreement,” as those terms are defined by the U.C.C. The “security agreement” is sufficient for filing only if it contains what the “financing statement” is required to contain, and if it is signed by both parties. (See § 8.9-402). In § 8.9-105(h) “security agreement” is defined as “an agreement which creates or provides for a security interest.” “Security interest” is defined in § 8.1-201(37) as “an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§ 8.2-401) is limited in effect to reservation of a ‘security interest.’” So the paper which we have referred to in the past as a “conditional sales contract” is now, or will be as of January 1, 1966, a “security agreement.” A copy of it may be filed in lieu of the “financing statement” under § 8.9-402.

Section 8.9-302 requires the filing of “financing statements” to perfect all “security interests,” except those listed in that section. Thus, filing is required to protect the seller who sells under contract and delivers possession, but retains title, except in those instances listed in § 8.9-302. The two exceptions applicable to your inquiry appear to be § 8.9-302 (c) and (d). But in both these cases one can file and obtain a more perfect lien (§ 8.9-307). Without filing in these two cases, the seller’s lien is good as against his creditors and trustees in bankruptcy, but if there is no filing and the debtor sells to another purchaser and that purchaser takes without knowledge of the security interest and for his own personal, family or household purposes or for his own farming operation, the purchaser will prevail.

Thus, while there will no longer be filing under the “old Conditional Sales Act,” there will be filing under Title 8.9 of the U.C.C., where “personal property is sold under contract and the vendor retains title to the goods, when the possession is allowed to remain with the grantor. . . .”

(3) The answer to this is in the negative. Title 8.9 of the U.C.C. does not apply to real property, but to transactions intended to create security interests in personal property and fixtures.

VIRGINIA STATE PORTS AUTHORITY—Authority—May construct and lease terminal facilities to city of Portsmouth.

Admiral D. H. Clark
Executive Director, Virginia State Ports Authority

January 8, 1965

This is in reply to your letter of December 4, 1964, supplemented by your letter of January 6, 1965, in which you request my opinion as to whether or not an agreement between the city of Portsmouth and the Virginia State Ports Authority, in light of the opinion of the Supreme Court in the case of Button v. Day (Record No. 5954), involving the Peninsula Ports Authority, will be in violation of any provision of the State Constitution.

The substance of the proposed agreement is stated in your first letter as follows:

“This Authority is in the process of negotiating an agreement with the City of Portsmouth which provides that the Authority will acquire property and construct terminal facilities and lease the terminal to the City of Portsmouth for an annual rental sufficient to service and amortize the
revenue bond issue to finance the acquisition and construction. The bond issue will amount to roughly $5 million and the obligation the City will assume added to all other existing obligations will not exceed eighteen per cent of the appraised taxable property within the City of Portsmouth.

"Until the bonds are retired, this Authority is to request successive State legislatures for appropriations each year equal to half the annual rental from the City of Portsmouth which will be applied to reduce that rental by one half. The City expects to recover the other fifty per cent of the rental from subleases of the terminal properties. In other words, they anticipate that the net cost to the City will be nil, but the City is obligated to pay an annual rental adequate to service and amortize the bond issue financing the acquisition and construction of the terminal."

Under the state of facts as presented, in my opinion, an obligation by the city to the extent stated in your letter would not be in violation of Section 127 of the Constitution, since the aggregate to which the city would be obligated would not exceed 18% of the assessed valuation of the taxable real estate located in the city.

With respect to Section 185 of the Constitution, it appears that the agreement between the city and the Authority would be a governmental function exercised for a public purpose, and, therefore, under the holding in the Peninsula Ports Authority case, in which the cases of Harrison v. Day (1959) 200 Va. 764 and Harrison v. Day (1961) 202 Va. 967, were cited, would not be in violation of Section 185. We have examined the text of the proposed agreement (designated as Memorandum of Intent) dated December 11, 1964, and nothing therein indicates that the proposed venture will not be a governmental function for public purposes.


CRIMINAL PROCEDURE—Affidavit—Preliminary to issuance of search warrant—Where filed.

HONORABLE W. FRANCIS BINFORD
Judge, Prince George County Court

January 22, 1965

This is in reply to your letter of January 20, 1965, in which you cite § 19.1-85 of the Code of Virginia, and present the following question:

"Under this section can the affidavit referred to be filed in the office of clerk of the county court, now referred to as a court not of record or is it mandatory that such affidavit be filed in the Circuit Court of the county which is the only place that a deed can be admitted to record."

The answer to your question is in the negative. Section 19.1-85 provides that the affidavit required for the issuance of a search warrant "shall be certified by the officer who issues such warrant to the county clerk of his county, etc." "County clerk" as used in this section means the "county clerk" mentioned in Section 110 of the Constitution, and should not be confused with a clerk of a county court. Therefore, the affidavit must be filed with the clerk of the Circuit Court of the county.
REPORT OF THE ATTORNEY GENERAL

WARRANTS—Search—Filing of affidavit certification.

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney for Dinwiddie County

March 24, 1965

This will acknowledge receipt of your letter of March 12, 1965, in which you state as follows:

"I would like to have some advice from you with reference to Section 19.1-85 of the Code of Virginia which has to do with the affidavit given preliminary to issuance of search warrant."

"This section of the Code provides, along with other things, the following:

'Such affidavit shall be certified by the officer who issues such warrant to the County Clerk of his County or to the Court Clerk admitting deeds to record, of his City, etc.'

"Does the sending of the affidavit to the Clerk of the County Court instead of to the Clerk of the Circuit Court invalidate the search made under said affidavit?"

Your letter would seem to pose two questions:

(1) Under Section 19.1-85 of the Code of Virginia, 1950, may the affidavit in support of a search warrant be filed with either the Clerk of the County Court, or the Clerk of the Circuit Court?

(2) If the affidavit may be filed only with the Clerk of the Circuit Court, is filing with the Clerk of the County Court fatal to the search warrant?

Section 19.1-85 of the Code of Virginia, 1950, is in substantially the same form as when first enacted by the Legislature. (See Acts of Assembly, 1920, Chapter 345, Section 1, page 516).

At that time (1920), the Constitution of Virginia provided for "One County Clerk, who shall be the Clerk of the Circuit Court," (see Constitution of Virginia, Article VII, Section 110, as found in Code of 1919); and "In each city which has a court in whose office deeds are admitted to record, there shall be elected ... a clerk of said court," (see Constitution of Virginia, Article VIII, Section 118, as found in Code of 1919).

It would appear that the Legislature in 1920, using as closely as possible the language of the Constitution, intended that affidavits for search warrants should be filed with the Clerk of the Circuit Court for the Counties, and in Cities with the Clerk of the Court (of record), where deeds are admitted to record. It should also be noted that in 1920, there was no system of County Courts as we know them today.

It is my opinion that Section 19.1-85 of the Code of Virginia, 1950, requires the certification by the issuing officer of the affidavit for a search warrant to the Clerk of the Circuit Court in Counties, or to the Clerk of the Court in which deeds are admitted to record in Cities.

This question is then presented. Is certification of the affidavit to the County
Court Clerk fatal to the search warrant? An examination of the Virginia cases reveals no case directly on point. However, in examining the laws of other jurisdictions, I find the following:

"The filing, docketing, or recording of the affidavit or application for a search warrant must comply with statutory provisions; but failure of the issuing officer in these respects has been held merely a neglect of a ministerial duty, which does not render the warrant invalid." 79 C.J.S., Searches and Seizures, Section 76, page 880.

The cases cited under this Section of Corpus Juris Secundum indicate that where the one, against whom the search warrant is issued, can show no harm by reason of the issuing officer's failure to file the affidavit as set out in the statute, then that failure does not invalidate the search warrant. In other words, these jurisdictions (Oklahoma, Iowa, New Mexico, Indiana, et al) discount this failure to comply with the statute where it is purely a technical defense, and no harm is done thereby.

In discussing the purpose behind the statutes, the highest court in Iowa, in the case of Battani v. Grund, 56 N.W. 2d 166 (1952), said that, "it was the evident primary purpose of the Legislature to insure that the magistrate should have before him a writing, showing under oath that there was probable cause for the issuance of the process. . . ." That court discounted the filing, required by statute, holding it to be a mere ministerial duty in the absence of harm shown thereby.

However, none of these cases are directly analogous to the question which you present in that the statutes in these jurisdictions are somewhat different from our own. Therefore, in the absence of any decision by our Supreme Court of Appeals, I am reluctant to express the unqualified opinion that the failure to comply with the filing requirement of the statute does not affect the validity of the search warrant. Strict compliance with the statute is the safest course to pursue. However, if you have pending a case in which the affidavit was filed with the Clerk of the County Court, I suggest that you bring to the attention of the court the authorities cited in this letter.

WATER AND SEWERAGE SYSTEMS—Authorities—Establishment—By qualified voters in county.

October 29, 1964

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for Henry County

This is in reply to your letter of October 23, 1964, in which you state that the governing body of Henry County is considering the creation of a Water and Sewer Authority under the provisions of Chapter 28, Title 15.1 of the Code. Section 15.1-1243 provides for a public hearing on the question and, under § 15.1-1244, if at such hearing in the judgment of the Board, substantial opposition by prospective users of the proposed services is heard, they may, at their discretion, call for a referendum on the question of undertaking the project, such referendum to be held not less than thirty nor more than sixty days from the adoption of the resolution providing for the referendum. The statute requires that the referendum be conducted in conformity with § 24-141 of the Code.

The terminal paragraph of your letter reads as follows:
"My question is, if the Board after the public hearing considers it advisable to call for a referendum on the question, would the question be voted upon by only the prospective users of the initial project or would all of the voters in the county be allowed to vote on the question."

The statute is to some extent vague with respect to who shall be entitled to vote on the question. It does provide that the resolution calling the referendum shall be directed to the election officials of the county. Another method by which a referendum may be called is upon a petition of ten percentum of the qualified voters in the political subdivision (defined in § 15.1-1240 of the Code to mean county or municipality), which implies a county-wide interest regarding the question.

In my opinion, the question must be submitted to the voters of the county as a whole.

You are aware of the fact, I assume, that only those voters who have registered under § 24-67 of the Code and have paid the poll taxes required by § 24-17 of the Code would be entitled to vote upon the question.

WATER AND SEWERAGE SYSTEMS—Chesterfield County—No authority to require property owners to connect to water system unless necessary to protect the public health.

HONORABLE ERNEST P. GATES
Commonwealth’s Attorney for Chesterfield County

January 8, 1965

This is in reply to your letter of January 6, 1965, which reads as follows:

"Chesterfield County is operating a water supply system under the authority of Chapter 175, Acts of Assembly, 1946, and amendments thereto. The net revenue derived from the operation pays for the cost of the system and its operation and is not supported by general taxes of the County.

"If a landowner owns property adjacent to such water system and desires to supply his residence or business property with water from a well approved by the State Health Department, can the County require him to connect to the County public water distribution system? The property owner is not subdividing his property under the subdivision regulations of the County."

Chapter 175 of the Acts of Assembly (1946) does not contain any provision conferring upon the county the power to force abutting property owners to connect with any water system which may be established under said Chapter. Your letter states that the county of Chesterfield is operating under this Chapter and "amendments thereto." We have been unable to find any record of amendments to this legislation and in a telephone conversation with you today you stated that you knew of no amendments having been passed. In the absence of a provision in the Act giving the governing body of the county the power to require property owners to connect with the system, I am of the opinion that this question must be answered in the negative.

A statute containing a provision of this nature is found in Chapter 523 of the Acts of Assembly (1948), which established the Weber City Sanitation District
REPORT OF THE ATTORNEY GENERAL

in Scott County. In the case of Weber City Sanitation Commission v. Craft, 196 Va. 1140, this provision was considered by the Supreme Court of Appeals of Virginia, as Craft had challenged its constitutionality. The court held that this was a valid exercise of the police power of the State and stated:

"Under our system the police power is vested in the General Assembly which may, through appropriate legislation, delegate the power to municipalities and other governmental subdivisions of the State."

Inasmuch as the legislation involved here does not delegate the power to the board of supervisors to require property owners to connect with the system, I do not feel that the board can enforce such a requirement unless it can be clearly shown that it is necessary in order to protect the public health of the inhabitants, in which event § 15.1-510 of the Code would apply.

WATER AND SEWERAGE SYSTEMS—Connection and Service Fees—Authority of governing body of county, city or town.

COUNTIES, CITIES AND TOWNS—Sewage Disposal Systems—Authority over.

August 21, 1964

MR. A. H. PAESSLER
Executive Secretary, State Water Control Board

This is in reply to your letter of August 4, 1964, in which you request my advice as to whether or not the town of Shenandoah, Virginia, may, by ordinance, require all property owners in the area designated by the ordinance to pay the connection fee to the sewerage system and to pay the monthly fee for sewer service.

You state there is no specific authority in the town charter for such an ordinance and some of the property owners have approved septic tanks. You state that the success of the construction of the sewer system and the disposal unit depends upon the town's authority to require all property owners in the service area to pay connection fees and monthly service fees.

You referred to an opinion issued by this office on December 22, 1960 (Report of Attorney General (1960-61), at p. 63) to Hon. J. B. Cowles, Jr., Commonwealth's Attorney of James City County, in which we held that we were of the opinion that under Code § 15-320 (then § 15-739) the county could require the property owners in the area designated by the ordinance to connect with the sewer system.

By reference to the Charter of the Town of Shenandoah, I find that Section 13 thereof provides as follows:

"The town may construct, maintain and operate sewers and sewage systems, and charge for connections therewith, and the use thereof such rates as the council may deem proper, and may change the same from time to time. The council may establish and promulgate any rules and regulations in regard to the connection, or continued use thereof as it may deem proper; may refuse any connection, and disconnect the same if for any reason the connection, or continued use thereof, becomes inimical to the public welfare, or detrimental to the sewerage system, or
if the charges therefor be unpaid, and the council may be the sole judge when the same is to be disconnected or when the connection is to be refused."

This provision of the Charter, as well as the State statute, specifically empowers the council of the town to install an adequate sewer system.

The establishment of an adequate sewer system in a community, especially a municipality, is essential to health and sanitation and the courts have held that the rule of strict construction is relaxed in construing grants of power to ascertain if an incidental power is granted. The Charter provision expressly grants the council the power to establish and promulgate any rules and regulations in regard to the connection, or continued use of the sewer system as it may deem proper and it may make charges for the connections.

The town may, in my opinion, as incidental to the installation of a sewer system, require adjoining and abutting property owners to use such facilities, at such reasonable charge as may be required to support the system. It has been held that statutes and ordinances compelling owners of buildings to connect them with public sewers, when not plainly unreasonable or arbitrary, are within the police power of a municipal corporation.

Any ordinances adopted by the town in connection with this matter should be very precise in its terms.

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WATER AND SEWERAGE SYSTEMS—Public Water Supply—Flouridation.

HEALTH—Public Water Supply—Flouridation under referendum.

February 12, 1965

DR MACK I. SHANHOLTZ
State Health Commissioner

This is in reply to your letter of February 9, 1965, which reads as follows:

"We would appreciate it very much if you could give us an opinion on the following:

1. If a public referendum on fluoridation of the public water supply has been defeated in the past, could the local governing body (the same or a subsequently-elected body) institute fluoridation by its own vote at a later date?

2. If not, would a second public referendum be necessary?"

The only statute which I am able to locate relating to this matter is Chapter 457, Acts of Assembly (1956), which, by its terms, is limited to the City of Charlottesville. As I understand your question (1), if a referendum has been held pursuant to this statute on the question as to whether or not fluoridation may be added to the water supply system and the voters have refused to approve the addition of fluoride to the water, could the governing body of the City of Charlottesville, at a later time, add fluoridation to the water without again submitting the question to a vote of the people?

In my opinion, the council would not have this power, but the question would have to again be submitted to a referendum, which could not be done until two
years after the previous referendum has been held. I believe this opinion answers your second question.

I enclose copies of two opinions and a letter heretofore issued by this office with respect to the effect of referendums when there is no statute authorizing the same.

These opinions are as follows:

Opinion to Hon. R. C. Goad
dated June 20, 1950
(Report of Attorney General, 1949-50, at p. 12)
Opinion to Hon. T. S. Coleman
dated September 12, 1951
(Report of Attorney General, 1951-52, at p. 122)
Letter to Hon. W. W. Bohannan
dated April 5, 1957

WATER AND SEWERAGE SYSTEMS—Public Water Supply—Proximity of sewage facilities.

HEALTH—Public Water Supply—Discharge of offensive drainage into source.

HONORABLE MACK I. SHANHOLTZ
Commissioner of Health

April 12, 1965

This is in reply to your letter of March 15, 1965, which reads as follows:

"A Mr. Malcom Squires, Contractor, anticipates building about ten (10) homes along Cabin Creek near Route 644 in Prince George County. Cabin Creek flows for about 1.5 miles from this point until it enters the Appomattox River. The point of stream confluence with the Appomattox River is about 1.5 miles above the Hopewell City Public water supply intake.

"The Prince George County Health Department anticipates the use of individual septic tank-drainfield sewage disposal systems on these properties. The drainfields will be parallel to and perhaps twenty (20) feet from Cabin Creek. However, it may be possible to place the drainfields in front of the homes and increase this distance to fifty (50) or sixty (60) feet.

"We would appreciate being advised whether the 200 foot restriction distance would be applicable in these cases in compliance with the provisions of Section 62-43 of Chapter III, Title 62 of the Public Water Supply Law. We might add that there have previously been homes constructed that are adjacent to this stream that have septic tank systems."

Septic tanks are not specifically referred to in § 62-43 of the Code, but, in my opinion, if any septic tank is closer than 200 feet to Cabin Creek and if Cabin Creek is "liable to contamination by the washing thereof or percolation therefrom," then that tank would be prohibited. The same is true, of course, of the other devices and substances named in § 62-43. The question is really a factual
one, to be answered by determining whether or not Cabin Creek would be liable to contamination by the washing or percolation from any of the septic tanks.

In this same connection, please refer to an opinion to you, dated July 12, 1962, concerning water supply reservoirs in Nansemond County. See, Report of the Attorney General (1962-1963), page 294.

WELFARE AND INSTITUTIONS—Convicts in Road Force—Punishment for escape.

JAILS AND PRISONERS—Convicts in Road Force—Punishment for escape.

HONORABLE C. VINCENT HARDWICK
Judge, Westmoreland County Court
September 14, 1964

This is to acknowledge receipt of your letter of August 27, 1964, in which you state in part:

"Section 53-115 of the Code provides for the punishment for escape of jail prisoners from the road force. Upon conviction for such escape, the Court is required to sentence the prisoner to labor on the State convict road force, in addition to his sentence for escape, for such additional time, calculated at the rate of fifty cents per day as shall be sufficient to cover the expense of recapture..."

"1. May the prisoner pay his cost of recapture and thus escape the additional time imposed upon him for costs of recapture?"

"2. If cost of recapture may be paid by the prisoner to whom must this money be remitted?"

Section 53-115, Code of Virginia (1950), as amended, reads as follows:

"Whenever any jail prisoner shall escape from the convict road force and be recaptured, he shall be taken by the officer having him in custody before a trial justice in the county where such escape was made, who shall, after a trial and upon conviction of such escape, sentence him to the State convict road force for a term not less than thirty days nor more than six months, and in addition thereto, sentence him to labor in the State convict road force, for such time, calculated at the rate of fifty cents per day, as shall be sufficient to cover the expense of recapture; such additional time, however, not to exceed one year in any case."

The purpose of the last clause of this statute is to impose an additional punishment for escape based on the quantum of the costs incurred in effecting the recapture. The time to be served is limited to one year. The statute is mandatory and its provisions may not be waived by allowing the prisoner to make a cash reimbursement of the expense incurred by the State as a result of the prisoner's escape. A court has no discretion with respect to the type of punishment that may be imposed unless allowed by statute.

I am of the opinion that a prisoner may not pay the cost of recapture to escape the additional time imposed upon him for the cost of capture pursuant to the above-quoted statute.
This is in reply to your letter of August 12, 1964, which reads as follows:

"Several local governmental bodies have raised the question with me as to whether or not the language in substantially the following form contained in a zoning ordinance is lawful, and I quote 'If at the time of enactment of this ordinance, any legal activity which is being pursued, or any lot structure legally utilized in a manner or for a purpose which does not conform to the provisions of this ordinance, such manner of use or purpose may be continued as herein provided, except that advertising structures that become nonconforming because of a rezoning have twenty-four (24) months within which to relocate in a permitted area.'

"The question that has been raised is whether it is proper for a local governmental unit to require the removal of nonconforming advertising structures after a period of twenty-four (24) months from the time of the zoning.

"This seems to be an increasingly popular thing to include in local zoning ordinances and I would appreciate your advice as to whether or not such a moratorium is proper in such an ordinance."

While I am not in a position to state categorically that the proposed zoning ordinance provision is invalid, I entertain grave doubts as to whether such a moratorium could be sustained as a valid exercise of the police power.

There is, of course, a presumption which favors the validity of any zoning ordinance. The Virginia Supreme Court of Appeals has indicated that such ordinances must be sustained if their unreasonableness is debatable. On the other hand, such ordinances are not considered to be retroactive, since the restrictive use on property is designed for futuristic purposes. Zoning restrictions are generally not intended to make unlawful any use of land which was lawful when the ordinance went into effect. Thus, there has arisen the so-called "doctrine of nonconforming use." This doctrine is generally applied when the land or premises was being used for a legitimate purpose at the time the restrictive ordinance was enacted.

There is a decided lack of accord as to the power to terminate a lawful nonconforming use existing at the time a zoning ordinance was passed after such use has been permitted to continue. See, 42 A.L.R. (2) 1146.

While there is no Virginia decision, to my knowledge, directly on point, the case of Board of Supervisors v. Carper, 200 Va. 653, is strongly indicative of the attitude of the Virginia Supreme Court of Appeals toward such moratoriums. In that case the Court declared invalid a county zoning ordinance for the reason, among others, that the "grandfather clause" permitted a number of nonconforming exceptions to the general restriction for a period of two years after passage of
the ordinance, the effect of which was a lack of uniformity, required by § 15-845 of the Code (now § 15.1-488).

In view of the foregoing, I seriously question the wisdom of inserting a two-year moratorium clause in a zoning ordinance which applies to one type of structure while at once permitting the continuation for an indefinite period all other nonconforming structures. This view is, of course, limited to the zoning provision here in question and is not to be construed as an expression on the power of the Legislature to regulate or prohibit advertising structures along the public highways.
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